

THE NEW INDIAN CONSTITUTION

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by

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TO
MY FATHER

PREFACE

THIS book, as its title suggests, is intended to throw some light on the New Indian Constitution. It seeks to state the Indian problem and to examine the suggested solution, critically but not without an appreciation of the difficulties inherent in it. It is somewhat of an adventure for a young mind to attempt an analysis of a problem so complicated. My only apology lies in the fact that the Indian point of view with regard to the new Constitution has not so far been made available to the British public through any authoritative publication. In the following pages the problem has been examined from the point of view of one who desires to emphasize agreements and to promote a "rapprochement" between the two great countries. The writer has been profoundly impressed by the lack of knowledge of Indian problems displayed by many in Great Britain, and not the least by those who may be called upon to play an important part in shaping the new Constitution. If the book succeeds in arousing some interest among the British public on Indian questions and checks the campaign of misrepresentation, it will have fulfilled its purpose.

The writer has been most fortunate in arousing the interest in this work of one who has played a very leading part at the Indian Round Table Conference, Sir Tej-Bahadur Sapru, who has been kind enough to peruse some of the chapters of this book and discuss them with the writer. For those discussions, and for the encouragement which he received from Sir Tej, he cannot be sufficiently grateful. He also wishes to express his sense of indebtedness to two friends who read the proofs—Mr. N. V. Kamalakar and Mr. E. H. G. Evans, both of Gonville and Caius College. There are others, Indian and English,

whose help and criticism have been both instructive and useful. Among them may be mentioned the names of Sir Cowasjee Jehangir, Mr. S. Sinha, Mr. M. R. Jaykar, and Professor A. E. Zimmern, to all of whom the writer conveys his deep thanks.

A. KRISHNASWAMI

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CHAPTER I

INDIA—A FEDERATION

THE student of political constitutions will find it difficult to single out any constitution which can be said to be perfect or capable of weathering every political storm and emerging triumphant. This fact need not depress one engaged in the search for the politically perfect State. Constitutions are intended to operate in States and for the benefit of human beings. There is a touch of nature which makes the whole world kin, but the infinite variation of human desires, impulses, characteristics, and aspirations must necessarily reflect themselves in the constitution of any State. The value of academic theories in the drawing up of political constitutions cannot be underestimated; but far beyond such theories there is the inevitable and inexorable logic of facts and humanities which no practical politician can afford to ignore. It is in the welding together of abstract theories and the hard facts of life that the success of a statesman depends, and constitutions to be workable must apply and even modify theories to the facts and circumstances of each country.

That every constitution has been drafted or developed on this principle will be obvious to one who subjects it to careful scrutiny. There is hardly a constitution which cannot be riddled with criticism on the ground that some of its provisions transgress well-established theories. But the real test of the worth of a constitution lies in its capacity to promote the ideals of the framers of the constitution and to be worked harmoniously without those devastating jars that convulse Society and the State.

It should not be forgotten that constitutions, whether written or unwritten, cannot be treated like the laws of the

Medes and Persians, unalterable and immutable. He who believes in that omniscience which enables him to frame a constitution for all time to come forgets the essential limitation of the human race. The learned Abbé Sieyès, author of several constitutions drawn up with great care and attention to doctrinaire ideals, must have realized, in the Elysian fields where one hopes he is now wandering, that constitutions ought not only to be theoretically perfect but should also be practical and workable.

There is another factor which has necessarily to be taken into account in the formulation of a constitution. Society is constantly changing. Nothing is static in life. The needs of a State to-day are not what they were half a century ago. Neither legal systems nor political constitutions should be so devised as to put Society into the strait-jacket, and so confine it in narrow bounds as to make growth, expansion, or adjustment impossible. It is sometimes asserted by constitutional writers that written constitutions are inflexible while unwritten constitutions make for mobility and enable progress to be made. The history of political institutions in various countries which possess written constitutions hardly justifies this statement. It is impossible to arrest progress even through written constitutions. What has really happened is that change in such countries has been brought about with greater difficulty by indirect and less straightforward methods, and occasionally by stretching and torturing constitutional provisions to suit the altering and often unforeseen needs of Society and State.

The purpose of these general observations will be realized when one comes to examine the details of the New Indian Constitution. They will explain, if they do not justify, the anomalies and illogicalities which the student is bound to come across. They will throw light on the intentions of those who helped in the framing of the Constitution. And they may help in sobering the critic whose aesthetic temperament is liable to be shocked by "the whimsicalities" of some of the provisions.

The Constitution that has been suggested for the great

continent of India is a Federal one. Even excluding the Indian States, which present peculiar problems in administration, it can safely be asserted that those who have bestowed any thought on the future constitution of British India have realized that a Federal as contrasted with a unitary form of government was inevitable. It is unnecessary to dilate on the divergences—racial, linguistic, geographical, and ethnological—that exist in India. These diversities have often been exploited as obstacles to progress, and the less critical among our public men have sometimes been honestly led to believe that their elimination is essential for the political advancement of the country. Those who have made a deeper study of the problem have been struck by that essential unity which underlies this infinite diversity, and have not been perturbed in their pursuit for constitutional progress. The student of political institutions will easily perceive that diversity of interests or even of objectives is not an exceptional feature in India, and that the progress of the country can be secured, not by eliminating them and thereby reducing the country into a soulless, monotonous whole, but by recognizing in the institutions to be set up this essential characteristic of the country. It is therefore not surprising that political thinkers, in contemplating future progress for British India, turned their thoughts towards the Federal ideal.

But a greater problem than the formation of a British India Federation presented itself to those distinguished men who met at the Indian Round Table Conference and represented British India, the Indian States, and the United Kingdom. What position should the Indian States occupy in any constitution framed for India? Could they be completely excluded from all concern in British Indian affairs? Was the political development of the two Indias in separate watertight compartments a possibility? Could the States follow that policy of "splendid isolation" which would enable them to ignore happenings in British India and remain unaffected by the laws and actions of a British Indian State? A bare perusal of the map of India, indicating

as it does the manner in which States are distributed all over India, entering and being cut into by British Indian Provinces, will prove the impossibility of separate and isolated development. But geographical considerations apart, economic considerations must conclusively demonstrate the havoc that would be caused to the whole country were such a policy adopted. What, then, was the solution?

It was in such circumstances, and with a full realization of the gravity and complexity of the problem, that the delegates met at the first Round Table Conference. The result, as is well known, and as provided in the Indian Constitution, was the acceptance of the proposal for the establishment of an All-India Federation, composed of British Indian Provinces and Indian States.

It is sometimes suggested that in coming to this conclusion the Round Table Conference was hustled by a few clever politicians from British India; that Indian princes and British delegates did not realize the significance of the steps that they were taking, and that a clearer visualization of the dangers involved in an All-India Federation would have prevented their reaching so disastrous a conclusion. On the other hand, there are not found wanting critics who bewail the short-sightedness, if not the imbecility, of British Indian politicians. They suggest that by this proposal they have jeopardized the whole future of British India; that they have substituted King Stork for King Log by replacing the British element in the Legislature by the reactionary nominees of despotic rulers, and that they have failed to perceive the elementary fact that undiluted autocracy and unfettered democracy never go hand in hand.

It is clear that both these criticisms cannot be correct, and it will not surprise one to find that neither is based on fact. In spite of all criticism it is undeniable that the Conference was composed of shrewd and able men who were not liable to be taken in, and none of whom was inclined to yield to purely sentimental appeals or be victimized by their own philanthropic impulses. Each section found in the proposal of an All-India Federation a solution

for the special problem with which it was confronted in devising the Constitution, and each delegation had its own motives and reasons for accepting the proposal.

The most vital issue that every section of the delegation at the Round Table Conference had to deal with was the issue of how to set up a responsible Government at Delhi, the centre of British India and of All-India. It is futile for anyone to suggest that when the British Government convened the Round Table Conference, with the full concurrence of all the political parties of the State, either the then Labour administration or any of the other political parties who consented to be represented at the Conference failed to realize that it was going to be the crucial question at the Conference. To conclusively prove the correctness of this assertion it is only necessary to trace the history of political agitation during a few months preceding the Conference.

The Indian Statutory Commission had made its recommendations for the future government of India. It had suggested that British Indian Provinces should have full self-government, and that all provincial subjects, including what is known as "law and order," should be administered by persons responsible to the Legislature. No one in India seriously contemplated the possibility of these recommendations being rejected by the British Government. Indian delegates therefore came not to support the proposals of the Statutory Commission, but to ensure that something really vital was granted by the Constitution, viz. central responsibility. Nor can it be suggested that the British Government had invited Indian delegates, most of whom had boycotted the Statutory Commission, to support the retrograde proposals of that body. Above all, the fact that Indian princes had been invited must make it clear that the Government realized that the issue of a change in the form of government at Delhi would be raised and must be squarely faced by them. If responsible government at the centre was definitely ruled out of consideration by the Government or any political party, it was farcical to have convened the Conference or to have taken any share in its

proceedings. It would not be inappropriate if those who to-day condemn the setting up of a responsible government at the centre, not on the merits of the proposed Constitution, but because they have always been opposed to it, were to ponder over these facts.

The delegates from British India were therefore vitally interested in the question of responsible government at the centre. They asked themselves how far such a Government could work, ignoring the position of Indian States. They realized that the administration of tariffs, railways, posts and telegraphs, the management of currency, could not be carried on purely on a British India basis. The States were equally interested in these matters, and without their willing consent government would be extremely handicapped, if it were not paralysed. Under the existing constitution a reconciliation between the interests of States and British India in such matters is brought about by the fact that the Government of India possesses the dual character of being the governing body for British India and the paramount power charged with safeguarding the interests of Indian States. A responsible Indian administration at the centre of British India cannot become the paramount power exercising control over or guarding the rights of Indian States. An adjustment of differences between the two Indias on matters of common interest may be brought about by the interposition of a grand committee composed of representatives of the British Indian Legislature and of the Chamber of Princes, but this solution was obviously not completely satisfactory.

Moreover, it had been the dream of Indian statesmen to integrate India into one administrative whole, so far as matters of common and national interest were concerned. Problems like Indian defence could not be solved except on an All-India basis. India's position would be fully secured and its dignity enhanced if its representative could speak on behalf, not of a portion of India, however large and influential, but the whole of the continent. Above all, full Dominion status—the objective of Indian statesmen—

could never be secured unless the two Indias were brought together under one common administration. Such were the considerations that weighed with British Indian delegates in suggesting an All-India Federation. They were aware that in the immediate present it was possible that British India might not have that freedom to control policy if Indian States were to enter a federation which it would otherwise possess if a responsible British Indian Federation were inaugurated. But they realized clearly that (the course of) the development of such a federation must inevitably be arrested at some stage if Indian States were excluded, and that it could never lead to full Dominion status. It was necessary to sacrifice some of the advantages of the present for the greater and more permanent blessings of the future. And so one "stretches a hand through time to catch the far-off interest of tears."

The delegates from the States, at the Round Table Conference, represented the cream of princely India. Baroda, the doyen of Indian princes; Bikaner, whose magnificent personality was only matched by his rare power of advocacy; Bhopal, precise, methodical, and with logic absolute; the Prime Ministers of Hyderabad and Mysore, with unrivalled administrative experience of the foremost of Moslem and Hindu States, were among those who considered the question from the point of view of Indian India. They had examined the problem for several years at the annual meetings of the Chamber of Princes. Some of them had visualized an All-India Federation many years before the Round Table Conference was convened. The Gaekwar of Baroda had advocated it as early as 1916. The Maharaja of Bikaner had expressed himself in favour of it at heart as far back as 1927. And their knowledge of the progress of British India during the last decade had confirmed rather than in any way weakened their conviction that in an All-India Federation lay the real solution of the Indian problem.

They saw clearly that the British Indian Legislature, with its members elected on an ever-widening franchise, was becoming, and must become, increasingly powerful; that the

paramount power, so far from protecting the interests of Indian States, was bound to be influenced by considerations affecting British India in matters of common concern; and that the States were virtually forced to adopt policies decided from the point of view of British India alone. The most obvious illustrations in justification of the statement are the policy of tariffs and the policy regulating currency, which are managed by the Government in India. British India was fast becoming protectionist, and the tariff wall was growing higher every year. To suggest that the paramount power took into consideration the interests of the States before yielding to the pressure of the Indian Legislature on this issue would be to give expression to an inexactitude. To affirm that States were individually or collectively consulted on the subject is to indulge in a cruel cynicism. Similarly, when the ratio of the rupee to sterling was fixed at 18 pence to the rupee, the States had no choice but to accept legislation passed by a purely British Indian Legislature. And it is obvious that Indian States, both administrations and people, were vitally affected by these two policies. The States had repeatedly complained to the paramount power that their views were ignored and their interests jeopardized. The issue was raised in an acute form and by almost all the States before the Indian States Committee, but they got no satisfaction from the perfunctory recommendations of Sir Harcourt Butler and his colleagues. As the report of the Indian States Inquiry Committee (Financial), presided over by the Right Hon. Mr. Davidson, says:

“In recent years, when a measure of autonomy has been vouchsafed to British India, it has become less easy for the Crown to discharge responsibility as trustee for all the conflicting interests under its suzerainty or rule, and it would be rash to affirm that the point of view of the States equally with that of British India has always been in the minds of those who have shaped India’s economic policy. It is in our view inevitable that, in the process of transferring further responsibility in such matters to Indian hands, provision should be made for the due participation of the States.”

The princes began to realize that this participation in affairs of common interest could be real and effective only through an All-India Federation.

The British Delegation was the third party represented at the Round Table Conference. It included members of all the three parties of Great Britain. Some of them had extensive knowledge of Indian administration; others had played a leading part in national and international politics. The problem that presented itself to them was how to create a democratic form of government for a vast country like India. Many of them were not believers in the slogan that Western institutions were inapplicable to Eastern countries, and that there was a quality in Orientals which led to an inherent incapacity to govern themselves according to democratic principles. Their doubts had a more fundamental basis, and did not arise from the possession of a superiority complex.

A survey of the conditions under which European States were being administered did not strengthen one's belief in democracy. Immediately after the Great War there was a violent wave of feeling in favour of democracies and parliamentary forms of government. The Romanoff dynasty had after three hundred years been overthrown; the Hapsburgs had gone into oblivion; the Hohenzollerns had been driven into exile. The three monarchies of Europe, the biggest and most influential, had fallen, and what could take their place but democracies—*vox populi, vox Dei*. The people must rule themselves. Had not the Great War been fought to the finish to make the world safe for democracy? In this melodramatic atmosphere, when the scarred and maimed soldier was still the hero of the hour, politicians of various European States drafted constitutions and provided for democratic forms of government. But it was a short-lived delusion.

Peace hath its victories no less renowned than war, but peace hath its ravages, too, no less terrible than war. In a very few years many of the States had virtually given up democracy in favour of a more resolute form of government: —

Communism in Russia, Fascism in Italy, Hitlerism in Germany, and dictatorship in Turkey got hold of the administration of these States. Statesmen began to doubt whether the democratic principle was as infallible as it was believed to be by an earlier generation. There were some who spoke of the "failure of democracy," others of the "limitations of democracy." But to entertain doubts whether democracy can be the panacea for all ills that the body politic is heir to is one thing; to suggest an effective substitute is a different and difficult question. After all that has been said and written against democracy, and notwithstanding the hectic experiences during the last few years of administrations in some European States, it is unquestionable that democracy still holds the field as the only method of government which can be permanently depended upon to secure the greatest good of the largest number.

British delegates who by instinct, training, and tradition had been brought up in a belief in democracy could not condemn it as totally inapplicable to Indian conditions. But they were hesitant and extremely reluctant to contemplate a system of government based on pure unadulterated democracy to meet the existing conditions in India.

As has already been stated, the crucial problem of India was the question of responsible government at the centre. Would they be compelled to state that it was unthinkable at the present time, particularly after their experience of post-war Europe? Was the Conference to be wrecked even before it started on its work? Were they to take the responsibility of sending back the Indian delegation disappointed and disheartened, and with added bitterness towards Great Britain which had dashed their hopes? What else would be the result of such a course except to drive every thoughtful Indian into hostility against the Britisher? To grant a purely democratic form of government to British India was to take a leap in the dark and, according to some, to land in certain disaster. To contemplate no change at the centre was to court certain trouble and disaster.

In this dilemma the British delegation heard the statements of the princes that they were willing to enter an All-India Federation, surrendering their sovereign powers to a responsible executive over matters of common concern to British India and Indian States alike. The declaration, which the supposed conservatism of the rulers of Indian States did not lead the British delegates to expect, radically altered their attitude. If the States were to enter an All-India Federation, and if their representatives were to take part in Federal affairs, then there would be just that sobering and restraining influence which would make India safe for a limited kind of democracy. The fear that under a pure system of democracy British India may take the bit between its teeth and run wild need no longer be entertained. The States, with their large vested interests, would be certain to see that no disastrous experiments were resorted to by an infant and inexperienced democracy.

Moreover, there had been a doubt in the minds of some of the British delegates whether the grant of responsible government would not so weaken the chain that bound India to the Empire as to endanger the connection and snap the link at any moment. "The lost Dominion" was a favourite phrase among a set of retired Anglo-Indians who still lived in the age of blood and thunder. The example of the Irish Free State and the rise of De Valera and his party to power had not a reassuring influence on those who believed in the principle of self-determination. But the entry of the States into a Federation gave a new turn to the whole question.

Indian States believed in the British connection. This was due to inherent ideas of loyalty, to sentimental causes, and historic associations. It was also due to the belief that in the permanence of the British connection lay the security, in some cases, at least, of their rule over their States. It is hardly correct to state that British India, or any considerable section of the public, really desired to cut away from the Empire. A few had spoken of independence and of ceasing to be within the British Empire. But it was a

gesture of despair rather than an indication of real desire, and in any case the overwhelming majority of the people had not come to entertain such an idea. They realized that in a world which was fast contracting, and in which time and distance were annihilated by scientific inventions, it was futile to adopt a policy of isolation, and the British Commonwealth of Nations afforded as good a medium for influencing world politics as any other league or union of States. But taking the worst view of the situation, the States could not be parties to such iconoclastic proposals, and the entry of the States was some guarantee of the continuance of the British connection and the preservation of India to the British Commonwealth.

The British delegates were in a position to realize these advantages, but the greatest credit for acuteness of perception in the matter, an intelligent grasp of the situation, and vivid realization of the possibilities of the future, must go to the Marquis of Reading, whose uncanny faculty of seeing what is still below the horizon enabled him boldly to advocate the formation of an All-India Federation with a responsible executive.

Such were the different and varying motives which animated the three sections of the delegates who accepted the proposal, and to such motives should be owed the birth of the All-India Federation. If the name of any delegate can be singled out as having played a decisive part in the evolution of this idea, it is that of Sir Tej Bahadur Sapru, whose suave manners, great knowledge of constitutions, persuasive advocacy, and rich culture won the admiration of all who worked with him at the three Conferences.

CHAPTER II

CONSTITUTION AND ALLOCATION OF FUNCTIONS

THE formation of a federation is the result of negotiations often protracted and of agreements arrived at after difficult and not infrequently hard bargaining. These negotiations have generally been carried on among units enjoying more or less the same status. The Canadian Provinces were all self-governing units, subject, however, to imperial authority. So were the Australian States. The North German Confederation of 1871 resulted from an agreement among Sovereign States, and the preamble refers to the conclusion of an everlasting confederation by His Majesty the King of Prussia, and the rulers of Bavaria, Württemberg, Baden, and the Grand Duchy of Hesse.

In the constitution of an All-India Federation one is struck by an obvious difference. British Indian Provinces and Indian States do not at present enjoy the same constitutional status. Subject to those undefined powers, which the Crown as the paramount authority exercises over Indian States, these units are autonomous, and in their internal administration possess a freedom which in many instances is real and complete.

British Indian Provinces are under the superintendence and control of a highly centralized unitary Government. Section 33 of the Government of India Act, 1919, provides that:

“Subject to the provisions of this Act and rules made thereunder, 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 all such orders as he may receive from the Secretary of State.”

Section 45 of the same Act reads thus:

“Subject to the provisions of this Act and rules made there-

under, every local Government shall obey the orders of the Governor-General in Council, and keep him constantly and diligently informed of its proceedings and of all matters which ought in its opinion to be reported to him or as to which he required information, and is under his superintendence, direction, and control in all matters relating to the matters of the Government of its Province."

The limitation contained in the above sections was necessitated by the transfer of certain provincial subjects to ministers responsible to the Legislature. But as the vital departments of law and order, revenue and finance, are reserved subjects, not administered by ministers, the control of the Governor-General in Council and of the Secretary of State over the Provinces is virtually complete. A recognition of this difference between British Indian Provinces and Indian States cannot in any wise be used as an argument against the formation of a federation. There have been critics, obsessed by this inequality, who have found it difficult to contemplate federation of such units. But this is to mistake the accidents of constitution for its essence. Federations may have been formed among independent units, but the impulses thereto have to be sought elsewhere. They have been necessitated by the fear of external aggression, by a realization of the value of economic unity, by a desire for the peaceful settlement of conflicting interests, or by the spiritual ideals of national unity. The motives which animated the "fathers of the Indian Federation" have already been referred to, and to those persons of large vision and of noble ideals the non-essential features of federal units, such as equality of status, had little or no meaning.

The question of the status of a federal unit after the constitution of a federation is more important than its pre-federation status, and in some constitutions specific provisions have been embodied for the form of government of these units.

"The United States shall guarantee to every State in the Union a republican form of government."

From the Swiss Confederation the following excerpt might be made:

“Qu’elles assurent l’exercice des droits politiques d’après des formes républicaines—représentatives ou démocratiques.”

The German Constitution of 1919 provides that “each State must have a republican constitution.”

Could the Indian Federation have adopted this precedent, and to what extent? Is it possible for British Indian Provinces and Indian States to adopt some common form of government? Would an Indian Federation at all be possible if an insistence had been laid on an observance of this precedent? The subjects of Indian India do not enjoy a uniform status. There are States where even the rudimentary forms of self-government are unknown; principalities where the popular control of even local affairs has been withheld by the ruler. There are other States where representative assemblies of popularly elected members are convened to advise the Government of a State, and Legislatures meet to help the Government in the enactment of laws. But in no State is the ruler a mere constitutional head or the Government an administration responsible to a popularly elected assembly. In such a state of affairs, where one comes across all the diversities from complete autocracy to a limited association of popular representatives in the making of laws, the problem of applying a uniform and democratic system of government is obviously insoluble. There is an hiatus between political idealism and realism, which statesmen as well as constitutional writers must be prepared to recognize. What a powerfully disturbing suggestion it would have been if, at the session of the Round Table Conference, it had been insisted that every federating unit, State or Province, must have a democratic form of government! Nothing would have been better calculated to break up the Conference and to postpone to an indefinite period the prospect of an All-India Federation. Moreover, from a study of the circumstances under which provisions for the uniformity of constitutions of federating units have been

insisted upon, it does not appear to have been dictated so much by the needs of a federation as by the conditions under which the Federation was brought into existence. The constitution of the United States of America, drawn up by the fathers of the convention, immediately after the secession of the American colonies from Great Britain, naturally emphasized this fact by prohibiting a monarchical form of government in any State and prescribing a republican system of government.

If, now, one turns to the German precedent, one finds a very similar reason for the adoption of a republican form of government in the units of the Federation. The stress and suffering through which the German nation had to pass during the Great War, the chastening reflection that the reign of the Hohenzollern dynasty was largely responsible for their severe trials and tribulations, led the framers of the new German constitution to adopt a democratic and republican form of government for their country. The impulse which led them to proscribe monarchy in the German Federal State was also responsible for its banishment in each of the federating States. Consistency and security alike demanded a republican form of government for each of the States. It will therefore be apparent that it was not as an ingredient of the Federal system, but on account of extraneous reasons, that these constitutions prescribe special forms of government to the States. If further proof were necessary to support this conclusion, it may be found in the fact that the constitution of the German Confederation of 1871 recognized the right of the federating States to choose whichever form of government they desired. The acceptance of the position that constitutional uniformity in the units is not of the essence of a federation does not imply a disregard of either the reaction of autocratic forms of government on the future federation or of the position and constitutional rights of State-subjects.

The value of political constitutions lies as much in their specific provisions as in their natural tendencies. It is an unprofitable task to prophesy, or to attempt to delve deep

into the future. But it is not altogether unreasonable to expect that the march of time, the lessons of the age, and in particular contacts with the Federal Government, will enable State rulers and administrations to realize that in basing their rule on popular consent lies their security and the happiness of the people.

The relative positions of Indian States and British Indian Provinces at the time of the constitution of the Indian Federation will, to a certain extent, explain the basis of the allocation of functions between the Federal centre and the units of the Federation. The States are naturally anxious to conserve as much of the functions of administration to themselves as possible, and to surrender only those that are obviously necessary in the common interests of the Federation. The British Indian Provinces, while agreeing to the exercise by the Federation of these functions, are anxious to go farther, and desire to vest in a central administration—other functions the exercise of which has helped to bring about uniformity of law and administration in certain directions in the Provinces.

As one scans the reports of the three Round Table Conferences, one comes across controversies which have a familiar ring about them. It is sometimes said that history repeats itself, and in these Conferences the battles waged over the issues of State rights and Federal rights, of representation according to principles of proportionality and equality, and of residuary powers, positing in the Provinces or in the Federal centre—all these had their counterparts in the controversies of other assemblies convened to draw up constitutions. So did Hamilton the federalist fight with Maddison the advocate of State rights.

The Constitution divides the functions into three categories:

- A. Those which are exclusively Federal.
- B. Those which are exclusively Provincial.
- C. Those which are concurrent (so far as the Provinces are concerned).

The first division needs further explanation. The exclusively Federal subjects may be subdivided into two classes:

- (a) Those which relate to States and Provinces alike.
- (b) Those which relate to the Provinces alone.

Laws passed by the Federal Legislature falling under the first category will in general be operative both in British India and the Indian States. In the second subdivision a reference has been made to laws which when passed by the Federation will be operative only in British India. To understand this distinction it is necessary to consider the classification of subjects. The exclusive authority of the Federal Legislature over the whole Federation extends to all matters coming within the classes of subjects enumerated below:

1. The common defence of India in time of an emergency declared by the Governor-General.
2. The raising, maintaining, disciplining, and regulating of His Majesty's naval, military, and air forces in India, and any other armed force raised in India, other than military and armed police maintained by local Governments, and armed forces maintained by the rulers of Indian States.
3. Naval, military, and air works.
4. The administration of cantonment areas by organs of local self-government, and the regulation therein of residential accommodation.
5. The employment of the armed forces of His Majesty for the defence of the Provinces against internal disturbance and for the execution and maintenance of the laws of the Federation and the Provinces.
6. (a) Chiefs' colleges and educational institutions for the benefit of past and present members of His Majesty's forces or of the children of such members.
(b) The Benares Hindu University and the Aligarh Muslim University.
7. Ecclesiastical affairs, including European cemeteries.

8. External affairs, including international obligations, subject to previous concurrence of the units as regards non-Federal subjects.
9. Emigration from and immigration into India, and inter-provincial migration, including regulation of foreigners in India.
10. Pilgrimages beyond India.
11. Extradition and fugitive offenders.
12. (a) Construction of railways in British India and, with the consent of the State, in a State, but excluding light and feeder railways and extra-municipal tramways being wholly within a Province but not being in physical connection with Federal railways.
- (b) Regulation of railways in British India and Federal railways in States.
- (c) Regulation of other railways in respect of (1) fares; (2) rates; (3) terminals; (4) interchangeability of traffic; (5) safety.
13. Air navigation and aircraft, including the regulation of aerodromes.
14. Inland waterways passing through two or more units.
15. Maritime shipping and navigation, including carriage of goods by sea.
16. Regulation of fisheries in Indian waters beyond territorial waters.
17. Shipping and navigation on inland waterways as regards mechanically propelled vessels.
18. Lighthouses (including their approaches), beacons, lightships, and buoys.
19. Port quarantine.
20. Ports declared to be major ports by or under Federal legislation.
21. Establishment and maintenance of postal, telegraphic, telephone, wireless, and other like services, and control of wireless apparatus.
22. Currency, coinage, and legal tender.
23. Public Debt of the Federation.

24. Post Office Savings Bank.
25. The incorporation and regulation of banking, insurance, trading, financial, and other companies and corporations.
26. Development of industries in cases where such development is declared by or under a Federal law to be expedient in the public interest.
27. Control of cultivation and manufacture of opium, and sale of opium for export.
28. Control of petroleum and explosives.
29. Traffic in arms and ammunition, and, in British India, control of arms and ammunition.
30. Copyright, inventions, designs, trademarks, and merchandise marks.
31. Bankruptcy and insolvency.
32. Negotiable instruments.
33. Control of motor vehicles as regards licences valid throughout the Federation.
34. The regulation of the import and export of commodities across the customs frontiers of the Federation, including the imposition and administration of duties thereon.
35. Salt.
36. The imposition and regulation of duties and excise, but not including duties of excise on alcoholic liquors, drugs, or narcotics (other than tobacco).
37. Imposition and administration of taxes on the income or capital of corporations.
38. Geological Survey of India.
39. Botanical Survey of India.
40. Meteorology.
41. Census; statistics for the purposes of the Federation.
42. Central agencies and institutes for research.
43. The Imperial Library, Indian Museum, Imperial War Museum, Victoria Memorial, and any other similar institution controlled and financed by the Federal Government.
44. Pensions payable out of Federal revenues.

45. Federal services and Federal Public Service Commission.
46. Immovable property in possession of the Federal Government.
47. The imposition by legislation of punishment by fine, penalty, or imprisonment for enforcing any law made by the Federal Legislature.
48. Matters in respect of which the Act makes provision until the Federal Legislature otherwise provides.

The exclusive authority of the Federal Legislature over British Indian Provinces extends to matters falling within the classes of subjects specified below :

49. Imposition and administration of taxes on income other than agricultural income or income of corporation, but subject to the power of the Provinces to impose surcharges.
50. The imposition and administration of duties on property passing on death other than land.
51. The imposition and administration of taxes on mineral rights and on personal capital other than land.
52. The imposition and administration of terminal taxes on railway, water- or air-borne goods and passengers, and taxes on railway tickets and goods freight.
53. Stamp duties which are the subject of legislation by the Indian Legislature at the date of Federation.
54. The imposition and administration of taxes not otherwise specified in this List or List II, subject to the consent of the Governor-General, given at his discretion after consulting Federal and Provincial Ministers or their representatives.
55. Naturalization and status of aliens.
56. Conduct of elections to the Federal Legislature, including election offences and disputed elections.
57. Standards of weight.
58. All matters arising in Chief Commissioner's Provinces (other than British Baluchistan) not having a Legislature.

59. Survey of India.
60. Archaeology.
61. Geological Survey.
62. The recognition throughout British India of the laws, the public Acts and records, and judicial proceedings of the Provinces.
63. Jurisdiction, powers, and authority of all courts in British India, except the Federal Court and the Supreme Court, with respect to the subjects in this List.
64. Matters ancillary and incidental to the subjects specified above.

The classification of subjects under this head has been necessitated by the fact that States were unwilling to surrender their functions with reference to them to the Federal centre, while British Indian Provinces felt that the need for uniformity of law and administration required their vesting in a central authority. Thus while States agreed to the imposition and administration of taxes on the income or capital of corporations, they reserved to themselves the right of determining the imposition of taxes on personal income. In British Indian Provinces the proceeds of the imposition of taxes on personal income will ultimately accrue to the Provinces. But it is felt that uniformity of legislation and simplicity of administration require that the Federal Legislature should pass laws relating to income tax, and the Federal Government administer those laws. Hence it is proposed that the imposition and administration of taxes on income other than agricultural income or income of corporation will be an exclusively Federal subject, but only so far as British Indian Provinces are concerned.

In a like manner, subjects such as Survey of India, archaeology, geological survey, standards of weight, naturalization and status of aliens are exclusively Federal subjects for British India.

There is an ambiguity in this provision which will not have escaped the attention of students of constitutions. If

the Federal Legislature should legislate over these subjects, which concern only British India, the representatives of Indian States will partake in decisions which do not bind the areas they represent. The participation of States' representatives in these laws conflicts with the principle of representative institutions, according to which laws applicable to a State must be made by the majority of the representatives of the State.

Two suggestions have been made to overcome this difficulty. The first is that a separate legislature, consisting only of representatives in the Federal Legislature from British India, should legislate on these subjects. This suggestion has been deprecated on the ground that it would encourage separatist tendencies in British India, and would therefore militate against those habits of common thought among all legislators which are necessary to promote the best interests of the Federation. A less radical suggestion is that a convention should grow whereby representatives from Indian States would abstain from voting when matters concerning exclusively British Indian Provinces are under consideration. The precedent of *Scottish legislation* in the House of Commons was invoked in support of this suggestion. It is very much to be hoped that a similar convention would grow in India, failing which it might be necessary to amend the Constitution so that the British Indian section of the Legislature might meet to decide on these issues.

The real solution of this whole anomalous position lies in the States recognizing in the course of time that they must federate on these subjects also. The working of the Federal Constitution, the active participation of State representatives in the Federal Government, the disappearance of suspicions that British India as a single unit will outweigh the Indian States in the Federation, and the development of confidence in the strength and impartiality of the Federal Government—these may lead to the more ready surrender of functions by the States than has been possible at the initiation of the Federation.

In each Province the Legislature has exclusive power to make laws in relation to matters coming within the classes of subjects enumerated below :

1. Local self-government, including matters relating to the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlements, and other local authorities in the Province established for the purpose of local self-government and village administration, but not including matters covered by item No. 4 in List I.
2. Establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province (other than marine hospitals).
3. Public health and sanitation.
4. Pilgrimages other than pilgrimages beyond India.
5. Education, other than the universities and institutions covered by item No. 6 in List I.
6. Public works and buildings in connection with the administration of the Province.
7. Compulsory acquisition of land.
8. Roads, bridges, ferries, tunnels, ropeways, causeways, and other means of communication.
9. Construction (query regulation) and maintenance of light and feeder railways and extra-municipal tramways not being in physical connection with Federal railways.
10. Tramways within municipal areas.
11. Water supplies, irrigation and canals, drainage and embankments, water storage and water power.
12. Land revenue, including—
 - (a) Assessment and collection of revenue.
 - (b) Maintenance of land records, survey for revenue purposes, and records of rights.
13. Land tenures, title to land, and easements.
14. Relations of landlords and tenants and collection of rents.

15. Courts of wards and encumbered and attached estates.
16. Land improvement and agricultural loans.
17. Colonization, management, and disposal of lands and buildings vested in the Crown for the purposes of the Province.
18. Alienation of land revenue and pensions payable out of Provincial revenues (query frontier remissions).
19. Pre-emption.
20. Agriculture, including research institutes, experimental and demonstration farms, introduction of improved methods, agricultural education, protection against destructive pests, and prevention of plant diseases.
21. Civil veterinary department, veterinary training, improvement of stock, and prevention of animal diseases.
22. Fisheries.
23. Co-operative societies.
24. Trading, literary, scientific, religious, and other societies and associations not being incorporated companies.
25. Forests.
26. Control of production, manufacture, possession, transport, purchase and sale of alcoholic liquors, drugs, and narcotics.
27. Imposition and regulation of duties of excise on alcoholic liquors, drugs, and narcotics other than tobacco.
28. Administration of justice, including the constitution and organization of all courts within the Province, except the Federal Court, the Supreme Court, and a High Court, and the maintenance of all courts within the Province except the Federal Court and the Supreme Court.
29. Jurisdiction of and procedure in Rent and Revenue Courts.
30. Jurisdiction, powers, and authority of all courts

within the Province, except the Federal Court and the Supreme Court, with respect to subjects in this List.

31. Administrators-General and Official Trustees.
32. Stamp duties not covered by item No. 53 in List I.
33. Registration of deeds and documents other than the compulsory registration of documents affecting immovable property.
34. Registration of births and deaths.
35. Religious and charitable endowments.
36. Mines and the development of mineral resources in the Province, but not including the regulation of the working of mines.
37. Control of the production, supply, and distribution of commodities.
38. Development of industries, except in so far as they are covered by item No. 26 in List I.
39. Factories, except the regulation of the working of factories.
40. Electricity.
41. Boilers.
42. Gas.
43. Smoke nuisances.
44. Adulteration of foodstuffs and other articles.
45. Weights and measures, except standards of weight.
46. Trade and commerce within the Province, except in so far as it is covered by any other subject in these Lists.
47. Actionable wrongs arising in the Province.
48. Ports, other than ports declared to be major ports by or under a Federal law.
49. Inland waterways being wholly within a Province, including shipping and navigation thereon, except as regards mechanically propelled vessels.
50. Police (including railway and village police), except as regards matters covered by the Code of Criminal Procedure.
51. Betting and gambling.

52. Prevention of cruelty to animals.
53. Protection of wild birds and wild animals.
54. Regulation of motor vehicles, except as regards licences valid throughout the Federation.
55. Regulation of dramatic performances and cinemas.
56. Coroners.
57. Criminal tribes.
58. European vagrancy.
59. Prisons, reformatories, Borstal institution, and other institutions of a like nature.
60. Prisoners.
61. Pounds and the prevention of cattle trespass.
62. Treasure trove.
63. Libraries (except the Imperial Library), museums (except the Indian Museum, the Imperial War Museum, and the Victoria Memorial), and other similar institutions controlled and financed by the Provincial Government.
64. Conduct of elections to the Provincial Legislature, including election offences and disputed elections.
65. Public services in a Province and Provincial Public Service Commission.
66. The authorization of surcharges, within such limits as may be prescribed by Order in Council, upon income tax assessed by the Federal Government upon the income of persons resident in the Province.
67. The raising of Provincial revenue—
 - (1) From sources and by forms of taxation specified in the Annexure appended to this List and not otherwise provided for by these Lists; and
 - (2) By any otherwise unspecified forms of taxation, subject to the consent of the Governor-General given at his discretion, after consulting the Federal Ministry and Provincial Ministries or their representatives.
68. Relief of the poor.
69. Health insurance and invalid and old-age pensions.
70. Money-lenders and money-lending.

71. Burials and burial-grounds other than European cemeteries.
72. Imposition by legislation of punishment by fine, penalty, or imprisonment, for enforcing any law made by the Provincial Legislature.
73. Matters with respect to which the Act makes provision until the Provincial Legislature otherwise provides.
74. The administration and execution of Federal laws on the subjects specified in List III, except No. 22.
75. Statistics for provincial purposes.
76. Generally any matter of a merely local or private nature in the Province not specifically included in the List and not falling within List I or List III, subject to the right of the Governor-General in his discretion to sanction general legislation on that subject.
77. Matters ancillary and incidental to the subjects specified in this List.

ANNEXURE

1. Revenue from the public domain, including lands, buildings, mines, forests, fisheries, and any other real property belonging to the Province.
2. Revenue from public enterprises, such as irrigation, electric power and water supply, markets, slaughter-houses, drainage, tolls and ferries, and other undertakings of the Province.
3. Profits from banking and investments, loans and advances, and State lotteries.
4. Fines and penalties arising in respect of subjects administered by the Government of the Province.
5. Fees levied in the course of discharging the functions exercised by the Government of the Province and local authorities, such as court fees, including all fees for judicial or quasi-judicial processes, local rates and dues, fees for the registration of vehicles, licences to possess firearms and to drive automobiles, licensing

- of common carriers, fees for the registration of births, deaths and marriages, and of documents.
6. Capitation taxes other than taxes on immigrants.
 7. Taxes on land, including death or succession duties in respect of succession to land.
 8. Taxes on personal property and circumstance, such as taxes on houses, animals, hearths, windows, vehicles; *chaukidari* taxes; sumptuary taxes; and taxes on trades, professions, and callings.
 9. Taxes on employment, such as taxes on menials and domestic servants.
 10. Excises on alcoholic liquors, narcotics. (other than tobacco), and drugs and taxes on consumption not otherwise provided for, such as cesses on the entry of goods into a local area, taxes on the sale of commodities and on turnover, and taxes on advertisements.
 11. Taxes on agricultural incomes.
 12. Stamp duties other than those provided for in List I.
 13. Taxes on entertainments and amusements, betting, gambling, and private lotteries.
 14. Any other receipts accruing in respect of subjects administered by the Province.

The Federal Legislature has no power to make laws in relation to these subjects. It will be noticed that *no classification of subjects as exclusively State has been drawn up*. The reason is obvious. Indian States have given up to the Federation only certain specified functions; all other functions continue to vest in the States. British Indian Provinces have been under a unitary central Government and, as already stated, subject to the complete control of the Governor-General in Council. In allocating functions under the new Constitution the Provinces have to be vested with powers which were hitherto exercised by the Government, and hence the need for exclusively Provincial subjects.

The third division—concurrent legislation—may now be considered. The Federal Legislature and each Provincial

Legislature have power to enact laws relating to the following subjects :

1. Jurisdiction powers and authority of all courts (except the Federal Court, the Supreme Court, and Rent and Revenue Courts) with respect to the subjects in this List.
2. Civil procedure, including the Law of Limitation and all matters now covered by the Indian Code of Civil Procedure.
3. Evidence and oaths.
4. Marriage and divorce.
5. Age of majority and custody and guardianship of infants.
6. Adoption.
7. Compulsory registration of documents affecting immovable property.
8. The law relating to—
 - (a) Wills, intestacy and succession, including all matters now covered by the Indian Succession Act.
 - (b) Transfer of property, trusts and trustees, contracts, including partnership, and all matters now covered by the Indian Specific Relief Act.
 - (c) Powers of attorney.
 - (d) Relations between husband and wife.
 - (e) Carriers.
 - (f) Innkeepers.
 - (g) Arbitration.
 - (h) Insurance.
9. Criminal law, including all matters now covered by the Indian Penal Code, but excluding the imposition of punishment by fine, penalty, or imprisonment or enforcing a law on a subject which is within the exclusive competence of the Federal Legislature or Provincial Legislature.
10. Criminal procedure, including all matters now covered by the Indian Code of Criminal Procedure.

11. Control of newspapers, books, and printing-presses.
12. Lunacy, but not including lunatic asylums.
13. Regulation of the working of mines, but not including mineral development.
14. Regulation of the working of factories.
15. Employers' liability and workmen's compensation.
16. Trade unions.
17. Welfare of labour, including provident funds and industrial insurance.
18. Settlement of labour disputes.
19. Poisons and dangerous drugs.
20. The recovery in a Province of public demands (including arrears of land revenue and sums recoverable as such) arising in another Province.
21. Regulation of medical and other professional qualifications.
22. Ancient and historical monuments, including the administration thereof.
23. Matters ancillary and incidental to the subjects specified in this List.

"The intention of providing for this concurrent field is to secure in respect of these subjects the greatest measure of uniformity which might be found practicable, but at the same time to enable Provincial Legislatures to make laws to meet local conditions. In the event of a conflict between a Federal Law and a Provincial Law in the concurrent field, the Federal Law will prevail unless the Provincial Law was reserved for and has received the assent of the Governor-General. The Federal Legislature will have no power to repeal or amend a Provincial Law to which a Governor-General has thus assented ~~same~~ with the prior sanction of the Governor-General."¹

The British North America Act provides for a similar concurrent jurisdiction to the Parliament of Canada and the Provinces. This concurrent jurisdiction enables Provinces to maintain unity in essentials and diversity in non-essentials = in these subjects.

The great codes of civil and criminal procedure have been in operation for nearly a century in British India, and

¹ Vide "The White Paper."

have brought about a uniformity in the adjective law of the courts which is of the highest importance to the public. The Indian Evidence Act has similarly established common canons for evaluating evidence in all courts of law. The laws relating to marriage and divorce are obviously laws which must be uniformly applicable over the widest area possible. The law relating to testamentary succession, to the transfer of property, to the trusts, and to contracts and the law of partnerships cannot vary from Province to Province without disastrous consequences to trade and commerce and to the vesting of property.

It may be regretted that Indian States have not found it possible to entrust to the Federation the function of making laws on such subjects. In actual practice, uniformity in such matters obtains in many States owing to the fact that they have bodily incorporated these laws among their statutes. But in such vital matters British Indian Provinces cannot have the option of adopting or rejecting these laws. There are, however, local conditions to be taken note of, and these laws, excellent in themselves, may result in great hardships if certain modifications are not made. The Indian Penal Code is one of the triumphs of legal draftsmanship, but there may be other offences to be provided against in some Provinces. The general principles of the law of transfer of property are again applicable throughout British India, but local variations may be necessitated by special customs such as pre-emption. Such considerations were responsible for the third classification of concurrent functions.

Careful and exhaustive as this classification has been, and numerous though the subjects mentioned in them may be, it is impossible to suggest that every possible function of administration that may at any time be necessitated has been included in these three groups. The wit of man cannot devise for all time to come. The fathers of the American federation thought that they could, and succeeding generations have had to pay the penalty, when the discoveries of science—electricity and aerial navigation, to indicate only two—shattered their assumption.

CONSTITUTION AND ALLOCATION OF FUNCTIONS 43

In modern Federal constitutions the question where residuary powers should lie has therefore been a matter of some importance and acute controversy. The British North American Act vests the power to legislate on residuary subjects in the Federal centre. The Commonwealth of Australia Act, on the other hand, vests it in the States. It is unnecessary to enter into this vexed controversy. The Indian Constitution essays to get over this difficulty by an ingenious compromise, the actual working of which will be watched with interest.

The Governor-General is vested with the power to decide in any given case which is the appropriate forum for legislation, and whether a measure relating to an unallocated subject should be introduced in Federal or Provincial Legislature. It may not be hazardous to suggest that in arriving at a conclusion the Governor-General will be largely influenced by the opinion of the Federal Government. In course of time, if the Federal Government is wise, it will be the real authority for deciding the issue, and so the solution will virtually amount to a vesting of the residuary power in the Federal centre.

CHAPTER III

THE FEDERAL LEGISLATURE

THE Federation of India is a union between the Governors' Provinces and such Indian States as signify their assent through instruments of accession to join the Federation. The executive Government of the Federation will derive its authority from a Federal Legislature. The constitution and functions of a Federal Legislature may now be examined.

It has been generally accepted that a bicameral system of legislatures is an essential feature of the Federal system. Apart from the arguments that have been advanced in unitary States for two chambers of a Legislature, the constitution of a federation affords an additional reason for the bicameral system. The units of the Federation agree to enter into the union for certain limited purposes. Their integrity and independence in other matters have to be safeguarded, and an assembly where the interests of States can be represented as States, and where no single unit could dominate either owing to its population or its wealth, has appeared to the federating units the strongest safeguards against their extinction or absorption. In the Indian Federation this feeling has been entertained to some extent by the Provinces, and in an exaggerated form by the Indian States.

The Federal Legislature therefore consists of two chambers, the Council of State, where the principle of State representation has been adopted, and the House of Assembly, where the principle of popular representation has been generally accepted. The constitution of these two bodies, the representation which the Provinces and Indian States should obtain in either of these chambers, has been the subject of prolonged controversy and negotiations. The Indian States claimed equality of representation in the Council of State. But as the number of these States is

legion, and even taking into consideration those States which are represented in the Chamber of Provinces come to over a hundred and twenty, where the number of British Indian Provinces are only eleven, an equal representation to every State and Province joining the Federation was an impossibility. Realizing the preposterous nature of such a claim, the Indian States approached the issue in a more diplomatic manner. They suggested that the Indian Federation would be constituted virtually of two entities: British Indian Provinces, which by long traditions of unitary government had developed common aims and objectives, and Indian States, whose peculiar position created in them an identity of interest. It would be proper if in the Chamber which represented the "State principle" each of these groups had the same representation. They were prepared to accept representation on a popular basis in the Assembly, but these proposals were not acceptable to British Indian representatives. The population of Indian States is only 25 per cent of the total Indian population. The contribution to Federal resources which British India can make is very much greater than that of the States, and, bearing in mind the relative powers of the two Chambers and the methods of representation to the Legislature from British Indian Provinces and Indian States, they felt that equality of representation would result in the domination of the Indian States in the Legislature. Such conflicting sentiments have prevailed whenever the representation of units in a federation has been the subject of discussion. It was ultimately agreed that the States should have 40 per cent of the seats in the Council of State and a third of the seats in the Lower House. The Constitution provides:

"The Council of State will consist, apart from the Governor-General's counsellors, of not more than 260 members, of whom 150 will be elected from British India in the manner indicated in Appendix I, not more than 100 will be appointed by the rulers of States, and not more than 10 (who shall not be officials) will be nominated by the Governor-General in his discretion.

"The Assembly will consist, apart from the Governor-General's counsellors, of not more than 375 members, of whom 250 will

be elected to represent constituencies in British India, and not more than 125 will be appointed by the rulers of States."

The number of seats to be allocated out of the State bloc to individual States again formed the subject of keen discussion. The smaller States pleaded for equality of representation within the State bloc, the larger States demanded proportionality on the basis of population, and in between these two extremes were some States which demanded special representation on the ground of their historic past or their present "high status." The decision of this question had ultimately to be left to His Majesty's Government.

The representation of Provinces in the Senate raised the same issue, though not in so aggravated a form. The Federal Structure Committee considered that the "guiding principle should be a reasonable approximation to equality of representation for each unit. Absolute equality, having regard to the great variations in size and population between the Provinces, would obviously be inequitable." The problem has been solved in the Constitution by grouping Provinces in different grades. Madras, Bombay, Bengal, the United Provinces, Punjab, and Bihar will send eighteen representatives each; the Central Provinces eight; Assam, the Frontier Province, Sindh, and Orissa five each. For the Legislative Assembly or Lower House the distribution of seats has been made primarily on the population basis, but the importance of some of the Provinces has also been taken into account. Madras, Bengal, and the United Provinces will send thirty-seven representatives each to the Council of State; Bombay, Punjab, and Bihar thirty each; the Central Provinces fifteen, and Assam ten; the Frontier Province, Sindh, and Orissa five each.

The normal life of a Council of State is seven years and of an Assembly five years. The method by which representatives to the two Houses will be chosen from the Provinces and the States differs. The States have declined to commit themselves to the principle of election either directly or indirectly. They have reserved to themselves the full right of determining how their representatives should

be chosen for the Legislatures. It has already been pointed out that even the most rudimentary forms of self-governing institutions are absent in some of the States. Moreover, the grant of franchise for elections to these Legislatures will necessarily affect the internal position of the State and the form of government which exists therein. While, therefore, the objections of the States may be understood and their wishes have been respected in the Constitution, it is not difficult to forecast that the association of representatives nominated by State Governments with elected members from British India will bring about changes in Indian States much sooner than may be anticipated by them.

In fact, some of the States have already declared through their rulers or representatives that in choosing representatives to the popular House of the Federation, the Governments of these States would consult such representative institutions as may exist in these States; and it may confidently be expected that this principle will gradually spread in many of the better-organized States. But for a long time the State representatives to the Senate will continue to be the nominees of the Governments concerned.

The members of the two Chambers from British Indian Provinces will be chosen on a different principle. The Provincial Legislatures will elect representatives to the Senate by the system of proportional representation. In Provinces where there is an Upper Chamber the members of both the Houses will participate in such an election. The system of proportional representation has been devised in order to give suitable representation in the Senate to minorities and certain interests. Under such a system it would be obviously possible for a minority, if it so chooses and concentrates its voting power, to elect its representatives. A Moslem or a depressed class minority, a landholder's group in some Provinces, labour and commercial interests in others, can ensure for themselves direct representation on the Senate. There are, however, some communities so small in numbers and consequently enjoying a very small representation in Provincial Legislatures, and yet

both distinct and significant, that it has been considered desirable to give them special facilities for representation on the Senate.

“The Indian Christian, Anglo-Indian, and European members of the Provincial Legislatures will not be entitled to vote in the elections for seats in the Council of State. Ten non-Provincial communal seats will be reserved in the Council of State, seven for Europeans, two for Indian Christians, and one for Anglo-Indians, these seats being filled by election by three electoral colleges consisting respectively of the European, Indian Christian, and Anglo-Indian members of the Provincial Legislatures.”

This special method adopted with reference to the Indian Senate ensures representation of all “minor minorities,” but does not necessitate, except in the case of the “minor minorities,” the creation of separate electorates.

The Federal Assembly will, so far as the British Indian section is concerned, be largely composed of representatives returned from territorial constituencies. In each Province certain seats have been allocated to minorities, and these seats will be filled by members of the minority communities returned by voters voting in separate communal electorates—Sikhs in the Punjab, Moslems, Indian Christians, Anglo-Indians, and Europeans in all Provinces will be returned by separate electorates. The depressed classes in most Provinces have been assured of some representation by the system of reserved seats in joint electorates of the general constituencies, a general constituency being a constituency composed of all qualified voters who are not voters in one of the special communal electorates. The principle of a reserved seat implies a recognition of the claim of a community to special representation. The difference between a reserved seat and a seat through a separate electorate is obvious. In the first, the candidate, though belonging to a particular community, is chosen by a body of electors belonging to all communities. In the latter, he is chosen by the voters of his own community. A reserved seat, however, implies that the candidate of the community, even though he may obtain a lower vote, must be chosen in

preference to a candidate of any other community who gets a higher vote. In the case of the depressed classes, a further restriction has been imposed, presumably in their interests, in order to guarantee that the candidate ultimately chosen enjoys the confidence of his community. The agreement made at Poona between some of the caste Hindus and members of the depressed classes at the instance of Mr. Gandhi recognizes this principle, and the Constitution accordingly provides that "all members of the depressed classes registered in the general electoral roll of a constituency will form an electoral college, which will elect a panel of four candidates for each of such reserved seats, and these will be the only candidates who will be qualified for the reserved seat at the general elections."

Apart from the communal seats, certain interests have been given special representation in the Federal Assembly. Special seats have been allotted to commerce and industry, to be filled by election by Chambers of Commerce and other special institutions. Landholders have been similarly granted representation through special landholders' constituencies, and the interests of labour are proposed to be ensured by representatives elected by special labour constituencies. It has been considered essential that there must be a certain number of women representatives in the Assembly, and the Provincial Legislatures will form constituencies for returning such representatives.

These detailed provisions for representation are the most novel that have ever been devised, and it is not possible to find a precedent in any of the constitutions for such proposals. They have been subjected to the severest criticism in some quarters, and it has been suggested that a Legislature so composed is not a democratic institution and cannot reflect the wishes of the bulk of the people. Moreover, by grouping communities in watertight compartments through separate electorates, by recognizing the legitimacy of vested interests, and, in fact, putting a premium on exclusiveness, both of communities and of interests, it has been urged that a death-blow has been struck at corporate life, and the

fragmentation of Society and of the body politic will be an inevitable result.

A careful consideration of the question shows that there is no foundation for the belief that the predictions of these prophets of woe will come true. While separate electorates may tend to exaggerate the special interests of certain communities, it must nevertheless be conceded that even past experience has proved that representatives faced with a common problem in the Legislatures have in most cases acted as if they were the chosen of the general public and not of particular sections. It must also be recognized that separate electorates are not intended to be a permanent feature of the Constitution, and that their early disappearance will largely depend on mutual trust and goodwill generated in the working of institutions.

Apart from the question of separate electorates, however, the representation of various interests and communities in Indian Legislatures is a highly ingenious device intended to overcome some of the disadvantages which have been found in the working of democratic institutions. These defects and disadvantages, and the manner in which they are sought to be overcome, have been explained in the chapter on "Minorities and a Social Federation."

As the *Federalist* has rightly observed :

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the Government to control the governed; and in the next place oblige it to control itself. A dependence on the people is no doubt a primary control on the Government; but experience has taught mankind the necessity of auxiliary precautions."

It is in the nature of such auxiliary precautions that the proposals for the representation of various communities and interests should be regarded. The *Federalist* continues :

"If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of

providing against this evil: the one by creating a will in the community, independent of the majority—that is, of the society itself; the other by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of the majority of the whole very improbable, if not impracticable. The first method prevails in all Governments possessing an hereditary authority. According to the second method, whilst all authority will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals or of the minority will be in little danger from interested combinations of the majority.”

It is not suggested that in the Constitution of the United States special representation of interests or communities has been recognized; but it is urged that in an age when minority problems, either in India or elsewhere, have received special emphasis and attention, some of the considerations urged by the *Federalist* are not wholly inapplicable.

While the representation of minorities and interests in the form suggested in the Constitution is inevitable in the present circumstances of the country, and their continuance in a modified form eminently desirable in the future for a well-balanced functioning of the State, there is one danger which the Constitution must provide against—the danger of parochialism developing among the representatives in the Legislatures. In some constitutions a residential qualification for the candidate has been insisted upon, with the result, that men with a narrow and circumscribed outlook on life and limited experience of public affairs have been generally returned. Mr. Lindsay Rogers says in his book on the American Senate:

“Another important factor is that American legislators are elected almost exclusively by the districts in which they live, and they have to think largely in terms of locality. The constitutional requirement is that senators must be connected by residence with their States; the constitutional provision for the representatives is the same, but in actual practice practically all congressmen are elected by their residential districts within their States. This makes localism the universal rule, and nowadays most treaties

stir up local currents of opinion. Even Senator Lodge, 'scholar in politics' that he was, and advocate of having party lines end at the water's edge, spent most of his time running around Washington getting jobs for his constituents, and was always willing to introduce resolutions pleasing to the Greek or Irish voters of the State of Massachusetts. His attitude towards the Treaty of Versailles was not unconnected with the nature of the electorate that he represented."

The Round Table Conference, therefore, rightly insisted that there should be no residential qualification for the candidate, and it is presumed that the new constitution will embody this principle.

The relationship between the two Houses of the Federal Legislature presents problems peculiar to a Federation, the solution of which has followed more or less uniform lines in all Federations. It has already been stated that the desire for an integral existence on the part of the federating units has led them to insist on the creation of a second Chamber. It is but natural that the federating units would not allow themselves to be thwarted in their real purpose by a constitutional provision which relegated the second Chamber to a lower and comparatively insignificant position. In several federations, therefore, the equality of the two Houses is specially emphasized. Section 53 of the Australian Constitution expressly states that:

"Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws."

Theoretically, every law must receive the assent of each of the Chambers of the Federal Legislature. The method of resolving conflicts which may arise if the decision of one House is at variance with that of another is an issue which will be separately examined. There are two limitations, however, to the equality of status which the Upper House enjoys. Laws appropriating revenue or moneys, or imposing taxation, originate in the Lower House, though they should be passed by both Chambers. In the Indian Federation the

Indian State units were naturally anxious to preserve all the rights of a Federal Upper Chamber, and if possible to confer perfect equality of status in every matter to both the Houses. They suggested that money Bills may originate in either Chamber; they even proposed that the Budget should be adopted by both Chambers and that appropriations for expenditure should not be made only by the Federal Assembly. They were considerably influenced in putting forward these extreme views by the fact that they had a higher percentage of representation in the Senate than in the Assembly. The provision about money Bills originating in the House of Representatives or in the Lower Chamber has been dictated by practical considerations. The framers of federal constitutions have usually felt that proposals for taxation must receive the widest measure of approval, and that the highest security of the State would be promoted if taxation proposals were first accepted by representatives, by legislators who were returned by popular electorates. In fact, in some Federations the power of the Senate is very limited with respect to money Bills. The Australian Constitution provides "that the Senate may not amend proposed laws imposing taxation or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. The Senate may not amend any proposed law so as to increase any proposed burden or charge on the people." The Constitution of the United States provides "that all Bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other Bills."

It has been pointed out that though the Lower House originates the Finance Bill, yet the Senate has so exercised its powers that it has virtually a superior jurisdiction even in such matters. Mr. Lindsay Rogers, in the course of a critical analysis of the powers of the two Chambers, states :

"To be sure the Constitution seeks to give the House special authority in respect of finance, but the provision that Bills for raising revenue must originate in the lower branch is only an empty fiction. It means no more than that the House of Repre-

sentatives has the right to originate the enacting clause. In 1883, for example, the Senate struck out all after the enacting clause in the Tariff Bill of that year, and wrote its own measure which the House was forced to accept. To the Payne-Aldrich Tariff Bill of 1909, the Senate added 847 amendments. To the War Revenue Bill of 1918 the Senate added 320 amendments and receded on 55. When the tax laws were revised in 1921, the Senate wrote a new measure in the form of 833 amendments. The House had its way in only seven cases. 760 Senate amendments were accepted, and on the other points in dispute there was a compromise. The Bill was debated in the House for four days and in the Senate for six weeks. The schedules of the Emergency Tariff Act of 1921 were dictated by the Senate."

But the Senate cannot be a model. Its peculiar position has been ascribed by Mr. Rogers to the fact that no closure can be applied to its discussions. It is difficult to justify such a statement, but one reason at least for the toleration at the present day of the large powers enjoyed by the Senate may be found in the fact that senators are represented on the basis of the same suffrage as members of the Lower House.

In the Constitution of the Indian Federation it has been provided that money Bills should be initiated only in the Assembly, but that all other Bills might be introduced in either Chamber. Similarly, proposals for the appropriation of revenues will be submitted in the form of demands for grants to the vote of the Assembly. The Assembly may either assent to or reject any demand or reduce the amount specified in a demand. The demands will then be laid before the Council of State by the Government, but the Council will have no power of vote thereon. There is, however, a curious proposal in the Indian Constitution for which there is no parallel. When the demand is laid before the Council of State, a motion may be made on behalf of the Government that any demand which had been reduced or rejected by the Assembly shall be brought before a joint session of both Chambers for final determination, and if the motion is accepted by the Council of State a joint session will

forthwith be held. This proposal virtually makes the two Houses equal in authority even in financial matters, and deprives the Lower House of one of its valuable methods of checking the executive. It is obvious that this power will have very considerable effect in finally determining the relationship of the executive to the two Chambers, and the emergence of one of these Chambers—probably the Senate—as the predominant legislative body of the Federation.

Differences arising between the two Chambers over proposed legislative measures have been the subject of anxious consideration by framers of constitutions, and many detailed provisions are found in various constitutions for resolving such differences and disputes. The Australian Constitution provides that the House of Representatives may, after an interval of three months, again pass a proposed law, with or without any amendments suggested by the Senate; and if the Senate for a second time rejects or modifies the measure, the Governor-General may order a dissolution of both Houses. If after such dissolution the same impasse arises between the two Houses, the Governor-General may convene a joint sitting of both the Houses; and if an absolute majority of the total number of the members of both Houses agree, the Bill will be taken to have been duly passed by both Houses of Parliament. The Constitution of South Africa, though not federal, provides for an even more detailed method of resolving such difficulties. Section 63 says:

“If the House of Assembly passes any Bill and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Assembly will not agree; and if the House of Assembly in the next session again passes the Bill with or without any amendments which have been made or agreed to by the Senate and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Assembly will not agree, the Governor-General may during that session convene a joint sitting of the members of the Senate and the House of Assembly. The members present at any such joint sitting may deliberate and shall vote together upon the Bill as last proposed by the House of Assembly and upon amendments, if any, which have been

made therein by one House of Parliament and not agreed to by the other; and any such amendments which are affirmed by a majority of the total number of members of the Senate and the House of Assembly present at such sitting shall be taken to have been carried, and if the Bill with the amendments, if any, is affirmed by a majority of the members of the Senate and the House of Assembly present at such meeting, it shall be taken to have been duly passed by both Houses of Parliament; provided that if the Senate shall reject or fail to pass any Bill dealing with the appropriation of revenue or moneys for the public service such joint sitting may be convened during the same session in which the Senate so rejects or fails to pass such Bill."

The Indian Constitution cuts the Gordian knot by a very simple procedure in cases of difference of opinion.

"In the case of disagreement between the Chambers, the Governor-General will be empowered in any case in which a Bill passed by one Chamber has not within three months thereafter been passed by the other, either without amendments or with agreed amendments, to summon the two Chambers to meet in a joint sitting for the purpose of reaching a decision on the Bill. The members present at a joint session will deliberate and vote together upon the Bill in the form in which it finally left the Chamber in which it was introduced, and upon amendments, if any, made therein by one Chamber and not agreed to by the other. Any such amendments which are affirmed by a majority of the total number of members voting at the joint session will be deemed to have been carried; and if the Bill with the amendments, if any, so carried is affirmed by a majority of the members voting at the joint session, it shall be taken to have been duly passed by both Chambers. In the case of a money Bill, or in cases where in the Governor-General's opinion the decision on a Bill cannot consistently with fulfilment of his responsibility for a reserved department or of any of his 'special responsibilities' be deferred, the Governor-General will be empowered in his direction to summon a joint session forthwith."

These provisions afford a reasonable guarantee that any measure considered vital by the Cabinet will be passed unless the Cabinet loses the confidence of each of the two Chambers. It is therefore all the more surprising to find that the Governor-General has been invested with special powers of legislation to enable him to fulfil his responsi-

bilities for the administration of the reserved departments and for the matters regarding which he has a special responsibility. The Constitution provides :

“that the Governor-General will be empowered at his discretion :

- (a) To present or cause to be presented a Bill to either Chamber, and to declare by message to both the Chambers that it is essential, having regard to his responsibilities for a reserved department or to any of his ‘special responsibilities,’ that the Bill so presented should become law before a date specified in the message; and
- (b) To declare by message in respect of any Bill already introduced in either Chamber that it should for similar reasons become law before a stated date in a form specified in the message.”

If the Bill is not passed by the two Chambers in the form specified, the Governor-General is empowered to enact it as a Governor-General’s Act.

It is clear that so long as there are reserved departments in charge of members not responsible to the Legislature, there must be a reserve power of legislation in the Governor-General; and when the fact of reservation is accepted, there is no “anomaly in investing the Governor-General with such powers.” Nor, if the need for special responsibilities is recognized at all, can the logical corollary be denied that the Governor-General should have the power to implement his powers by legislation if necessary. One can understand the Governor-General presenting a Bill to either Chamber, but the case for “special responsibilities” can only arise in exceptional circumstances. The need for permanent legislation to meet a special emergency is not apparent. Nor can the intervention of the Legislature in such circumstances be either desirable or calculated to create traditions of ministerial responsibility. The occasion for exercise of special powers by the Governor-General in the transferred field, necessarily involves a failure on the part of the Ministry to do its duty. In so far as the Governor-General decides to invoke his special responsibilities, it can only mean that, in

the opinion of the Governor-General, the Ministry has failed to exercise a proper sense of responsibility. But where the Legislature is asked to approve the course proposed by the Governor-General, and does so in the most solemn form open to a Legislature, i.e. by legislation, the conclusion is irresistible that the Legislature has condemned the action, or want of action, of the Ministry. What is the position of a Ministry if a Bill presented by the Governor is passed by the two Chambers? Would their position be compromised or not? The White Paper states that where the Governor-General desires a particular legislation, "its presentation to the Legislature should be brought about by the personal intervention of the Governor-General, that his responsibility for it should be manifest, and that Ministers should in no way be compromised by his action either with their supporters in the Legislature or their constituencies in the country." The proposals seem, however, to negate this principle. The second alternative, whereby the Governor-General may intervene by a message in respect of any Bill that has already been introduced, seems to be even more objectionable. Excluding from consideration Bills relating to reserved departments, it is apparent that this power would strike at the root of responsible government. If a Bill is introduced by a Ministry which contains provisions which the Governor-General considers essential for the discharge of his special responsibilities, can he intervene with a message that such provisions should be passed before a certain date, so that he may feel certain that he will have the necessary legislative authority. In such a case is not the responsibility of the Ministry for the Bill blurred or overcast by the shadow of the message of the Governor-General? Will not the suspicion be general that where a Ministry found it difficult to convince the Legislature regarding the desirability of certain provisions it invoked the assistance of the Governor-General, and thereby escaped from the natural consequences of an adverse vote by the Legislature. These anomalies can be multiplied. If the power of legislation must be conceded to the Governor-

General—and it appears to follow from the fact that there are reserved subjects and special responsibilities—the only logical plan is for the Governor-General to exercise that power of legislation on his sole responsibility and without any reference to the Legislatures. Where the Bill is referred to the Legislature, the consequences would seem to be undesirable, whatever view the Legislature might take. If the Legislature rejects the proposals of the Governor-General, his action would be open to more serious criticism than ever. If it approves of his action, a constitutional crisis must arise, for it is difficult to see how any Ministry could thereafter continue in office.

The Governor-General has been further empowered to enact legislation for a temporary period if he feels that it is required for the reserved departments or the discharge of his special responsibilities. Such legislation is termed an “ordinance,” and its operation renewed for a second period of six months, but in that event it must be laid before both Houses of Parliament. The Governor-General may also issue ordinances at the request of his Ministers. This set of ordinances corresponds to emergency Orders in Council, and the Governor-General is merely a constitutional authority acting on the advice of his Ministers. Such ordinances have a limited duration, and may be terminated earlier if a resolution of disapproval is adopted by both Houses.

The relationship of the Federal Executive to the Legislature may now be examined. The Constitution has not laid down any hard-and-fast rules regarding the methods by which the responsibility of the executive may be ensured. The Constitution provides that the members of the executive may be drawn from both Houses, but they will have a right of audience in the Chamber of which they are not members. In choosing his Ministers, the Governor-General will be enjoined by his instrument of instructions to consult the person who in his judgment is likely to command the largest following in the Legislature and to appoint those persons who will best be in a position collectively to com-

mand the confidence of the Legislature. The Constitution further provides that the salary of a Minister will not be subject to variation during his term of office. The questions whether the Ministry should possess the confidence of the Lower or the Upper House, whether a bare or snatch vote adverse to its proposals should entail its dismissal, and whether there should be any preliminary formality for a motion of no-confidence in a Ministry, have all been left undetermined. The Constitution apparently suggests that these questions should be determined by the growth of healthy conventions and that the Governor-General should be left free to assist in the growth of such conventions. It cannot be denied that it is of the highest importance to the Indian Federation that Ministries should have a reasonably stable existence. One may assume that in the earlier years of the Federation the Indian Legislatures will be composed of political groups and not of two parties. The chances of instability are increased by this factor, and it was proposed at the Round Table Conference by some of the Indians themselves that the Czechoslovakian precedent may be adopted in India, whereby a minimum support from the Legislature should be assured for a discussion of vote of confidence in the Ministry. The proposal has, however, not been embodied in the Constitution. Moreover, the practice has grown in recent years in the British Parliament of not recognizing every adverse vote as a vote of no-confidence in the Ministry—a vital change from Gladstonian precedents. The whole responsibility is cast on the Governor-General to decide when the executive can be said to have lost the confidence of the Legislature. While formal provisions for a motion of no-confidence may be deprecated, it is not a satisfactory position that on so vital an issue the entire responsibility should be cast on the Governor-General.

The powers of the Legislature with reference to constitutional amendments may now be examined. In every country the constitutional Act is invested with a special sanctity. It is a fundamental Act which cannot be subjected to the whims of a transient majority. Most Constitutions, therefore,

hedge the power of a Legislature to amend the Constitution by various provisions, such as that the amendment should require the assent of a requisite majority, or that the provision should be adopted and confirmed by a second vote after a certain period. Section 128 of the Constitution of Australia and Section 152 of the Constitution of South Africa contain provisions relating to the amendments of the Constitutions of these two countries respectively. The Indian Constitution, with its special provisions relating to reserved subjects and exceptional powers vested in Governors and Governors-General, cannot have unlimited powers of constitutional amendment. During the transitional period neither of these powers can be interfered with; but there are other provisions, particularly those relating to franchise, which can be the subject of amendments under properly devised limitations. The Constitution does not, however, make any provision for such constitutional amendments; that even in such matters of purely domestic concern the British Parliament has necessarily to intervene with amending Acts. The whole case for constitutional amendments, the methods to be adopted for carrying them out, will in all probability come up before the next Round Table Conference.

CHAPTER IV

STATES AND THE FEDERATION

THE Indian Federation will consist of British Indian Provinces and Indian States. The manner in which these two different sets of units can be brought together for Federation has been the subject of careful thought, and a method has been devised which differs from any that has so far been conceived. The Canadian and Australian Federations were the results of agreements among units which desired to form Federations; these agreements had no doubt to be incorporated in Acts of the British Parliament. But it was clearly understood that Parliament could not vary the terms of the agreements; the passing of the Commonwealth of Australia Act illustrated the limitations under which Parliament had to enact legislation, embodying the agreement arrived at among the units. The speech of the Secretary of State for Colonies, the Right Hon. Joseph Chamberlain, in introducing the Commonwealth of Australia Bill, vividly described the position of Parliament with reference to that Bill:

“There are a great number of propositions in the Bill which, if it were a case of freely discussing a Constitution of our own, would arouse much difference of opinion. If we had been invited to frame a Constitution, or if we had been consulted after the Constitution had been framed, it is quite possible—I do not say it would have been so—it is quite possible we might have had many suggestions to make and some amendments to offer. But that is not the position. The Bill has been prepared without reference to us. It represents substantially and in most of its features the general opinion of the Australian people; although I differ totally from those who have said that the Australian people do not desire that this great measure, the result of the labour of their representatives, should receive in the Imperial Parliament the fullest consideration and even the fullest discussion; although I deny altogether that the Australian people have ever considered, or shown that they consider, the Imperial Parliament as merely a court for the registration of their decrees;

and although I am convinced that the Australian people will be neither offended nor insulted if we alter a word here or a word there, or even a clause in this Bill, I think, on the other hand, they do expect that we shall have a reasonable regard to the labours which they have already expended upon this measure, and to the general feeling of the Australian people, wherever it has been really and conclusively shown, and to those rights of self-government of which they have made so magnificent a use, and which we have so freely and gladly conceded. Now, it is therefore on these main principles that the Government have proceeded in dealing with this Bill. On the one hand we have accepted without demur, and we shall ask the House of Commons to accept every point in this Bill, every word, every line, every clause which deals exclusively with the interests of Australia. We may be vain enough to think that we might have made improvements for the advantage of Australia, but we recognize that they are the best judges in their own case, and we are quite content that the views of their representatives should be in these matters accepted as final; and the result of that is that the Bill which I hope to present to the House to-night is, so far as ninety-nine hundredths of it, I think I might almost say nine hundred and ninety-nine thousandths of it is concerned—as regards the vast proportion of the Bill—exactly the same as that which passed the referendum of the Australian people.”

The only issue on which Parliament attempted to intervene was that relating to the jurisdiction of the Supreme Court and the right of special leave of appeal from the Supreme Court to Her Majesty in Council. But even in this case it was done after prolonged negotiations with the delegates and Colonial Governments. The position with reference to the passing of the Indian Constitution Bill, it must be frankly recognized, is fundamentally different. Whatever hopes might have been entertained by the delegates to the various sessions of the Round Table Conference that agreements arrived at would be incorporated in the Constitution Act, and however desirous the Government of the day may be to respect such agreements, it is obvious that in existing circumstances Parliament will really be free to modify the provisions of the Bill. The representative character of the Indian delegates to the Round Table Conference cannot be doubted, and though they cannot be

described as members of a constituent assembly, it is permissible to question, taking all three sessions together, whether any Indian constituent assembly could have been more representative.

But a representative assembly by itself is not enough to fetter the discretion of Parliament in such matters. Mr. Joseph Chamberlain in his speech described the position of Australia in relation to Great Britain in the following terms:

“We have got to a point in our relations with the self-governing colonies in which I think we recognize once for all that these relations depend entirely on their free will and absolute consent.”

It is hardly necessary to point out that India has not yet attained that status. It may be that at some future epoch the conclusions of an Indian constituent assembly relating to the Constitution of India will have the same sanction behind it as in the case of Australia or Canada, and will be similarly incorporated in Acts of Parliament. But that stage has not yet arrived, and the present position leads to certain consequences which have to be faced.

The Indian States have consistently held the view that their consent to enter into the Federation cannot be given till they are certain of the final constitutional position. In the Australian Bill provision was made for the union of certain specified States into a Federation, since the conditions under which they agreed to enter were not capable of variation by Parliament. In the Indian Bill, on the other hand, provision cannot be made for an inclusion of certain States into the Federation, as the conditions are different. Many provisions of the Bill can be varied by Parliament, and may be modified by it. Indian States enjoying autonomy have naturally pointed out that they will not enter a Federation unless they know what conditions Parliament in the final stage imposes. The task of forming an All-India Federation can be taken up only when and if a satisfactory Bill is passed by Parliament. The Indian

States will then have before them what has been termed as the complete picture, which will enable them to decide whether they can co-operate in this task of setting up a Federation. At this stage, as there is no Federation in existence, their willingness to enter it can be conveyed only through the Crown or paramount power. The States will therefore surrender to the paramount power those functions which they are willing to entrust to the Federal centre, on the understanding that the Crown will convey them to the Federation. This process will be carried out by each State by means of an instrument of accession.

The Constitution provides for an All-India Federation being formed, after a certain number of States have given their assent through such instruments of accession. The White Paper states :

“So far as the States are concerned, His Majesty’s Government propose as the condition to be satisfied before the Federal Constitution is brought into operation, that the rulers of States representing not less than half the aggregate population of the Indian States, and entitled to not less than half the seats to be allotted to the States in the Federal Upper Chamber, shall have executed instruments of accession.”

The allocation of seats reserved for the States in the two Chambers of the Federal Legislature has not yet been decided upon, and, in spite of great efforts to arrive at a settlement by mutual consent, it is becoming increasingly clear that the States would have ultimately to depend upon an adjudication by His Majesty’s Government—a suggestion which was put forward by Sir Mirza Ismail, a leading State delegate and Prime Minister of Mysore—at an early stage. Incidentally, it may be pointed out that an inability to arrive at agreements on such points as among either communities or States is not due to fundamental antagonisms and jealousies, but rather to a desire for an arbitral award. Though a specific allocation of seats among the States has not yet been made, the basis has been accepted that so far as the Lower Chamber is concerned it will depend on the population of the States, and that for the Upper Chamber

various other factors have to be taken into account. On this assumption the condition laid down in the White Paper implies that half the number of the seats allotted to the States should be filled up in each Chamber. The arbitrary limit of 51 per cent of the seats cannot be justified. The accession of States representing 51 per cent of the population will not materially alter the character of the Legislatures, and cannot therefore satisfy those who believe in State representation having a sobering effect on the counsels of the Federation. It is possible, moreover, that the percentage can be attained, though every one of the bigger States whose co-operation is most needed for the successful functioning of the Federation keeps out of it. On the other hand, a provision of this kind has alarmed the smaller States and roused in their minds the suspicion that they might be entirely ignored in inaugurating a Federation. In actual practice, States will convey their willingness to enter the Federation through instruments of accession without reference to these percentages. It would therefore have been more logical and statesmanlike if freedom had been left to the Government to start the Federation by a royal proclamation as soon as a few States had expressed their willingness to join the Federation. Before the nature and terms of the instruments of accession are considered, the position of States who enter the Federation after it has been inaugurated may be briefly dealt with.

The arguments that have been advanced justifying the execution of an instrument of accession with the Crown will show the inappropriateness of such a procedure, once the Federation has started functioning. The correct constitutional practice will then be for the State to come to an agreement with the Federation. Federal Constitutions have provided for the entry of new members into the Federation, and in all such cases the Federation is the body which recommends such entry. Section 146 of the British North American Act provides :

“It shall be lawful for the Queen, by and with the advice of Her Majesty’s Most Honourable Privy Council, on Addresses

from the Houses of Parliament of Canada, Colonies, or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western territory, or either of them, into the Union, on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and in the Provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

It may be that from a special sense of State dignity Indian States may desire to execute instruments of accession in favour of the Crown even after the inauguration of the Federation. But a vital distinction between instruments of accession executed before and after the Federation exists — and must not be ignored. The instrument of accession will provide, as will be explained more fully later, for special conditions, immunities, or privileges with reference to individual States. These privileges and immunities can be matters of negotiation between the Crown and the States before the Federation is formed. *But once the Federation begins to function they can form the subject-matters of negotiation only as between the Federation and a State.* If, for example, an immunity from customs duty is enjoyed by a State and the instrument of accession proposes the yielding up of that immunity on payment of compensation, an agreement between the Crown and the State cannot be superimposed on the Federation. The approval of the Federal Executive and Legislature is therefore a *sine qua non* for the entry of new States into the Federation once it has been formed, and that approval may be subject to formal ratification by His Majesty.

A point of subsidiary importance in connection with the instruments of accession may here be noticed. The execution of an instrument of accession implies an active consent on the part of the ruler of a State to enter the Federation. Where the State ruler is a minor, such consent cannot be forthcoming, and the accession of States whose rulers are

not at the time of the Federation exercising ruling powers will have to be postponed until their rulers are in possession of ruling powers.

The nature of the instruments of accession and their contents require careful consideration. In the chapter on the allocation of functions, the subjects which would be Federal, and with reference to which normally each State would have ceded jurisdiction, have been described. Moreover, the Constitution Act will provide the extent of Federal jurisdiction and the relationship between the Federation and its units. The instrument of accession, whether the State conveys a transfer of the necessary powers and jurisdiction to the Crown or to the Federation after its formation, will be in accordance with the specific provisions of the Act. But the position of the States is not uniform with the subjects now proposed to be transferred to the Federation. Treaties with various States, agreements arrived at from time to time, an exercise of the rights of paramountcy in certain circumstances, and historical evolution have conspired to place some States in a position different from others. The jurisdiction that individual States are willing to transfer to the Federation will therefore vary. "Consequently the instrument of accession must provide for exclusion from the purview of the Federation of those powers and jurisdiction in respect of Federal subjects in whole or in part which it was not agreed by the individual States to transfer to the Federation, subject to the understanding that there could be no question of a State so restricting the transfer of powers as to render its adherence to the Federation ineffective."

Two propositions clearly emerge from these considerations :
— a State cannot withhold the whole or part of its jurisdiction in respect of a Federal subject at its sweet will and pleasure. No useful purpose would have been served by the three prolonged sessions of the Round Table Conference if, after having arrived at a list of Federal subjects by mutual agreement, a State were to consider itself free to accept or reject at its pleasure cession of jurisdiction over any Federal subject. It can only be justified in doing so if there are

special circumstances, such as the enjoyment of a privilege — or an immunity or special powers with reference to that subject. It is equally clear that the Federation can decline to permit the entry of a State if such onerous conditions are attached in the instrument of accession as to make the — entry of the State undesirable from the Federal point of view. The nature of some of the immunities and privileges ¶ may now be detailed.

Salt, its production and administration, are matters of Federal concern. Many Indian States possessed and operated their own salt works, and placed their surplus salt on the British Indian market in the days when the East India Company was managing the affairs of British India. To secure the revenue from this concern to British India, the East India Company at one time had to construct a cordon of two thousand five hundred miles, stretching from the Indus to the extreme south of the Central Provinces, and guarded by an army of thirteen thousand men. The cordon consisted of "a great impenetrable hedge of thorny trees and evil plants and stone walls and ditches, through which no man or beast could pass without being stopped and searched."

Salt production in British India has been a Government monopoly, and during the years 1873–80 the Government came to agreements with various individual States by which the difficulties experienced with salt produced in the States were eliminated, and an effective degree of — Government control established over salt sources throughout British India. The States of Cochin and Travancore have still the right to manufacture salt from their own sources, and ✓ under the Inter-Portal Convention of 1865 have agreed to adopt the British Indian selling-price of salt, and received the privilege of importing from British India all the salt required by the State at a commercial price without payment of duty. It is clear, therefore, that in submitting itself to the jurisdiction of the Federation in matters relating to the administration of salt, these States would require the continuance of, and the Federation must recognize, the privileges = ,

which they are now enjoying. The instrument of accession would provide that Travancore and Cochin would, so far as salt is concerned, exclude the jurisdiction of the Federation to the extent stated above. There are other States like Jeypore and Jodhpur which receive cash payment and a certain quantity of untaxed salt, and have handed over to the Government of India the right to manufacture salt from the Sambhar Lake. And so the conditions vary from State to State. These have either to be bought out by the Federation or recognized in the instruments of accession. One method suggested is the offset of these cash immunities against the tributes which some of the States are paying.

Another Federal subject with reference to which the cession of Federal subjects will vary is the administration of sea customs and ports. Many of the maritime States of India enjoy privileges of varying degrees by the treaties which they concluded with the East India Company, and by conventions and agreement which have been since arrived at. The Kathiawar ports form the most important group in this connection. Bhowanagar has by its treaty been admitted to the full benefits of a British port; it can levy its own customs duties and can appropriate the whole of the proceeds on all goods which enter its ports, whether such goods are consumed within or without the State. The only limitation is that the customs duty must not be less than that imposed at British Indian ports. When the Government of India attempted to tax at its land-frontier goods imported via Bhowanagar port, Lord Morley, as Secretary of State, ruled that "so long as His Highness fulfills his part of the agreement it is not open to the Government to hinder or tax the land trade of Bhowanagar by the establishment of a customs line." Other States like Baroda, Nawanagar, Junagad, and Porbunder have privileges of a more limited character. The States of Travancore and Cochin have recently entered into an agreement with the Government of India and the Government of Madras whereby the revenue from customs duties at certain ports of these two States is being divided between these two States and British

India according to certain proportions. The position of an inland State of very great importance—Kashmir—with reference to customs administration, may also be dealt with. Under a treaty of 1870 the State undertook to refrain from taxing all merchandise passing through the State by the Central Asian trade route, thus establishing free trade between British India and Central Asia. In return for the loss of revenue thus occasioned, the State was accorded the privilege of importing sea-borne goods in bond. The administrative arrangements by which this is effected are simple. All goods imported in bond into the State are covered by invoices showing the amount of duty paid at the port of entry. These amounts are credited to the Darbar on the authority of endorsements made on the invoices by the Kashmir Residency authorities. At the time of the conclusion of the Treaty the trade traffic to and from Central Asia was substantial; on the other hand, the privilege accorded in return for freeing this trade from taxation was of trifling value, and even at the beginning of the present century was not worth more to the State than $1\frac{1}{2}$ lakhs of rupees a year. But in recent years the position has been reversed; the value of the land trade has declined, and the customs value of the goods imported in bond into the State greatly increased. The amount of customs revenue thus forgone has risen as high as Rs. 29 lakhs, and the fair average value of the State's customs rights at the present time could not be reckoned as less than Rs. 25 lakhs per annum.

The Central Asian trade passing through Kashmir had a total value of Rs. 20.94 lakhs in the year 1929-30, the chief items of import being silk (Rs. 2.6 lakhs) and charas (Rs. 1.63 lakhs); and of export, cotton (Rs. 3 lakhs) and silk goods (Rs. 2.86 lakhs).

Consequently an instrument of accession must embody these privileges. There are minor immunities which States enjoy in the matter of administration of the Posts and Telegraphs Department, and even with reference to currency and coinage. The importance of having a common currency

system for the whole of India cannot be underestimated. Many States had the right of minting coins, but these have been gradually given up. Some, however, still possess mints and currencies, which to a small extent reduce the circulation of the Government of India's notes and coinage.

“Consideration of the privileges now enjoyed by several States in the issue of their own currency raises a far more difficult question. Clearly it is most desirable that a uniform Federal currency should circulate, without competition or limitation, throughout India. But even here allowance has to be made for dynastic and local sentiment, and we observe that the inclusion of currency in the list of Federal subjects prepared at the Round Table Conference was made ‘subject to adjustment with the States concerned or such rights as are not already conceded by them.’ The States which at present exercise the right of coinage are less than twenty in number, and in many the right is limited to the minting of coins of low value (Pudukkottai, for instance, mints only a copper coin of the value of one-twentieth of an anna), or of coins which are used for ceremonial rather than for currency purposes. In only seven States does the local currency constitute a factor deserving serious consideration for present purposes, and only in Hyderabad is it of such a nature and magnitude as to admit of extensive profit-making. This State alone possesses a paper currency as well as a mint, the face value of its notes in circulation being over Rs. 9 crores. The issue of notes has proved to be by far the most, if not the only, consistently profitable branch of the Government of India's currency operations, the management of metallic currency being subject to speculative factors in the case of gold and silver, while the margin of profit on copper coins is reduced to small dimensions by the cost of manufacture.”

“The conclusion which we draw from the above facts and considerations is that, with the exception of Hyderabad, particularly in respect of its note issue, the currency operations of Indian States are unlikely to involve any serious competition with the Federal currency, and are not of a nature which would justify a financial offer to extinguish them at the cost of Federal revenues, even if the States concerned were willing to sacrifice sentiment and agree to such a course. In the case of Hyderabad, which agrees that the possession of a separate currency is a source of considerable revenue to itself, if the right to supply coinage and currency notes for the State's own needs is assessed either on a population basis or on the basis of active note circulation, the loss to Federal revenues is approximately Rs. 17 lakhs.”

This account of the position of some of the Indian States in relation to future Federal subjects will explain the limits within which States will be entitled to contract themselves out of Federal jurisdiction, and will also indicate the terms that may be embodied in instruments of accession. One would deplore the need for such provisions, as they certainly weaken the Federation and keep alive divergencies which are merely the accidents of time and circumstance, and are not based on logic or reason. But the pure federalist cannot always have it his own way. He can only point to the ideal and leave it to time to develop that complete Federal consciousness which will render the continued recognition of these peculiarities unnecessary.

Whether the Indian States agree to enter into the Federation in respect of the entire schedule of Federal subjects or only some of them, their relationship with the Federal Government will, under the proposals accepted at the Conference, differ in some respects from those in the Provinces. The administrative relations between the Federal Government and the Provinces will be dealt with in the chapter on Provinces. It will be seen that the Constitution recognizes the growing tendency of recent times in Federations in general, and in India in particular, of employing a direct agency for Federal functions. But the need for entrusting Provincial Governments with certain of the functions of the Federation, because of both administrative convenience and economic considerations, has also been accepted.

The States present a different problem. They have shown a disinclination to have Federal officers operating directly on State subjects within their areas. They have in this respect based their claim on the analogy of the German Federation of 1871. At the third session of the Round Table Conference the administrative relations of the Federation with the State in Federal matters were discussed at great length.

“It was recognized that the relationship of the Federal Government with the States cannot be in all respects identical with that which will obtain with the Provinces. It was agreed that the Constitution should impose upon the States’ Governments

an obligation to exercise their executive power and authority so far as they are necessary and applicable for the purpose of securing that due effect is given within their territories to every act of the Federal Legislature which applies to that territory.

“It was further agreed that the Constitution should recognize arrangements ‘Which would, in fact, be made in suitable cases through the instruments of accession’ for the administration by the States on behalf of the Federal Government of Federal subjects through the agency of staff and establishments employed and controlled by themselves, but that any such arrangements should be subject to conditions to be expressed in the Constitution enabling the Governor-General to satisfy himself, by inspection or otherwise, that an adequate standard is maintained. Finally, it was agreed that power should vest in the Governor-General personally to issue general instructions to the ‘States’ that their obligations to the Federal Government specified in this paragraph are duly fulfilled.”

It is clear from the above extract that the Federal Government has the power of appointing an inspectorate or supervisory body to check the work of officials who are carrying out the administration relating to Federal subjects. This inspectorate, however, will have no direct authority either of control or of censure in relation to the officials. Their reports will be laid before the Federal Governments, and if any interference is needed to regulate the administration or approximate the State concerned to norms laid down by the Federal Government, the Governor-General will advise them to rectify themselves. The responsibility of ensuring that the Governments of States carry out the policy of the Federal Government is laid on the Governor-General. There is an arresting parallel to this provision in the German Constitution of 1871, Section 19 of which reads thus :

“Whenever members of the Confederation do not fulfil their constitutional duties towards the Confederation, they may be constrained to do so by way of execution. Such execution must be decreed by the Council of the Confederation and be carried out by the Emperor.”

The Emperor was in supreme command of all the armed forces of the Federation, and as execution against a recalcitrant State might have meant the use of the military, the

duty was entrusted with propriety to the Emperor. And so it is in the Indian Federation for the time being; defence is a reserved subject, and the Governor-General is held responsible for the proper conduct of the Army. The ultimate enforcement of these obligations being by the use of the military forces, the Governor-General has the responsibility of ensuring the obligations of the States towards the Federation conferred on him.

Moreover, the personal intervention of the Governor-General in such matters would prevent the encroachment by the Federal Executive on the autonomy of the States. It must not, however, be assumed from the foregoing provisions that Federal officers will never act directly within the territories of States. There are certain branches of the Federal administration, like Posts and Telegraphs, where at the present time officers of the Government of India exercise jurisdiction within the areas of the States. In such cases the existing practice will continue, and State services would be requisitioned for the administration of Federal subjects only in those cases where the agency of the Central Government does not operate at present. It is not an unreasonable hope that when the States get more accustomed to the idea of a Federation and its working, and gather more confidence in the Federal Executive, that Executive may get into direct touch with the Governments of the States and the personal intervention of the Governor-General may be rendered unnecessary. There is an organic growth in the functioning of a Federation which often transcends constitutional restrictions and limitations, and the Indian Constitution is not likely to be an exception to this natural law.

CHAPTER V

PROVINCES AND SECOND CHAMBERS

THE Provinces of British India have played a great part in the growth and development of the Indian nation. Starting as independent units, unrelated to each other by linguistic or administrative ties, they soon grew up into parts of a fine mosaic, so co-ordinated as to present the unified structure of a highly centralized administration. The common ties of religion and race which overswept geographical boundaries helped this process very considerably. But in this very unified structure could be traced a diversity of details which became more marked as the problems of administration developed and were more closely examined. The demand for decentralization of certain functions and responsibilities of the unitary Central Government has become more insistent during the last two decades. The Decentralization Commission which examined the problem just before the Great War recommended the conferment of larger powers and responsibilities on the Provinces. The reforms introduced in 1919 carried the matter a stage farther, and the transferred field of responsibility had of necessity to be free from central control. The acceptance of a Federal principle marks a turning-point in decentralization. It has already been pointed out that before the inauguration of Federation large powers of administration now exercised by the Central Government at Delhi must be transferred to the Provincial Governments. There are many who feel that at long last, and on the inauguration of the new Constitution, the Provinces will step into their rightful inheritance.

It is not easy to forecast the exact nature of Federal development nor where the centre of gravity of power will ultimately rest. The experience of the working of Federations has shown that neither by the amount of representation in the Federal Legislature nor even by its population,

which a unit possesses, can the extent of its influence in the Federal Legislature be predicted. The advocate of "equality" in Federal America believed that the position of the units would be identical if numerical exactness of representation were to be assured to them. New York and Nevada have equal representation in the Senate of the United States of America, though the former has a population of ten million people and the latter only eighty thousand. Similarly Pennsylvania, whose population is larger than that of all New England, has two Senators, while each of the six States of New England has two representatives. It is estimated that States which contain less than a fifth of the whole population return a majority of the members to the Senate.

The German Federation presents anomalies of the same kind. But experience has proved that some of the units have, in course of time, attained an incomparably superior position in the counsels of the Federation to the advantage of the whole country. Their contribution to the resources of the Federation, not merely in a pecuniary sense, but far more in the wealth of talent and business capacity which they can place at the disposal of the country, has been the main factor in the determination of their status, and in the readiness with which other States have accepted their leadership. It is not unlikely that similar considerations will prevail in the development of an Indian Federation, and that Provinces and States enjoying varying degrees of weightage of representation in the Federal Legislature will settle down to their proper place in the body politic, according to the actual contributions which they make towards the progress of the Federation. Taking a historical perspective, one is inclined to arrive at the conclusion that British Indian Provinces are bound to play a predominant part in the development of the Federation.

A realization of the importance of Provinces in the New Constitution has naturally led to an accentuation of the feeling which was developing for some time in favour of the creation of new Provinces based on linguistic affinities. The formation of Provinces in British India was not based on

logical grounds, but was the result of accidents of history. It is not surprising that where there are marked differences of language and culture there should have developed a desire for uniting all the people possessing the same culture and speaking the same language under one administrative unit. The Constitution, therefore, provides for the creation of two new Provinces, Sindh and Orissa, the former comprising the Moslem inhabitants west of Rajputana and the latter the Oriya-speaking peoples now distributed in the Provinces of Bengal, Bihar and Orissa, Madras, and in the Central Provinces. While no objection need be raised to the constitution of these areas into provincial units, it is very much hoped that such influences will not be allowed to prevail in future. A redistribution of Provinces on linguistic considerations will develop narrow and sectional jealousies and rivalries, intensify parochial patriotisms, and jeopardize the growth of that national development which has been the aim of all statesmen. Moreover, there is no problem of linguistic minorities in India. The danger which minorities in Europe apprehend of language and cultural traditions being throttled by majorities does not exist in India. Traditions of tolerance in these matters have so developed that even those who advocate the creation of new Provinces do not base their case on such grounds. Lastly, the importance of provincial units will be considerably minimized if the process of dissection into smaller areas is encouraged, and it will be to the advantage of neither the Federation nor of the Provinces that dissected administrative units should replace the present administrations.

One of the Provinces about whose future a great deal of uncertainty prevails is Burma, whose distinctness from India on ethnological and linguistic grounds cannot be disputed. The combination of India and Burma has been a happy accident of history, and has resulted in the solution of many problems which otherwise would have proved formidable. The people of Burma are vacillating over the issue whether Burma should remain within or outside the Federation. There is no doubt that in the existing Constitu-

tion Burma has played a very minor part in All-India matters. Its remoteness from the capital and its comparative isolation may have resulted in its interests being ignored or given insufficient attention to on occasions.

In varying degrees, similar complaints have been made by some of the outlying Provinces. The New Federal Constitution, which postulates large powers to the Provinces to manage their own affairs and gives them a fair chance of influencing Federal decisions, must prove as attractive to Burma as it does to other Provinces. The separation of Burma would complicate many issues which face both countries, and would lead to no tangible advantage to Burma. Even if Burma were to be separated, its proximity to India, the close commercial connections which exist between the two countries, would require pacts and agreements not differing in essence from Federal relations, and not having the advantages of a direct Federal connection. Unless there is an overwhelming desire on the part of the Burmese to secede from India, there appear to be no rational grounds for altering the present status.

The demand by the Provinces for a large measure of decentralization, and for the conferment on them of plenary powers of administration in matters which are of provincial concern, has already been referred to. This demand has been described as a demand for provincial autonomy. But the phrase does not convey accurately all that is implied in the demand. By "provincial autonomy" is meant not merely a transference of control from the centre to the Provinces, but the vesting of that control in executives responsible to Legislatures representative of the people. The Constitution provides that subjects which are exclusively provincial should be administered by such executives in the Provinces. For the purpose of aiding and advising the Governor in the exercise of powers conferred upon him by the Constitution Act for the government of the Province, except as regards matters left by law to his discretion and the administration of excluded areas, there will be a Council of Ministers. The Ministers will be chosen and summoned by the Governor,

and sworn as Members of the Council, and will hold office during his pleasure. Persons appointed Ministers must be or become within a stated period members of the Provincial Legislature. The Governor will be enjoined by the instrument of instructions to select his Ministers in consultation with the person who is likely to command the largest following in the Legislature, and "to appoint those who will best be in a position collectively to command the confidence of the Legislature."

The effect of these provisions is to make the retention of office by them dependent on the will of the Legislature. Two vital principles of the British Constitution have received formal recognition in the Indian Constitution: the selection of one who is *primus inter pares* among his colleagues and will be the Prime Minister of the Province; and secondly, the joint responsibility of the Executive. The Irish Free State Constitution, drawn up after the War, is the only other one among the Dominions which formally embodies these principles. An important injunction will be laid on the Governor in his instrument of instructions, that in making his choice of Ministers in consultation with the leader of the largest group he should as far as possible endeavour to include *members of important minority communities*. This injunction will not in practice cut across the principle of joint responsibility, as it will be found expedient in most cases for the Prime Minister to include in his Cabinet a representative of the minorities. The provision is apparently to serve as a guide and reminder to both the Governor and the Prime Minister of the principle that minorities should have a reasonable chance of being associated with the administration of the Province.

This clause has been severely criticized in some quarters, and it has been suggested that the whole basis of democratic Constitutions would be undermined by the recognition of what has been termed as communal representation in the formation of a Cabinet. There is no reason to be apprehensive of such catastrophic results from a provision which is intended to allay the fears, real or imaginary, of the minorities. Prece-

dent is not entirely lacking for inclusion in the Cabinet of members belonging to different races or communities. The interesting case of Canada—where the claims of the French and the English of the Catholics and the Protestants have to be reconciled by a Prime Minister—affords a valuable precedent.

“In considering the claims of the leaders of the political party at Ottawa and at the provincial capitals, the new Premier must also regard (1) the claims of French Canada; (2) the claims of the other eight provinces; (3) the claims of the English-speaking population of Quebec; and (4) the claims of the Roman Catholic population of the Dominion that is not French.”

“Three Cabinet or Ministerial offices are usually assigned to French Canada. The same number as a rule go to Ontario. At least one Cabinet office must, by usage, be assigned to each of the provinces of Nova Scotia, New Brunswick, Manitoba, Saskatchewan, Alberta, and British Columbia; and since the appointment of Edward Kenny of Nova Scotia in 1869 as representative of the English-speaking Catholics, no Cabinet has been long without a representative of the English-speaking Roman Catholic Church.”¹

A further quotation from Mr. Porritt may not be out of place:

“Distribution of Cabinet offices based on geographical considerations and on claims of race, religion, and special financial and material interests, is an innovation on the usages and traditions of Cabinets at Westminster. The innovation has been developed by the differing conditions of Canada and the United Kingdom; by the operation of the Federal principle and by the need for conciliating assertive interests—racial and religious—which is as old in Canadian politics as the ill-assorted legislative union of upper and lower Canada of 1841–1867.”

At the risk of tiring the patience of the reader, a further excerpt might be quoted, this time from the *Tribune*:

“Sir Wilfred is not the only sinner. Practically every party leader in Canada managed Quebec as Sir Wilfred has managed that Province. A little more than an equal division of the spoils of office, concessions here and concessions there to race and creed,

¹ Porritt, *Evolution of the Dominion of Canada*, pp. 357–358.

and there you have the statesmanship of Canadian Premiers of both Conservative and Liberal stripe.”

The number of Ministers and their respective salaries is to be regulated by the Legislature. The Governor is to act as a constitutional head, and accept the advice of the Council of Ministers except in matters regarding which he has a special responsibility. The nature and extent of this special responsibility has been dealt with in the chapter on “Safeguards and Reservations.”

For every Governor's Province there will be a Provincial Legislature, consisting of the King, represented by the Governor, and of one Chamber, to be known as the Legislative Assembly. An exception has been made in the case of three Provinces—Bengal, the United Provinces, and Bihar—where the Legislature will consist of the Governor and of two Chambers known respectively as the Legislative Council and the Legislative Assembly. The Constitution provides that after a period of ten years a single Chamber may replace the two Chambers if both Houses have separately passed an Act to that effect, and have confirmed it by a subsequent Act passed not less than two years later. It similarly provides that the other Provinces may elect for a system of bicameral Legislatures if the Legislative Assembly so resolves. The provision for a bicameral Legislature in the three Provinces is apparently based on the assumption that the people of the Province have shown a preference in its favour. The Sub-Committee of the Round Table Conference which discussed the Provincial Constitution came to the conclusion by a majority that public opinion had expressed itself in favour of a Second Chamber in these Provinces. After the publication of the report an opportunity was given to the Legislatures of all the Provinces to specifically express an opinion on this issue. The Provincial Legislatures of these three Provinces decided in favour of a bicameral system, while the rest rejected it. The Constitution Act, relying on this expression of opinion, has made provision for a dual Chamber in these Provinces. Though the proposal

is apparently not unjustified on these facts, it will be found on closer examination that it rests on a fallacious basis. The Provincial Legislatures came into existence in 1930, and at the time of the election there was not the faintest suspicion in the minds of the electors that they would be called upon to decide on such a momentous and far-reaching issue. It is true that the complexities of legislation and administration have so much increased that Legislatures are called upon to decide on issues which cannot be foreseen at the time of the election, and have, therefore, not been embodied in party programme. The development of democracies has led to the recognition of parliamentary representatives less as mandatories and agents and more as plenipotentiaries. But even so, what justification can there be to regard the very basis of the future Constitution as an incidental issue? Looked at from another angle, a decision on such a question is virtually a decision on the amendment of a Constitution, and none who has regard for the spirit and essence of democracy can venture to suggest that a decision on so vital an issue can be obtained otherwise than by a referendum.

This part of the Constitution, it will be noticed, makes rigid and almost impossible conditions for the abolition of a Second Chamber, while it affords every facility for the establishment of such a Chamber. In the former case a formal Act of the Legislature must be passed, the approval of each of the Houses being naturally necessary, and this Act must be confirmed after two years by a second Act—requiring similar approval! In the latter, a simple resolution of the Assembly in the form of an Address to His Majesty, passed by a bare majority, is sufficient for fettering the Province with a Second Chamber!

A Second Chamber has been suggested for these Provinces on the bases that—

“it should be small in size, about one-fourth of the Lower House, that it should not compete for power with the Lower House, and

1 Vide Franchise Committee Report, chapter on “Second Chambers.” ¶

that its power should be limited to revision and delay for a period—say a year—after which a conflict of opinion should be resolved by a Joint Session, save in the case of the Budget, where the views of the Lower House should prevail. It has been urged that 'it is important at a time when the suffrage is being very largely extended to create a body which will be representative of experience and expert knowledge to act as a stabilizing factor.' Further, 'the great majority of the democracies of the world—even those which have come recently into being—have been established on a bicameral basis. Experience in the Australian and American Federations seems to show that their existence has been a security against abuse of power and impetuosity on the part of the popular Chamber. A Second Chamber makes it possible for the people of political and administrative experience, who for reasons of age or finance or health are unable to enter the Lower House through the arduous process of electioneering, to be brought into public life and made available for public office.'"

It is unnecessary to examine the question of Second Chambers from a purely theoretical point of view. Their existence might be justified in certain countries, but the real question is whether in the conditions prevailing in India they are either necessary or desirable. The franchise proposed for election of some of the members to the Second Chamber is a high property qualification, or alternatively "a qualification based on service in certain distinguished public offices, such High Court Judge, Minister, Member of an Executive Council, or Vice-Chancellor of a University." A good proportion of the members of the Legislative Council will be elected by the members of the Legislative Assembly.

For the Province of Bengal the Constitution provides that the Legislative Council or Upper Chamber will have sixty-five members; ten of them will be nominated by the Governor, twenty-seven will be elected by members of the Bengal Legislative Assembly by the method of the single transferable vote. The other thirty members will be elected by communal electorates on the basis of the franchise already referred to. Similarly in Bihar, out of a total of thirty members, five will be nominated by the Governor, twelve elected by the Lower House, and thirteen by communal constituencies.

Past experience has shown that representatives drawn from such electorates are likely to be very conservative where vested interests are threatened, and to impede measures intended for the amelioration of the masses should such measures in any wise prejudice their position. It has also been found that in other matters the Second Chamber will be a mere duplication of the First. Moreover, from the very nature of the franchise for the Lower Chamber and the distribution of seats in that body, it will be apparent that the normal justification for a Second Chamber does not exist in Indian Provinces. Adult franchise has not been proposed, and the argument about popular excesses has less force where the electorate is of a limited character. The Legislative Assembly or the Lower House will be constituted not merely of members representative of territorial constituencies, but also of those who will specifically represent various communities and interests. The minorities have been assured of special representation through constituencies composed exclusively of themselves. Landholders and commercial magnates have also been granted a similar privilege.

The popular House, composed as it will be of these interests, will be an institution of a special character, where legislation will not be either hasty or one-sided, and will be founded on a reasonable compromise of conflicting interests. Where there is such a bulwark against hasty legislation, it is unnecessary to interpose a Second Chamber which from the start will be viewed with hostility by the public, and may ultimately bring about those consequences for the avoidance of which its establishment has been intended.

In the case of the three Provinces where there are Second Chambers, legislative proposals require the concurrence of each of the Chambers, and money Bills are no exception to this rule. Where there is a difference of opinion between the two Houses the Bill may be referred to a joint session of the two Chambers, and the decision of a majority of the members at such joint session will prevail. The annual

budget will be laid before each of the two Chambers, but proposals for the appropriation of revenue will be submitted only to the vote of the Legislative Assembly. Ministers may be recruited from either Chamber, and will have a right of audience in the Chamber of which they are not members. These proposals give the widest possible power to Second Chambers, and emphasize the conclusion that their establishment cannot meet with approval.

The basis of the franchise for Provincial Legislatures has been the subject of elaborate investigation by a special committee appointed for the purpose. The Committee, which was presided over by the Marquis of Lothian, toured India, and after detailed inquiries made its recommendations, which have been generally accepted and embodied in the Constitution. One of the most important questions which occupied the attention of the Committee was that of Adult Franchise.

The justification of representative institutions lies in the wide support that they derive from the people. Democracy has been defined as "government by the people." Representative institutions are based on the assumption that the will of the majority of the people can be ascertained through such institutions. In strict logic, democratic forms of government and representative institutions must derive their validity from the fact that every adult member of the population has a voice in shaping the affairs of the country. Adult suffrage, therefore, forms a feature of complete democracies. The days when Robert Lowe levelled fierce attacks on the extension of the franchise, and described the new voters as "venal, ignorant, and illiterate," are gone. Neither ignorance nor illiteracy can be alleged as a real barrier to the exercise of franchise. Plato, in an arresting passage, descants upon what he calls "double ignorance"—that is, when a man is ignorant that he is ignorant. It can truthfully be said that many who are educated according to modern standards may be found to be doubly ignorant. Hegel says, "The people is that part of the State that knows now what it wants." Cynical as this statement

sounds, it embodies a certain element of truth. Recent parliamentary elections in the most advanced democratic countries have proved that many of the electors are incapable of appreciating the issues raised or arriving at an independent decision on them. Even in great crises it is impossible to suggest that the majority of the people have a firm determination or a conscious will in the matter. Elections are swayed by many divergent motives, by personal predilections, and by the party machinery. Notwithstanding all these considerations, recent events have established that the power of the people is a reality and not a myth. During the Great War Governments depended for the success of their measures on the active support which the people extended to them. Parliament itself was influenced by opinion outside the House much more than by the individual views of representatives. The New Constitutions of Europe which have come into existence are the result definitely of popular opinion. On occasions of paramount importance, therefore, the will of the people is a reality and not a fiction.

The case for Adult Franchise in India cannot therefore be dismissed on the ground that people are uneducated and illiterate. If it were possible to establish immediately Adult Franchise in India, it would solve many problems peculiar to that country, and facilitate the rapid evolution of Responsible Government. Any form of restricted franchise conflicts with the principle of equality of all individuals in the State. But in India there is an additional factor to be taken into account: there are communities which are on different levels of economic prosperity; there are classes, again, which, owing to social conditions, are of vastly unequal economic status. A restricted franchise based on property or literary qualifications results, therefore, not merely in inequality of individuals, but in inequality of sections throughout the body politic. The position of women, again, and the laws of inheritance which apply to them, produce the same result. Adult Franchise would be a solution of these difficulties, and would give the fairest chance to

every individual community and section of the population to influence the administration of the country.

Why, then, did the Lothian Committee reject the immediate introduction of Adult Franchise? The Committee in justification states :

“The two special problems which confront India in setting on foot a system of responsible government are the huge numbers involved, and the fact that only 8 per cent of these are literate. Literacy is by itself no test of wisdom, character, or political ability, and illiteracy by no means implies that the individual is not capable of casting an intelligent vote on matters within the range of his own knowledge and experience. The Indian villager is, like the peasant all over the world, a fairly shrewd person. Illiteracy, however, inevitably restricts the range of the individual’s knowledge and his power of access to knowledge. The breaking down of illiteracy in India is only a matter of time, and in proportion as it takes place the electoral problem will be simplified. But for the present it would be unwise to ignore the impediment which illiteracy creates to the successful working of democracy based upon Adult Franchise.”

A second argument which influenced the Committee in arriving at this conclusion is the stage of party development in India.

“Party organization is still rudimentary in India. Such organizations as exist have been largely preoccupied with the question of securing national self-government for India rather than with the policies which should be followed after responsible government has been attained. *Indeed, it is only after responsible government has been introduced that the alignment of parties on normal political lines will begin to develop.*”

Moreover, there are strong administrative arguments which militate against an immediate grant of Adult Franchise.

“If an electoral system is to command the confidence of the people, it must reflect accurately and honestly the votes as they are intended by the voters themselves. Nothing could be more injurious to the healthy working of responsible government, or more conducive to cynical indifference and irresponsibility among the people themselves, than a well-grounded suspicion that the elections were falsified by inefficiency or corruption in the electoral machinery itself.”

The Committee suggests that there are three reasons for adopting an attitude of caution in deciding on an extension of franchise.

“The presiding officer is, in the main, the bottle-neck of the polling system. He must be a person of sufficient authority and competence to manage the officials and control the agents of candidates, the voters, and, if necessary, the police in the polling station. He must be capable of understanding the law and practice relating to the conduct of elections sufficiently to enable him to decide any disputes that may arise, and above all he must be of such standing and reputation for integrity that he will be above suspicion of abusing his power in the interests of any candidates or parties, and that candidates, their agents, and the general public will have confidence in his impartiality.”

The Committee comes to the conclusion that the number of suitable persons available as presiding officers being limited, it is not possible immediately to work a system of Adult Franchise. The second administrative ground is the lack of sufficient police organization to work such a system. In the initial stages, and till India has become accustomed to political elections and the spirit in which they should be contested, excitement is bound to run high, and the help of the police will be necessary to maintain such conditions at the election booths as to make a fair election possible. The extension of franchise to all adults will involve the setting up of such a number of polling stations and the recording of such large numbers of voters that it will be impossible to find enough police to maintain peace.

The third administrative difficulty arises out of the social conditions of India. In many of the upper Indian Provinces women observe the purdah system, and peculiar difficulties have to be faced in making the necessary polling arrangements. The impossibility of obtaining a large proportion of women as polling officers, combined with the difficulties of identification, leads to the conclusion that Adult Franchise cannot be introduced at once.

Many of these difficulties will disappear with the passage of time and the growth of political education among the

people. Apart from all these arguments, it is undeniable that a fundamental consideration prevailed in rejecting the proposal for Adult Franchise and in adopting a restricted one. The change in the system of government in India is to be a real one. The agencies that will come into existence under the new dispensation will have little relationship to those which have so far been responsible for the governance of the country. It is not surprising that there should be a real apprehension that basing the new institutions on Adult Franchise would be too much of a "leap in the dark." It is true that other countries have in the last decade taken such leaps and have not accepted the theory of gradualness in such matters. But the nature of the apprehensions can be understood even by those who may not find it possible to justify them.

A limited franchise being therefore the only possibility, the Constitution lays down the qualifications which entitle a person to a vote. These qualifications vary from Province to Province, and are generally based either on the possession of property of a certain amount or on the payment of a tax to the Federal or Provincial Governments, or a rate to a local administration. In addition to these two qualifications a literary test has been laid down as qualifying a person to exercise a vote. The last of these tests may be elaborated at some length as it involves a discussion of principle. The Constitution provides that men "who have passed the matriculation examination will be entitled to vote." In this respect it overrules the recommendation of the Franchise Committee, which suggested the standard that is required to complete the compulsory elementary education course. The reason for enfranchising men purely on their educational qualification—a basis which is hardly found in any other Constitution—is due to the consideration that the classes which are most politically minded would be brought within the constitutional machinery, and should be enabled to take an active and constructive part in the working of political institutions. Owing to the peculiar laws of inheritance which are in vogue in India, and the existence of the

system of joint families, qualifications based on property or payment of tax will result only in select adult male members of a family exercising the franchise. A large section of the educated young Indians, who are thirsting to play their part in building up a new structure, will be precluded from pursuing their legitimate ambitions, and may prove a source of weakness to the State and a danger to the Constitution itself. But the provisions of the Constitution, while taking note of these considerations, have unduly restricted the franchise. The lower qualification suggested by the Committee would have brought in a larger number of the educated and politically minded classes, and would have further provided an easily expanding electoral system. Moreover, a qualification such as that recommended by the Committee would act as a fillip to the spread of free and compulsory elementary education in the Provinces. It is much to be regretted that this aspect of the case has been ignored.

Apart from these general qualifications, certain special qualifications have been proposed for certain classes and sections of the people. These form by far the most important portion of the franchise proposals. They are intended to circumvent the disadvantages arising from a rejection of Adult Franchise, and to provide for a reasonable share in the administration for every section of the population. Differential qualifications have been suggested for women and the depressed classes, so that there may be included in the electoral rolls a sufficient number of these important sections of the community. It has been proposed that women who have a lower literary qualification, or whose husbands are qualified to be voters on the basis of property or payment of tax, may be enrolled as voters on application. The effect of these proposals will be to considerably increase the number of women voters, but here again the Constitution, by requiring a prior application from the woman for enrolment as a voter, considerably detracts the value of the privilege extended.

The problem of the depressed classes is peculiar to India,

and it is only proper that the Constitution should have taken note of this special problem. The depressed classes are not only socially at a disadvantage, but owing to that very fact they are economically submerged and educationally very backward. To depend upon general franchise qualifications would in their case be to exclude them for a very long time from the privilege of the vote. It has therefore been proposed that a differential qualification, enabling 10 per cent of their population to be voters, should be devised. These differential qualifications will vary from Province to Province. They may include the enfranchisement of all village servants or a bare literary qualification, or a reduction of the standard property qualifications or the enfranchisement of wives of depressed class voters, or even the grant of a double vote to the depressed class elector. These distinctive proposals of the Indian Constitution stand out as a recognition of the principle of a social federation which tends to give life to the mechanism of a political Federation. They recognize the principle of equality in the sense of giving equality of opportunities to all; they seek to redress ancient wrongs and to inaugurate a new era on the basis of social humanity and justice—two ideals and objectives which have stirred the imagination of the youth in the country, and which have been given specific expression by representative and national associations like the *Non-Brahmin Youth Leagues of South India*.

The Constitution at the same time has considered it desirable to adopt another principle in its proposals on franchise and representation to the Legislatures. Modern political thought has come to realize that Parliaments based on purely territorial representation fail to be representative of all sections and interests of the body politic. A political Parliament finds it increasingly difficult to solve the complex social and economic problems which form a fundamental feature of modern life. In an era when the interference of the State in the economic and social life of the community was at a minimum, and when Parliament was content to leave the adjustment of economic issues and the moulding

of social life to unorganized economic and social forces, the importance of the representation of these interests was hardly felt or recognized. The conception of the responsibility of a State has radically changed, and Ihering's definition of rights "as legally protected interests" marks the orientation of this trend. The evaluation of interests has become, therefore, the primary function of institutions which make laws. "Law exists only because men do continually value and revalue interests, because they do aim at a harmony of interests, because they seek to safeguard their own interests, and recognize the propriety of respecting the interests of others. This sense of mutual rights and obligations is the bedrock upon which political society is built. Upon it are founded political organizations which, broadly speaking, exist, first, in order that the valuation of interests may be more certainly ascertained, and, second, in order to ensure that public interests be preserved and the value imputed to them be realized."¹ The German Constitution, which provides for the establishment of a vocational Parliament or an economic council in Germany, marks a recognition of this principle in the functioning of the State. But the separation of the vocational from the political Parliament has led to a conflict of jurisdiction and to a consequent supersession of the former. For where the one Parliament claims to represent the entire nation, and the other only certain sectional interests, it is difficult to give equal weight to the decisions of the two bodies.

The Indian Constitution essays to overcome these difficulties and at the same time to make Parliament more representative of the economic life of the country by giving special representation to economic interests. The commercial community, Indian and European, elects through recognized associations a certain number of members to the Legislatures. Labour will similarly, either through recognized trade unions or through special labour constituencies, return its own representatives. Landholders, again, through their own electorates, are given representation in these Legisla-

¹ From the Introduction to Krabbe's *The Modern Idea of the State*.

tures. But the extent of representation given to these interests is rightly of a limited character. The object is not to allow them to dominate the national assembly, but to ensure that their point of view is prominently before the Parliament. These proposals have met with criticism in some quarters on the ground that they are an unjustifiable innovation on the democratic system. The more correct view is that they seek to embody the principles of a fully developed democracy.

Provincial Legislatures constituted on the above lines are empowered to legislate on all subjects which are exclusively provincial, and on all other subjects regarding which these Legislatures possess a jurisdiction concurrent with the Federal Legislature. A list of these subjects has been given in the chapter on the "Constitution and Allocation of Functions." "No Bill will become law unless it has been passed by the Legislative Assembly with or without amendment, and has been assented to by the Governor." In some cases the Constitution Act provides that the Bill should require the assent of the Governor-General, and in such cases the Bill will be reserved by the Governor for the consideration of the Governor-General. Either the Governor or the Governor-General may remit a Bill to the Legislature with a message that the Bill be in whole or part reconsidered, together with such amendments as he may recommend. The Legislature will then reconsider the Bill, and if it is again passed with or without amendments it will be presented again to the Governor-General for his consideration.

"If at the end of six months from the date on which a Bill is presented to the Governor-General the Governor-General neither assents to it nor reserves it for the signification of the King's pleasure, nor returns it to the Governor, the Bill will lapse. Finally, any Act assented to by the Governor or by the Governor-General will within twelve months be subject to disallowance by His Majesty in Council."

These proposals are no doubt analogous to the provisions in Dominion Constitutions. The Australian Constitution

has the following provisions with reference to the laws passed by the Federal Parliament :

“When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen’s assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen’s name, or that he withholds assent, or that he reserves the law for the Queen’s pleasure. The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.”

“The Queen may disallow any law within one year from the Governor-General’s assent, and such disallowance, on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.”

“A proposed law reserved for the Queen’s pleasure shall not have any force unless and until, within two years from the day on which it was presented to the Governor-General for the Queen’s assent, the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that he has received the Queen’s assent.”

The British North American Act provides :

“Where a Bill passed by the Houses of the Parliament is presented to the Governor-General for the Queen’s Assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty’s instructions, either that he assents thereto in the Queen’s name, or that he withholds the Queen’s Assent, or that he reserves the Bill for the Signification of the Queen’s pleasure.”

“A Bill reserved for the Signification of the Queen’s Pleasure shall not have any force unless and until, within two years from the day on which it was presented to the Governor-General for the Queen’s Assent, the Governor-General signifies, by speech or message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council. An entry of every such speech, message, or proclamation shall be made in the Journal of each House, and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the Records of Canada.”

These provisions relating to the Federal Parliament have

been extended and applied to the Legislatures of the several Provinces, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen, and of one year for two years. The powers of dissent, reservation, and disallowance are therefore normal features of all Dominion Constitutions, except that of the Irish Free State, where this power has been specifically omitted. But the existence of this power in the Constitutions does not imply that it can be exercised at the present time; in fact, during the last fifty years the power of disallowance of legislation has not been exercised in Canada, and the Inter-Imperial Conference of 1930 in its report states :

“That the power of disallowance can no longer be exercised in relation to Dominion legislation.”

Similarly the power of dissent has rarely been exercised, and, constitutional writers justify this power on the ground that it might be useful in case of faulty legislation,¹ or where a private Bill has been passed against the wishes of a Government, or in the case of a Bill introduced by a previous Ministry and the Government in power is opposed to certain of its provisions. These cases are, however, not so exceptional as to justify the intervention of the Governor or Governor-General, and modern constitutional opinion tends to suggest that there are equally effective alternate methods. If hasty legislation has been passed, and the Government of the day recognized the mistake, it could introduce an amending Bill and both measures could receive the simultaneous approval of the constitutional head. Again, if the Government were opposed to a private Bill, it would be most improper to allow it to be passed by a Legislature and invoke the power of the Governor or Governor-General to rescind it.

The only power which is exercised is the power of reservation. In Australia this power of reservation has been exercised on more than one occasion. In South Africa its need

¹ Keith, *Responsible Government in the Dominions*.

has been felt particularly in cases of legislation dealing with natives or Asiatic immigrants.

The provisions in the Indian Constitution cannot, however, be interpreted in the light of these analogies from the Dominion Constitutions. Whatever might have been the intentions at the time when the respective Constitution Acts were passed, the development in status of the Dominions has resulted in making many of these provisions nugatory. — The intention of the framers of the Indian Constitution is not to treat these provisions as formal but to vest the Governors and Governors-General with very real powers of dissent, disallowance, and reservation. The justification of this view is to be found in the vesting of special responsibilities in the Governor-General and Governors. The exercise = of these special responsibilities may require that they must disallow or dissent from legislation which has been approved by the Legislatures.

The growth of conventions which will render inoperative in course of time these provisions cannot be relied upon in entirety. So long as there exist these "special responsibilities," the powers, however rarely used, will be real. The constitutional development which will ultimately make the Governor or Governor-General a constitutional head must proceed on two different lines. The instrument of instructions which will largely guide the activities of the Governor and the Governor-General must to an increasing extent enjoin on these authorities the duty of respecting the wishes — of responsible executives and legislatures. But this by itself is not sufficient, and a stage will be reached when the safeguards provided for by statute must be repealed. This last — contingency depends on a variety of circumstances, not the least important of which is the class of men who get into responsible positions in the Cabinets and Legislatures of India, and their sense of fairness, justice, and patriotism.

In the discharge of his special responsibilities it has been provided that the Governor may dissent from a Bill or refuse — his assent. But the vesting of this special responsibility involves not merely the exercise of a negative authority

but also on occasions a positive power. The Constitution therefore provides that:

“In order to enable the Governor to discharge the ‘special responsibilities’ imposed upon him, he will be empowered at his discretion—

- (a) to present, or cause to be presented, a Bill to the Legislature, with a Message that it is essential, having regard to any of his ‘special responsibilities,’ that any Bill so presented should become law before a date specified in the Message; and
- (b) to declare by Message in respect of any Bill already introduced in the Legislature that it should, for similar reasons, become law before a stated date in a form specified in the Message.

If, before the date specified, a Bill which is the subject of such a Message is not passed, or is not passed in the form specified, as the case may be, the Governor will be empowered at his discretion to enact it as a Governor’s Act, either with or without any amendments made by the Legislature after receipt of his Message. A Governor’s Act so enacted will have the same force and effect as an Act of the Provincial Legislature, and will be subject to the same requirements in respect of the Governor-General’s assent, and to disallowance in the same manner as an Act of the Provincial Legislature, but the Governor’s competence to legislate under this provision will not extend beyond the competence of the Provincial Legislature as defined by the Constitution.”

It may be logical to give this power to the Governor, where special responsibilities vest in him. But this consideration gives additional weight to the arguments and criticisms which have been advanced against the vesting of special responsibility in the chapter on “Reservations and Safeguards.” It has been suggested there that on a closer examination that many of these safeguards are unnecessary, and that in any case the responsibility relating to them can be entrusted to authorities other than the Governor or Governor-General, like the Federal Court. Moreover, even if there are certain special responsibilities vesting in the Governor and it is found necessary that there should be an exercise of positive powers for the discharge of such responsi-

bilities, it does not imply that he should be empowered on his sole responsibility to enact legislation of a permanent character. The very nature of this special responsibility involves an emergency power. The prevention of any grave menace to peace or tranquillity of the Province, the safeguarding of the legitimate interests of minorities, the securing of rights to the public services, the prevention of commercial discrimination or securing the execution of orders lawfully issued by the Governor-General, must in their very nature be a temporary and passing necessity. They can only arise in certain circumstances and at a particular juncture. If they were permanent features of the administration one may rightly despair of responsible government, either because a Ministry will have no sense of responsibility or because a Governor will be an autocrat. The more reasonable course, therefore, is to give a limited power to the Governor to exercise his positive powers for a temporary period and not to allow him to cumber the Statute Book with a permanent piece of legislation.

If legislation were to be passed on the sole responsibility of the Governor, what are the powers of the Legislature to repeal or amend such legislation? If these powers must be conceded, as it is suggested they should be, is there any period during which the Legislature should not be free to interfere with a Governor's Act? What, again, is the manner in which the Bill is to be presented to and discussed by the Legislature? It will be an orphan from the start, disowned by the Ministry obviously, and not adopted by any party in the Legislature. A very remote analogy to this extraordinary procedure may be found in the Bills which the President of the United States of America sends to the House of Representatives with a message for adoption. But conditions are entirely different; for while in the United States of America the President may be backed by his party, in an Indian Province the Governor is expected to be above party politics. It need only be added that in the American system Bills have been modified in spite of the recommendation of the President.

The Constitution recognizes the need for emergency powers of legislation by the Governor, and makes the following provision :

“The Governor will be empowered at his discretion, if at any time he is satisfied that the requirements of any of the ‘special responsibilities’ with which he is charged by the Constitution Act render it necessary, to make and promulgate such Ordinances as, in his opinion, the circumstances of the case require, containing such provisions as it would have been competent, under the provisions of the Constitution Act, for the Provincial Legislature to enact.

“An Ordinance promulgated under the proposals contained in this paragraph will continue in operation for such period, not exceeding six months, as may be specified therein; the Governor will, however, have the power to renew any Ordinance for a second period not exceeding six months, but in that event it will be laid before both Houses of Parliament.

“An Ordinance will have the same force and effect whilst in operation as an Act of the Provincial Legislature; but every such Ordinance will be subject to the provisions of the Constitution Act relating to disallowance of Acts and will be subject to withdrawal at any time by the Governor.”

The conferment of these emergency powers to enable the Governor to discharge his special responsibilities serves to emphasize the undesirability of the power of permanent legislation vested in him. The Governor possesses the power of enacting an ordinance which will be in effect for one year, a period sufficiently long for the emergency which necessitates the use of such an extraordinary power. There is a further objection to a Governor’s Act. An ordinance will be received by the Houses of Parliament if it is to last for more than six months. But a Governor’s Act may never come up for review before a Parliament, and *ex hypothesi* not having been approved by the Legislature, it becomes the gravest form of dictatorial legislation.

The emergency power of the Governor to issue an ordinance has been criticized by those who, while accepting the need for such powers, question the appropriateness of the Governor exercising them. Ordinances are not a novel feature of the Indian Constitution. The power has existed

and has been exercised for several years, but where a Province needed such emergency legislation it has been enacted by the Governor-General and not by a Governor. The possibility of hasty and pannicky legislation by a Governor is not remote, and the calmer atmosphere of Delhi and Simla, where the Governor-General is in a position to take a broader view and will be able to judge local circumstances in the light of experience in other Provinces, has been the reason for entrusting the Governor-General rather than a Governor with this power. In the New Constitution there is a greater reason for continuing this power in the Governor-General, as the ordinances enacted by a Governor may have repercussions so serious as to disturb the peace and tranquillity of the Federation as a whole. This special power has been justified on the basis that the power to make ordinances by a Governor-General will detract from the autonomy of the Province. It is difficult to appreciate this argument, as it is not the autonomy of the Province but the autonomy of the Governor which will be affected by the omission of such a provision.

In considering the ordinance-making powers of the Governor, reference may be made to the provision enabling the Governor to issue an ordinance on the advice of his Ministers. The Governor is empowered at any time when the Legislature is not in session, if his Ministers are satisfied that an emergency exists which renders such a course necessary, to make and promulgate an ordinance for the good government of the Province. These ordinances must be laid before the Legislature, and will cease to be operative after a definite time unless the Legislature has disapproved of it by resolution, in which case it will cease to operate forthwith. Such provisions are found in other Constitutions, and these powers have been invoked by the British Cabinet and other executives.

One of the special responsibilities of the Governor which may now be considered relates to the administration of "excluded areas." The Governor will himself direct and control the administration of any area in the Province, for

the time being declared to be an excluded area. No Act of the Federal Legislature or of the Provincial Legislature will apply to such an area.

“Legislation required, whether for Excluded Areas or Partially Excluded Areas, will be obtained in the following manner:

“No Act of the Federal Legislature or of the Provincial Legislature will apply to such an area unless the Governor in his discretion so directs; and in giving such a direction the Governor will be empowered to direct that the Act, in its application to the area, or to any specified part thereof, is to have effect subject to such exceptions or modifications as he thinks fit.

“The Governor will also be empowered at his discretion to make Regulations for the peace and good government of any area which is for the time being an Excluded Area or a Partially Excluded Area, and will be competent by any Regulation so made to repeal or amend any Act of the Federal Legislature or of the Provincial Legislature which is, for the time being, applicable to the area in question.

“Rules made by the Governor in connection with legislative procedure will contain a provision prohibiting the discussion in the Provincial Legislature of, or the asking of questions on, any matter arising out of the administration of an Excluded Area, and enabling the Governor at his discretion to disallow any resolution or question regarding the administration of a Partially Excluded Area.”

The reason for these extraordinary provisions is not apparent; the excluded areas are obviously the undeveloped tracts peopled by hill tribes and aborigines. It must be one of the privileges of a responsible Ministry to take special care of the people of backward tracts and undeveloped areas; and to deny the Cabinet the right of administering these areas is to suspect them of an inherent incapacity to do justice to the less vocal sections of the public. To carry the segregation of these administrations to such an extent as to prohibit any discussion in the Legislature, or even the right of interpellations with reference to them, is to invite autocracy to establish itself in these areas. The unreasonableness of this provision will be further realized when it is remembered that special representation is proposed to be

given to backward areas in the Legislatures. What is the purpose which the representative of an excluded area can serve in the Legislature if he can neither raise a discussion nor interpellate on any matter affecting the administrative of his area? Above all, the Governor can only administer the excluded area through a human agency not always infallible, and the reason for safeguarding the interests of the backward peoples of these excluded areas by timely discussions and interpellations in the Legislatures appears to be even greater than in the case of non-excluded areas, where a vigilant Press and an alert Public may be expected to exercise a check.

The administrative relations between the Federal Government and the Provinces do not present the same difficulties as in the case of the States. "The Central Government has habitually employed the ordinary provincial administrative staffs as the agency for administering a large part of its functions." Considerations of financial and practical convenience suggest that there should be no violent breach with the traditional methods and machinery of Indian administration, and that the constitution of the Federation should not involve a complete separation of administrative staffs. The Constitution therefore provides that:

"It will be the duty of a Provincial Government so to exercise its executive power and authority, in so far as it is necessary and applicable for the purpose, as to secure that due effect is given within the Province to every Act of the Federal Legislature which applies to that Province; and the authority of the Federal Government will extend to the giving of directions to a Provincial Government to that end.

"The authority of the Federal Government will also extend to the giving of directions to a Provincial Government as to the manner in which the latter's executive power and authority shall be exercised in relation to any matter which affects the administration of a Federal subject."

The liability thrown on a Provincial Government by these provisions may involve increased expenditure on provincial staffs. It would no doubt be improper if for every duty cast on such staff a Provincial Government were to

advance a claim for a subsidy or a financial contribution by the Federal Government. On the other hand, it would be unfair to cast such heavy duties on provincial staffs by Federal enactments as to compel the Provincial Governments to increase their own staff and yet not relieve them of the additional financial burdens cast thereby. The Constitution does not provide for such relief, but it may nevertheless be hoped that such financial adjustments may be made in the interests of efficiency and smooth working.

The Federal Government will thus be in a much closer relation with Provincial Governments than with the States in the administration of subjects. The embarrassing circumventions which have been devised in the case of the States, the interposition of the Viceroy as the representative of the paramount power, and the consequent execution of Federal authority by the Viceroy are happily unnecessary in the case of the Provinces. One of the main factors which makes the direct and close connection of the two Governments possible is the fact that both are substantially responsible executives, deriving their power and authority from the same fountain source, and depending for their existence on the will of the same authority—the people. The one may be answerable to a smaller electorate than the other; nevertheless it is the same public opinion which influences the actions of both. The sphere of the functions of Provincial Legislatures and Executives, the correlation of legislative functions between the Federal and Provincial Legislatures, the nexus that must exist between the two administrations have now been dealt with. It will be realized that Provinces cannot be considered as administrative entities functioning without any relationship to the Federal Government, but that they are all parts of one organic whole. There have been some who in their zeal for provincial autonomy have misconceived its scope and have suggested such complete separation of status and functions as would result in political anarchy. Juristic ideas of sovereignty derived from Austin have been considerably transformed by political experience, and it is realized to-day that the

independence of a State or unit does not depend upon its isolation, and is quite compatible with co-operative effort. In fact, at a time when international relations have so developed that many independent States are willing to abide by the decisions, or at any rate suggestions, of the international community, it is futile to suggest that the units of a Federation are so independent as to live lives of grand isolation with the phylacterics of sovereign status on their foreheads.

CHAPTER VI

RESERVATIONS AND SAFEGUARDS

THE New Indian Constitution purports to confer on the people of India responsibility for the administration of the country. In concluding the first session of the Round Table Conference the Prime Minister observed:

“I hope and I trust and I pray that by our labours together India will come to possess the only thing which she now lacks to give her the status of a Dominion amongst the British Commonwealth of Nations—what she now lacks for that—the responsibilities and the cares, the burdens and the difficulties, but the pride and the honour of responsible government.”

This statement was intended to mean that the totality of the functions of the State would vest in the people, subject, however, to certain exceptions, for a definite period of transition. The declaration of the Government on that occasion makes this explicit:

“The view of His Majesty’s Government is that responsibility for the government of India should be placed upon legislatures, central and provincial, with such provisions as may be necessary to guarantee during a period of transition the observance of certain obligations and to meet other special circumstances, and also with such guarantees as are required by minorities to protect their political liberties and rights. In such statutory safeguards as may be made for meeting the needs of the transitional period it will be a primary concern of His Majesty’s Government to see that the reserved powers are so framed and exercised as not to prejudice the advance of India to full responsibility for her own government.”

The Constitution, based on this assumption, contains provisions designed to fulfil this objective. The nature of these provisions, the objects intended to be served by them, and the essentiality or otherwise of such provisions, may now form subjects for investigation.

These provisions have been termed “reservations and

safeguards." The administration of certain subjects will vest in the hands of the Governor-General as agent of the Crown, and will be carried on by members responsible not to the Indian Legislature or the people of India, but to the Crown through a Secretary of State. The subjects which fall under this category may be termed Crown or reserved subjects, and they are those of defence and external relations of India. All other subjects will be entrusted to the charge of Ministers responsible to the Legislature both at the Federal centre and in the Provinces. But owing to certain special circumstances, the nature of which will be dealt with later, the Governor-General and the Governors have been invested with special powers of interference so that they might be able to safeguard certain aspects of the administration of these subjects. These special responsibilities have received the nomenclature of safeguards.

"Under existing conditions," says the declaration of the Government referred to above, "the subjects of defence and external affairs will be reserved to the Governor-General. The departments are to be entrusted to the Governor-General personally, and he will control them in responsibility to His Majesty's Government and Parliament." The conditions which His Majesty's Government had in view were apparently the present composition of the Indian Army, the functions which it is intended to serve, and the paramount importance of securing the safety of the country. They were anxious to maintain the same standards of efficiency in training as are prevalent in England. They could not overlook the responsibility of the Crown for defence which is now exercised through the Committee of Imperial Defence, the body ultimately responsible for examining all problems relating to the Commonwealth. It was pointed out "that the responsibility of the Committee of Imperial Defence was not something special to India, but was common to the Empire as a whole." These were the circumstances which induced the Government to make an exception in the case of defence and exclude it from the list of responsibly administered subjects.

But on reflection it will be apparent that the problem of the defence of a country from foreign aggression is a more intimate concern of the people of the country than of any external authority. And self-government without the right of self-defence would be a mockery. The Thomas Committee on Defence recognized the validity of this claim when it observed:

“That with the development of the new political structure in India, the defence of India must to an increasing extent be the concern of the people of India and not of the British Government alone.”

Three questions now arise with reference to the administration of defence under the new Constitution. Who should administer the subject under the supervision of the Viceroy? How are the funds to be raised for meeting the cost of defence? And what should be the position of the Legislature with reference to this subject? The Constitution provides that the Minister of Defence shall be chosen by the Governor-General, and as the White Paper says:

“He will not be restricted in his choice of his counsellors; the sole consideration will be to select the individual best suited in the Governor-General’s opinion for the office, wherever he may be found.”

It has been suggested by a very influential section of Indian opinion that:

“the Army member, though appointed by the Governor-General and responsible to him, should be selected from the members of the Legislature representing British India and the Indian States.”¹

The grounds for this suggestion are that it would not be difficult to find among five hundred members an individual suited to be the Army member; that a person so chosen would carry great weight and influence in the Legislature, and would be a useful link between the Governor-General and the Legislature. Such an appointment would also enable some members of the Legislature to acquire intimate

¹ Sapru-Jaykar note.

knowledge and experience of the department, so that at the end of the period of transition there may be found a number of elected members of the Legislature capable of discharging the duties of a responsible Minister of Defence.

While it may be desirable from some points of view to have the Army member chosen from the Legislature, it does not seem to be clear that such an appointment is of vital importance so long as the member is exclusively responsible to the Governor-General. Composed as the Legislature will be of various sections and of all communities, it is not improbable that the Governor-General's choice may result in the appointment of a person who can fulfil none of the hopes and expectations entertained by this body of opinion.

Moreover, a period of transition has been insisted upon, not because no member of the Legislature is considered fit to administer the subjects, but for a variety of other reasons. The future Army member, from whichever quarter he may be chosen, will not be a technical military expert but an individual who can appreciate the advice of his experts and be in a position to adopt or modify it to suit the needs of the State. It can hardly be suggested that such an individual cannot be found from among the members of the Legislature, either now or much less at the end of the period of transition. It need only be added that the provision does not exclude the appointment of a member of the Legislature.

The relation of the Army member to his colleagues may now be examined. The administration of the Army cannot be carried on without any reference to the civil departments of the State. The Army in India fulfils a double purpose, as in other countries. It is intended to defend the frontiers against foreign aggression, and to ensure internal peace in the last resort. A correlation of the administration of the Army with that of other departments is essential for the smooth working of the Administration as a whole. Though the Army is a Crown or reserved subject, its administration cannot be carried on in a watertight compartment ignoring

and having no connection with the other departments of the State. The White Paper, in visualizing the future administration, therefore rightly observes :

“Although the Reserved Departments will be administered by the Governor-General on his sole responsibility, it would be impossible in practice for the Governor-General to conduct the affairs of these departments in isolation from the other activities of his Government, and undesirable that he should attempt to do so, even if it were in fact possible. A prudent Governor-General would therefore keep his Ministers and the advisers whom he has selected to assist him in the Reserved Departments in the closest contact; and without blurring the line which will necessarily divide, on the one hand, his personal responsibility for the Reserved Departments, and, on the other hand, the responsibility of Ministers to the Legislature for the matters entrusted to their charge, he would so arrange the conduct of executive business that he himself, his Counsellors and his responsible Ministers are given the fullest opportunity of mutual consultation and discussion of all matters—and there will necessarily be many such—which call for co-ordination of policy.”

It is therefore suggested that the Governor-General's instrument of instructions should contain a direction that “without derogation from his responsibilities, he should encourage deliberations between himself, his Counsellors, and his Ministers.” A large section of public opinion has, however, expressed the view that the extent of co-ordination contemplated here is not sufficient. It is proposed by them that the entire Cabinet, including the members in charge of the Reserved Departments, should act on the principle of joint responsibility, and that an adverse vote of the Legislature should entail the dismissal of the Cabinet as a whole, though the members in charge of the Reserved Departments may be eligible for reappointment by the Viceroy. There are obvious advantages in the growth of such a convention: it will tend to make each section of the Government realize more clearly the difficulties and limitations of the other, and, without blurring the line of responsibility, may make the intervention of the Governor-General as rare as possible.

But a more important question is that which relates to the defence budget. The preparation of a budget and the sanctioning of military expenditure raises issues of a financial and political nature. Remembering that defence is a reserved subject, three suggestions were put forward with reference to the budgetary arrangements for military expenditure. It was proposed that military estimates might be placed before the Legislature for sanction in exactly the same manner as estimates are now submitted to the Provincial Legislatures for Reserved Departments. The Legislature may have the power to reduce or modify a grant, but the Governor-General can restore it by certification if in the discharge of his special duties he considered it necessary to do so. This suggestion is beset with many difficulties and rightly did not find favour.

Secondly, though during the dyarchic period in the Provinces Legislatures have scrutinized the details of a budget and cut down individual items of a grant, it must be conceded that this is not an ideal system, and is not in consonance with parliamentary practice in self-governing countries. Legislatures are concerned primarily with scrutiny of policy, and it must be the duty of the executive in carrying out the policy dictated by the Legislature to make the necessary amendments in the Budget. It should be stated in fairness to the Legislature, which has worked under a very difficult constitutional system, that in many instances reduction of grants was resorted to merely to enforce the desire for a change of policy in the administration of Reserved Departments. Under the new system, defence policy is outside the purview of the Legislature, and it seems inadvisable to delude a Legislature into the belief that it can do indirectly what it has specifically been prohibited from doing directly.

The second proposal is that an amount fixed by agreement for a period of years, termed a "contract budget," may be annually set apart for military expenditure. This amount will not be subject to the vote of the Legislature,

the Army member having full control over it, and the balance of any amount accruing after expenditure during the financial year being carried over without lapsing to the credit of the military in the next year's Budget. The virtues of this system are claimed to be many: it respects the canon of certainty; gives the military the opportunity of carrying out schemes of reorganization spread over a period of time; ensures greater efforts at economy by removing the fear of lapsed grants—in short, it promotes the efficiency of the Army. Further, it also serves the purpose, highly useful, of making the civil portion of the Budget less liable to alteration from year to year, by preventing any unforeseen raids on the Exchequer on behalf of the Army. This suggestion, which at first sight looked very attractive, was on further consideration turned down. On reflection, it will be found that the advantages claimed for this system are not so great as its advocates have supposed. A "contract budget" cannot give the Army member as much latitude as the term apparently suggests. The Finance Department must necessarily check the expenditure to satisfy itself that the canons of financial propriety are being followed. It must also see that obligations of a recurring character are not undertaken in such a manner as to prejudice the next settlement of a contract budget. If new obligations of a recurring nature are incurred by the diversion of funds saved on non-recurring items, then one of the parties at the next period of revision will be forced to accept a higher amount than is justified. Moreover, the difficulty of deciding as to who should be the parties to the contract, and how it should be drawn up, has to be faced. Obviously the parties to the contract must be the Federal Government and the Governor-General acting on behalf of the military department. If no agreement is reached between these two parties, the decision of a higher authority will have to be invoked, in which case the theory of a contract budget falls to the ground. Above all, the factor of changing economic circumstances has to be taken into account. Economics is no respecter either of reserved or transferred subjects, and it therefore

appears extremely inadvisable to compel a Government to find a definite amount for a period of years for the Army irrespective of what its total resources may be from year to year. It is true that the military expenditure cannot be placed on the same level as other kinds of expenditure, where heavy retrenchments have to be carried on owing to financial stringencies; but neither can it be kept so sacrosanct as not to be affected by the prevalent financial conditions.

The scheme that has ultimately been adopted by the Constitution is therefore one which combines freedom from legislative interference with detailed scrutiny by the responsible executive. It is proposed that the military budget should be settled by the Cabinet, provided, however, where the Army member feels it essential to differ from his colleagues, the matter in dispute may be referred to the Governor-General for final settlement. The Ministry will have opportunity of suggesting economies particularly in what are termed the auxiliary services of the Army, and the Army member would have a better realization of the financial position of the Government as a whole. The ultimate power of the Governor-General to decide on matters not settled by agreement would enable him to discharge his responsibilities for the reserved subject. The solution is not an ideal one, but essays to meet opposing points of view.

Military expenditure is not the only aspect of this singularly complex problem; matters of policy in the organization and utilization of the armed forces of the country arise frequently and have to be settled by some authority. The ultimate decision rests with the Committee of Imperial Defence; but it is obvious that every question of policy cannot be referred to the Committee, and that in any case a local organization will be of great assistance to the Imperial Committee. The present Army Committee is a curious body; it consists of chiefs at the Army headquarters in Simla, the Army Secretary, and the Military Financial Adviser. What a strange irony of fate it is which seeks to

entrust the full administration of the Army to a War Council!

It is this consideration which has driven a strong section of Indian opinion to suggest that in the changed circumstances of the country an organization akin to the Committee of Imperial Defence may be constituted to advise on matters of policy relating to defence. The Committee is to consist of the Army member and such other representatives of the Army Department as the Governor-General may appoint,¹ "the Prime Minister, the Finance Minister, and such other members of the Federal Government as the Prime Minister may appoint." The student of constitutional law will have recognized that the Committee suggested for Constitution bears a resemblance to the Australian and Canadian Committees, which can trace their ancestry to the Balfour Committee of 1904. This body will have purely advisory functions, but will be most helpful in finding solutions of various Army questions; the intervention and final decision of the Governor-General will be rendered unnecessary in most cases. The Committee will attempt to arrive at an agreed amount relating to Army expenditure. It will also consider the question of Indianization of the officers of the Indian Army from time to time, and advise the Governor-General on this matter. Further, it would usefully discuss matters relating to the organization of the Army, and, finally, its assent would be most invaluable in cases where the Indian Army is utilized for purposes other than the defence of India. This suggestion does not necessarily imply the statutory enactment of a provision for the establishment of an Indian Defence Committee. It is highly desirable, therefore, that the instrument of instructions to the Governor-General should convey the direction for the constitution of such a Committee, the scope and utility of which may be left to the developments of conventions.

The position of the Federal Legislature with reference to the Army now requires to be explained more clearly. From the foregoing paragraph it will be apparent that the Legis-

¹ Sapru-Jaykar note at the Third Round Table Conference.

lature will not be empowered to pass the military budget. Nevertheless, it will have powers of criticism of Army matters and military policy. Its decisions may not be binding, but its views, albeit, will carry weight. The two main aspects of the Army which will inevitably occupy the attention of the Legislature are the need for economy and that of Indianization. The fact that the military budget has been discussed by the Committee of Indian Defence may reassure Legislatures that the need for economy has been recognized, and may enable members of Government other than the Army members to justify the proposed military expenditure and thus strengthen the principle of joint responsibility.

The problem of Indianization bristles with difficulties. It may be conceded that nothing should be done which will impair the value of the Indian Army as a fighting force and that military efficiency is a matter of supreme importance. But it is difficult to convince Indian opinion that the substitution of Indian officers for British will in any way result in the deterioration of the forces. The whole history of the question of Indianization, the arguments employed against it, and in particular the argument that the Indian rank and file would resent the appointment of Indian officers, have not been calculated to remove the suspicion that the objections to rapid Indianization are dictated by political rather than military considerations. The Legislature will concern itself largely with this question as it will affect the future of the country and its international status. Though this problem cannot fall within the ambit of a constitutional Act, still the need for its solution must be recognized in the best interests of peace and contentment. The proposals of the Indian Sandhurst Committee, which recommended that a certain number of cadets should be taken annually from the Indian Sandhurst, have met with very general disapproval, and it has been with aptness and justice pointed out that at the rate contemplated in this scheme Indianization can take place only at the end of a century. It has, on the other hand, been pointed out that

the number fixed by the Chetwode Committee is not a permanent one incapable of variation at any time, but, as experience proves the success of the new proposals, a more rapid rate of Indianization may be adopted. A brilliant defence of retrograde proposals!

As Indian opinion attaches very great weight to a proper solution of this question, it is desirable that a larger number of recruits than that proposed by the Sandhurst Committee may be fixed initially, and the proposed Committee of Indian Defence may well be left to examine the question from time to time and advise the Governor-General about a more rapid rate of Indianization. As early as 1922, a Committee presided over by the late Lord Rawlinson suggested a scheme which, if translated into practice, would have brought about the complete Indianization of the Army in twenty-eight years. The scheme had the unanimous support of the Indian Executive Council presided over by Lord Reading, and which included statesmen like the late Sir Mahomed Shafi and Sir Tej Bahadur Sapru, experienced administrators like Lord Rawlinson and Sir Malcolm Hailey. Nearly half the period contemplated in those proposals has elapsed, and the extreme sensitiveness of Indian opinion on this subject can be understood when it is recollected that out of a total of four thousand officers only a hundred are Indians at the present time! It will be both prudent and statesmanlike if the Army is removed from bitter controversy of a unanimous national character by adopting immediately a more generous policy of Indianization and charging the Governor-General in the instrument of instructions with the function of taking the advice of the Indian Committee and translating their suggestions into practice.

The utilization of the Indian Army for purposes not concerned with the defence of the country is a matter of consequence to the people, and therefore to the Legislature. The Indian Army may be used either on the Indian frontiers, or even outside India if the defence of the country requires it. But if it is used for purposes unconnected with the defence of India, it is apparent that financial and

political issues are raised. Section 22 of the Government of India Act provides :

“Except for preventing or repelling actual invasion of His Majesty’s Indian possessions or under other sudden and urgent necessity, the revenues of India shall not without the consent of both Houses of Parliament be applicable to defraying the expenses of any military operations carried on beyond the external frontiers of those possessions by His Majesty’s Forces charged upon those revenues.”

In the new Constitution a provision of this nature will be inappropriate, as the finances of the country will be administered by a responsible Minister. Politically, it would be inexpedient to use the army of a Dominion without its consent for imperial purposes. It is unnecessary to consider in this connection the question whether a declaration of war by Great Britain against a foreign country should necessarily involve a state of hostility to the foreign country on the part of every Dominion of the Commonwealth. The subtlety of the King being at war with one country as the head of Great Britain and at peace with the same country as the head of a Dominion is purely theoretical and fictitious. So long as there is a Commonwealth under a common King, with ties however loose, the relationship of peace or war is not capable of variation from Dominion to Dominion. But the question of whether and how far a Dominion army should be available in an imperial war must depend on the will of the Dominion concerned. It has been claimed by public men in India that the Legislature must authorize the employment of troops outside India for purposes other than those of Indian defence. The Government have agreed “to consider how far the Legislature might appropriately be given a voice as to the loan of Indian forces to the Imperial Government on occasions when the interests of India within the sphere of defence were not involved.”¹ It is expected that this consideration will result in the adoption of the Indian point of view.

Closely connected with the Army is the ecclesiastical

¹ Vide Third Round Table Conference Defence Report.

establishment of the Christian faith. The ecclesiastical service has developed in India mainly out of the needs of the Army. The Army has a certain number of chaplains, but the larger portion of this service is employed at various centres in the country and minister to the wants of both the civil and the military population. The ecclesiastical department has hitherto been under the control of Provincial departments. Christianity being the religion of a minority in India, fears were entertained in some quarters that under a system of Provincial autonomy the ecclesiastical service may not continue to be employed, and the suggestion was made that it might be transferred to the centre and administered as a reserved subject. Indian delegates with a long tradition of tolerance in religious matters did not raise any objections to this proposal, though they felt that the fears were groundless.

The second subject which falls under the category of reserved subjects is that pertaining to the administration of external affairs. So long as a Dominion forms part of the British Commonwealth, its external relations cannot be the sole concern of the Dominion itself. Since the termination of the Great War the position of the Dominions and of India has considerably altered with reference to their external affairs. The convention has grown up of the United Kingdom consulting them before any treaties or pacts are concluded. And, in fact, such treaties and pacts are signed by representatives not only of the United Kingdom but also of the Dominions. The Kellogg Pact affords a classic instance in point. But this very obligation of the United Kingdom to consult the Dominions before entering into treaties binding on the Commonwealth entails a corresponding obligation on any Dominion to consult the United Kingdom in matters relating to foreign relations.

Under existing circumstances, the external political relations of India have been proposed to be administered by the Crown through the Governor-General. The Foreign member in charge of the Political Department will occupy a position analogous to the Defence member. There is an

aspect of political relations peculiar to India pertaining to the Indian States. Those Indian States which enter the Federation become parts of Great India only for limited purposes. They will preserve their independence in all other matters which have not been specifically given up to the Federal Government. They have, however, treaty rights and obligations with the Crown. These rights and obligations lie outside the Federal sphere in so far as they have not been handed over to the Federation by the "treaties of accession of individual States." It follows that the political relations of the Crown with Indian States must continue to be regulated by an extra-Federal authority. The Viceroy, as agent of the Crown, will be such an authority, and may deal with this aspect of the question. The view was at one time held by a few Indian publicists that the paramountcy rights exercised by the Crown over the Indian States may be transferred to a responsible British Indian Ministry. A clearer understanding of the nature of these "rights" and of the manner in which they are exercised has helped to establish the wholesale unsoundness of this position. The scope of the paramountcy rights is undefined and indefinite, and, notwithstanding the efforts of various princes and of the Chamber of Princes, it is bound to remain so for some time.¹ Two of these rights, are, however, definite and have been accepted without question. The right of the paramount Power to decide on all questions relating to the succession to the throne of a State is accepted without any reservation.

Secondly, it can exercise its right of paramountcy in case of maladministration in any State. Instances of the exercise of such power have not been infrequent during the past decade. It will be easily realized how a purely British Indian Federal Government, or even an All-India Federal Government, cannot take upon itself the responsibility for the decision of such questions under existing circumstances. It is a matter for consideration whether a machinery cannot be devised which will take charge of these functions and

¹ Vide Maharajah of Bikaner's speeches and *The British Crown and the Indian States*.

relieve the paramount Power of the necessity and odium of such interventions. The proposal has been put forward that a "Committee of Peers" composed of Indian princes presided over by the Viceroy may act as a judicial body for the decision of such questions. And the analogy of an English peer being tried by his fellow peers has been cited in support of this suggestion. Till these questions have been finally decided it is clear that the political department which deals with Indian States should be under the control of the Viceroy.

The phrase "external affairs" has been advisedly used in a restricted sense as applying only to the "political external affairs of the country." India has relations with foreign countries in matters of trade and commerce which are of the very highest moment to its prosperity. The other Dominions have established special trade embassies in foreign countries and have received in their areas foreign Consuls charged with the duty of promoting trade relations between the two countries. Since the inauguration of the scheme of reforms in 1919 it has been recognized that India is free in fiscal matters; the convention has grown, and has been established beyond controversy, that the Government of India does not act as the agent of the Secretary of State in framing its fiscal policy, but is in fact bound by the decision of the Legislature. When, in 1930, the Government sponsored proposals for a preferential duty on goods from the United Kingdom, the Commerce member specifically read out to the Legislature a statement of the Secretary of State for India that the Government could only offer advice in such matters and that the final decision must be that of the Legislature and of the Government of India.

More recently, the sending of the Trade Delegation to Ottawa and the submission of the Ottawa Pact to the approval of the Legislature were the result of the adoption of this principle. As these pages are in print, news comes of a trade agreement being negotiated between India and Japan at Delhi, the high contracting parties being the Government of India on the one hand and the Japanese

Government on the other. These facts must serve to show that the autonomy now enjoyed by India in arranging its commercial relations with foreign countries cannot possibly be denied to it under a more generous Constitution, and non-political external affairs will therefore vest in responsible Ministers, and cannot be a reserved subject in charge of the Foreign Minister.

In a like manner the treatment of Indians in the Dominions will be a matter for negotiation between the responsible Ministry and the Government of the Dominion concerned. But the question of the treatment of an Indian in Brazil will come under the jurisdiction of the Foreign Minister in charge of the Reserved Department. As a matter of administrative detail, it may be mentioned, following well-established precedents in all countries, the Foreign Office will be the agency through which the responsible Ministry will carry on negotiations in commercial and non-political matters. Thus the subjects of Defence, Ecclesiastical Establishment, and Foreign Affairs form the reserved departments of the Federal Government, and will be administered by members not responsible to the Legislature. All other subjects are transferred to the control of a responsible Government. Nevertheless, certain limitations have been imposed on their administration in the interests of peace and tranquillity or of minority or of vested interests. These limitations and their justification may now be examined.

The Governor-General has been invested with certain special responsibilities in relation to the operations of the Federal Government. The precise effect of an imposition of such responsibility on the Governor-General has been explained in the introduction to the White Paper:

“It should be made clear,” says that document, “that unless and until the Governor-General feels called upon to differ from his Ministers in the discharge of a ‘special responsibility’ the responsibility of Ministers for the matters committed to their charge is complete. To take a concrete instance, it will be clearly the duty of the Ministers, rather than of the Governor-General himself, to

ensure that the administration of their departments is so conducted that minorities are not subjected to unfair or prejudicial treatment. The intention of attributing to the Governor-General a special responsibility for the protection of minorities is to enable him, in any case where he regards the proposals of the Minister in charge of a department as likely to be unfair or prejudicial to a particular minority, in the last resort to inform the Minister concerned (or the Ministers as a body, if they generally support the proposals of their colleague) that he will be unable to accept the advice tendered to him. Nor is it contemplated that the Governor-General, having been vested with 'special responsibilities' of the kind indicated, will find it necessary to be constantly overruling his Ministers' advice. The present proposals in general necessarily proceed on the basic assumption that every endeavour will be made by those responsible for working the Constitution to approach the administrative problems which will present themselves in the spirit of partners in a common enterprise. In the great bulk of cases, therefore, in day-to-day administration, where questions might arise affecting the Governor-General's 'special responsibilities' mutual consultation should result in agreement, so that no question would arise of bringing the Governor-General's powers in connection with his special responsibilities into play."

The vesting of special responsibilities in the Governor-General necessarily detracts from the extent of responsibility conferred on the Government. Whatever emphasis may be laid on the hope that occasions for the exercise of such powers will be rare, there is no doubt that constitutionally it is an infringement of the theory of self-government. Apart from these special responsibilities, the Governor-General has certain "discretionary powers" relating to the summoning and dissolution of Legislatures, the sanctioning and rejection of Bills passed by the Legislatures. These discretionary powers have in the course of time and by the growth of conventions ceased to be exercised by the agents of the Crown in the Dominions. They will not, however, be merely formal functions in the Indian Constitution in the beginning, and the Governor-General will not be a constitutional head, even with reference to subjects under the control of the Ministry. The addition of powers to enable him to discharge his special responsibility is entirely

opposed to constitutional precedents and is a serious encroachment on Legislature responsibility. These safeguards have therefore to be regarded from the point of view not of constitutional theory, but of political expediency and of political compromise. Indians have accepted the principle of such safeguards to allay apprehensions of certain interests in the country and to ensure the harmonious working of the Constitution. These safeguards have therefore to be examined from the dual point of view of necessity and of utility. To take the instance that has been referred to in the paragraph quoted above, the Governor-General has a special responsibility to safeguard "the legitimate interests of minorities."

In the chapter dealing with the minorities problem in India, the rights of minorities and the manner in which those rights are to be protected have been explained. It has been pointed out therein that all reasonable sections of public opinion in the country are anxious to have these rights safeguarded and desire to allay the apprehensions in any quarter in the interests of the successful working of the Constitution. A Constitution started under the aegis of maximum good will will have a splendid chance of fulfilling its purpose—that of leading the nation to the goal of creative achievement. Notwithstanding the occasional outbursts of extreme communalists who indulge in unbalanced attacks on rival communities, more often to preserve their individual ascendancy on their community than in its real interests, it must be conceded that the generality of the public favours a peaceful adjustment of communal claims. Nothing can illustrate the truth of this statement more forcibly than the fact that the communal award of the Government has been practically accepted by an overwhelming majority of the communities concerned. If therefore the special powers of the Governor-General to safeguard the legitimate rights of the minorities are subjected to a searching and critical examination, it undoubtedly is not on account of any lack of appreciation of such rights. The question is not whether the legitimate rights of the minorities should

be safeguarded, but whether the Governor-General is the proper authority on whom this responsibility should fall. Will he be in a position to discharge this responsibility on all occasions? Secondly, will it be possible for him on the exercise of these powers to confine himself solely to the safeguarding of these rights?

Where a minority claims a right to which it is entitled according to all canons of fairness and justice, it must be expected that such a right would be incorporated among the fundamental rights. Should this be of a justiciable nature, the proper forum to which it would make an appeal in case of violation is the Federal Court. To bring out the point more clearly, let us assume that a right which falls within the ambit of "justiciability" is threatened by the adoption of a particular clause of a Bill by the Legislature. Two remedies are open to the minority concerned. It may approach the Federal Court and obtain a writ that the Bill is *ultra vires* of the powers of the Legislature. Secondly, it can approach the Governor-General and invoke his prerogative of refusing assent to the Bill. The argument may be advanced that while the former involves expense and delay, the latter combines in itself the virtues of effectiveness and despatch. But the advantages are apparent rather than real. A declaration by the Federal Court in favour of a minority will put an end finally and for ever to all attempts at such legislation. The action of the Governor-General, on the other hand, is bound to raise political controversy, and repeated attempts at such legislation may be resorted to till at last the Government will be forced to give assent, notwithstanding the fact that a legitimate right is being sacrificed. The veil of silence will be drawn over a Bill of the Legislature declared to be not in consonance with the spirit of the Constitution—by its guardian, the Federal Court. In case of the latter, murmurs of opposition will begin the moment the supreme executive declares the Bill to be in dissonance with the principles of the Constitution, and gradually gather in volume, and may eventually force the Governor-General to rescind his original order.

Secondly, in the new Constitution, minorities will with justice have special, and in some instances generous, representation accorded to them. Moreover, as the White Paper aptly points out:

“In his instrument of instructions the Governor-General will be enjoined *inter alia* to use his best endeavours to select his Ministers in the following manner, that is, in consultation with the person who in his judgment is likely to command the largest following in the Legislature, to appoint those persons (*including so far as possible members of important minority communities and representatives of the States members of the Federation*), who will best be in a position collectively to command the confidence of the Legislature.”

Minorities will have two bulwarks to support them: their representatives in the Legislature, who will expose executive iniquities, and a Minister who may be expected to put their point of view before the Cabinet and possibly avert any executive wrong being done to them. If the right of a minority is infringed by executive action, the intervention of the Governor-General will be equally inappropriate and sometimes possibly futile. Democratic institutions will be smothered in their infancy if minorities are encouraged in ventilating their grievances, not indeed in the public forums of representative institutions, but in the drawing-rooms and boudoirs of Viceregal estate. Nothing is calculated to demoralize public life more than the threat of an appeal against Ministerial action to a Governor-General, who might set it right, rather than to a Legislature, who may not merely correct it but, by removing the Minister, make a repetition of it impossible.

It may, however, be argued that when a majority is determined to crush the rights of a minority, an appeal from the Minister to the Legislature will be a vain one from Philip sober to Philip drunk. But if there were such a determined majority, will the Governor-General be able to safeguard the interests of the minority without precipitating a first-class constitutional crisis, and how rarely can a Governor-General's choice be right when he is presented

with the dilemma of the violation of a minority right and the precipitation of a first-rate political crisis?

But there is another aspect of the question which might appropriately be considered by minorities themselves. Human nature is much the same the world over, and the temptation to use the grievance of a minority for purposes other than the legitimate protection of its rights may prove irresistible to a Governor-General or Governor harassed by the conduct of the Ministry in spheres where its power is unrestricted. Above all, the growth of a life of healthy, virile self-dependence and of effective participation in the affairs of the State of a minority will be arrested if it is treated as a hot-house plant capable of development only in the exotic atmosphere of Viceregal protection. It need only be repeated that these observations have been made not with a view to detract from the rights of minorities, but rather to ensure them better.

Remarks of a very like nature apply to the special responsibility of the Governor-General to prevent commercial discrimination. The position of the Governor-General will be even more anomalous and intolerable if this power were to be exercised. The safeguard is framed in general terms, but the veriest tyro in politics is aware of its narrow character. It is intended to prevent penalization of European commerce and industry established in India. Here, again, the effective safeguarding of the interests of the European community can only be obtained through a fundamental right enforceable in the Federal Court. It is not the negation of these rights that is suggested, but with the proper enforcement and enactment of such rights. Discrimination against a British trader merely because he is British, either by legislation or executive action, should be prohibited, and the prohibition enforced by judicial decisions. But to cast the responsibility on the Governor-General, who will himself be a Britisher with all the ties of blood and race, is to subject him to the terrible and continuous suspicion of partiality and unfairness. Every intervention of the Governor-General will result in public agitation, create bitterness and hostility

against the head of the State, and consequently injure the community concerned. The very purpose of affording protection against commercial discrimination will be frustrated. — Past experience suggests that political agitation resulting from such an act of the Governor-General may easily lead to a trade boycott and result in greater disaster to the community concerned. There was never a greater truth than when Mr. Baldwin said :

“The day when we could dictate to India what she can buy and where she can buy is gone. It has not gone this year: it went in 1919. Having got that out of the way, I have good hopes for the future. Mr. Hacking was perfectly right when he said that you can only trade while there is a will to trade. —

“There has been a great deal of talk about safeguards. All the safeguards are being examined by the Joint Select Committee. Whatever safeguards you have, the real safeguard is the maintenance of good will. — ✓

“Some of the measures suggested to which Lancashire people have been asked to give their support have been calculated to destroy rather than to further any possibility of good will between Lancashire and India which you can get, which you ought to get, and which you cannot do without. Whatever the Government may do, you cannot prevent a population nowadays, especially an Oriental as opposed to an Occidental population, if it considers it has been unjustly treated, from expressing its feelings by a boycott. —

“Boycotting has been brought to a fine art in the East. Japan has had the experience of it in China and what it means. We have had the experience of it in India. The boycott in India has died away, and it has died away, I believe, not only under the influence of a firm Government, but I believe because of the conviction in the minds of Indians that we were going to deal honourably with them and keep our word that we were going on with reform. —

“The moral aspect did as much and perhaps more to break the boycott than any force. I may be called coward for saying so, but I do not believe you can break a national boycott by force. — ✓ You can do a good deal with a bayonet. It is a very useful thing with which to open a tin or to dig with. But it is the worst thing in the world to sit on. You had better sell your goods in India by putting cotton streamers on the point of the bayonet.” —

A judicial decision of the Federal Court in a case of

commercial discrimination cannot lead to any of these consequences—at any rate to the same extent. It is not beyond constitutional draftsmanship to devise a formula which can embody a fundamental right on this subject. It may be suggested that such a right cannot be as ample as the right safeguarded under the special responsibility of the Governor-General; but it is permissible to point out that what is lost in amplitude may be gained in effectiveness.

The special responsibility of the Governor-General for the protection of the services may now be considered. The duty is cast on the Governor-General and the Governors in the Provinces of securing to the members of the public services of any “rights provided for by them by the Constitution” Act of the safeguarding of their “legitimate interests.” The superior public services in India occupy a unique position; they have been recruited by the Secretary of State, and certain “privileges” have been conferred on them from time to time under his rule-making powers. Section 96 B (2) of the Government of India Act provides :

“The Secretary of State in Council may make rules for regulating the classifications of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to Local Governments, or authorize the Indian Legislature or local legislatures to make laws regulating the public services.

“Provided that every person appointed before the commencement of the Government of India Act, 1919, by the Secretary of State in Council to the Civil Service of the Crown in India shall retain all his existing or accruing rights, or shall receive such *compensation for the loss of any of them as the Secretary of State in Council may consider just and equitable.*

“The right to pensions and the scale and conditions of pensions of all persons in the Civil Service of the Crown in India appointed by the Secretary of State in Council shall be regulated in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council, and shall have effect as so varied or added to; but any such variation or addition

shall not adversely affect the pension of any member of the service appointed before the date hereof. —

“Nothing in this section or in any rule thereunder shall prejudice the rights to which any person may or may have become entitled under the provisions in relation to pensions contained in the East India Annuity Funds Act, 1874.” —

It has been the practice in many Dominions when a constitutional change is brought about to secure the serving officers their existing rights. Section 144 of the South African Constitution Act provides: = ✓

“Any officer of the public service of any of the colonies at the establishment of the Union who is retained in the service of the Union or assigned to that of a Province shall retain all his existing or accruing rights, and shall be entitled to retire from the service at the time at which he would have been entitled by law to retire, and on the pension or retiring allowance to which he would have been entitled by law in like circumstances if the Union had not been established.” —

There can be no reasonable objection to securing to serving officers the privileges which they have been granted and which they are at present enjoying. There has been a long-standing controversy in India as to whether these concessions have been legitimately deserved by the services, and whether their continuance under the changed economic conditions is in any wise justifiable. At the other extreme is a body of opinion which has exalted these privileges and concessions to the status of contracts—a position unsound in theory and not borne out by practice. If there were no change in the Constitution, it can scarcely be denied that under the powers conferred on the Secretary of State by the Section referred to in the Government of India Act he would have the right to vary or amend the privileges now enjoyed by the services. In fact, the 10 per cent reduction in pay that has been effected during the last two years must conclusively refute the idea of the contractual basis of these privileges. This does not, however, mean that the services should not have their future assured in the new Constitution. A contented service is a *sine qua non* for the proper

functioning of the State. Democracies are much more dependent on the services than autocracies; for while the former attempts to ensure the rule of reason and higher creative citizenship—two principles which Spinoza has emphasized with great iteration in his *Tractatus Politicus*—the latter seeks to consolidate its rule of force, and possibly of deadening monotony. The responsible Government of the future in India will have to rely very largely on the co-operation of the permanent services for those new and enlarged activities of the State which are bound to be undertaken for a remoulding anew of our social organization. The plan of a *social federation*, if it is to be translated into practice, will require the earnest and sincere co-operation of these permanent servants of democratic India. It is therefore politically wise that old and bitter controversies about the monetary rights of the services, such as Lee concessions, should be buried and the existing position accepted by the new Government. To this extent, therefore, the Constitution Act should provide for these rights to the *members now in service*, and the Government, central or provincial, should have the obligation of respecting and giving effect to these rights.

If there is an infringement of these rights, it is presumed that a public servant affected would have the usual right of appeal to the Government, the appeal being referred for the opinion of an independent authority like the Public Services Commission, and the Government basing its final orders on the recommendations of that authority. It is hard to understand how in this scheme of things the Governor-General's special responsibility is intended to be exercised. The impartial judgment of the Public Services Commission, which in practice will necessarily be accepted by the Government, is the highest security that the service can demand or enjoy.

The special responsibility of the Governor-General extends not merely to safeguarding the rights of the services provided under the Constitution, but also its legitimate interests. What exactly is intended to be conveyed by the phrase

“legitimate interests” is not clear. An elastic interpretation of it may enable the Governor-General or Governor to interfere in every aspect of the administration, making the proper exercise of Ministerial responsibility impossible. The difficulty is not really met by presuming that every special responsibility will be exercised with tact, moderation, good sense, and reasonableness. It is true that some of the members of the services may feel apprehensive of their position in the new régime. The toad beneath the harrow knows exactly where each tooth-pick goes. But it is at the least doubtful whether the interests of the services will not be best promoted by throwing the responsibility of safeguarding its privileges on the Minister direct rather than by the interposition of a *deus ex machina*, a Governor-General, or a Governor helping a public servant out of his difficulties. The experience of the past decade, when members of these services had to work under Ministers in the diarchic régime, does not justify these apprehensions. The best scheme in their interests seems to be one which provides a definite set of rights, capable of being adjudicated upon by a Public Services Commission.

The most important, as it has been the most controversial, subject is the special responsibility of the Governor-General to safeguard the financial stability and credit of the Federation. It has to be remembered that the finances of the Federation are proposed to be entrusted to the charge of a Minister.

“It will be for the Minister and the Minister alone to take decisions on all such matters as to the means to be used for raising the necessary revenues, for allocating expenditure in the responsible field, and for the programme of external and internal borrowing.”

The White Paper explains the scope of the special responsibility in this connection. The object of the Governor-General’s special responsibility for the

“safeguarding of the financial stability and credit of the Federation, is to confer on him powers to step in if the need should arise in the event of the policy of his Minister, in respect, for

example, of budgeting or borrowing being such as to be likely in the Governor-General's opinion to endanger seriously the provision of resources to meet the requirements of his Reserved Departments, or of any of the obligations of the Federation, whether directly or indirectly, by prejudicing India's credit in the money markets of the world. The definition of this special responsibility is drawn in somewhat wide terms, not in order to diminish the field of responsibility of the Minister, but owing to the difficulty of giving a detailed qualification of financial operations or measures which might on occasion endanger stability and call for the use of the Governor-General's powers."

The proper management of the finances of the country is the test of the success of a Government; and it has, therefore, been rightly contended that without Ministerial responsibility for financial administration the Constitution will be but a husk and worth nothing. Before the need for special responsibility is considered, the limitations under which a Minister will function may be detailed.

"The service of certain obligations, viz. the service of the debt, the salary of the Governor-General, the salary and pensions of judges of the Federal Court, will be a charge on the revenues of the Federation; the salaries and pensions payable to, or to dependants of, certain members of the public services will also be a similar charge, and will not be subject to the vote of the Legislature. Expenditure required for the Reserved Departments will similarly not be subject to the vote of the Legislature. It is outside these items that the Ministers will have a discretion to regulate expenditure.

Moreover, the proposals relating to the responsibility for the finance of the Federation are based on the assumption that before the first Federal Ministry comes into being a Reserve Bank would have been established charged with the management of currency and exchange. In such circumstances it is difficult to visualize the nature of the special responsibility and the manner in which it can be exercised. One can understand the fear that a National Government may evade meeting its debt obligations, reduce the pay of a service which it considers alien, withhold the necessary

expenditure for Reserved Departments. But this is exactly what the Government will not be permitted to do or withhold, owing to the fact that these form a first charge on the revenues of the Federation or are not subject to the vote of the Legislature. These obligations will be met whether the responsible Government wishes to meet them or not so long as the proceeds of the revenue are sufficient to meet them. If the contingency arises when the till is insufficient even for such purposes, it will mean that there has been a complete and overwhelming breakdown of the financial system of the country, and no powers of the Governor-General can extricate it from this position.

It has further to be remembered that financial stability, and particularly the credit of the Federation, is, and must always be, the primary concern of a responsible Ministry. Trade will be paralysed, the exchange would break down, and borrowing, whether internal or external, would become an impossibility if the credit of the Federation is not maintained. The pressure of Indian public opinion and the criticism in the Legislature is the best corrective for a Minister who pursues unsound financial policies. How, then, is the Governor-General to exercise his special responsibility for safeguarding the financial stability and credit of the Federation? Those who have proposed an inclusion of this power have been unable to explain in what contingencies it may be exercised. They rely on it as a sort of reserve in unforeseen contingencies, the nature of which they are unable to visualize. The indefiniteness of the provision must be the measure of its condemnation. It is not unlikely that these stringent provisions have been suggested in view of the experience of Great Britain in recent times. The repudiation of the payment of annuities by the Irish Free State, the default of many European countries in paying their debts, may explain, if they do not justify, this proposal. But the sins of Ireland cannot be visited on India. Moreover, the circumstances of the two countries are different. The fact that the financial obligations form a first charge on the revenues, coupled with the Governor-General's power to

make the necessary appropriation for meeting these charges, must rule out all possibilities of default on the part of India.

The criticism of this special responsibility does not imply that during a transitory period specific powers should not be vested in the Governor-General to maintain the financial stability and credit of the Federation. It has already been stated that the Budget should include certain items of expenditure which are declared to be non-votable, like charges in respect of Reserved Departments, the service of debt, and the salaries and pensions of some members of the public services. The Governor-General must necessarily have the power to satisfy himself that provision is made for these items in the Budget. The establishment of a Reserve Bank free from political influences for the management of currency and exchange is another safeguard which will curtail very considerably the powers of the Finance Minister. The consent of the Governor-General to any Bill passed by the Legislature to amend the paper currency or coinage Act will be another method whereby recklessness in manipulating the exchange may be avoided. It has been suggested that the previous sanction of the Governor-General should be obtained before even the Bill is introduced in the Legislature on this subject. Such a power does not seem to be necessary when it is realized that no Ministry can undertake to expand or contract the note issue and modify the ratio without the fullest co-operation of the Reserve Bank. The veto power of the Governor-General will be more than sufficient in order to meet the strange contingency of a Minister, a Legislature, and a Reserve Bank all joining in trifling with this question. The power to permit the introduction of legislation is as unnecessary as it will be irritating to the parties concerned.

The Governor-General will have, further, the power to intervene when the security of the investor, British or Indian, is sought to be impaired by the action of the Finance Minister. An unsound policy of borrowing, the presentation of a series of deficit budgets to the Legislature during the course of several years, may lead to a situation of the utmost

financial gravity, as harmful to the investing public as to the country as a whole. In such contingencies the Governor-General has been given special powers of intervention, and may implement his powers by necessary legislation. Armed with these powers, he can well meet every contingency, and the vesting of special responsibility for protecting the financial stability and credit of the country apart from these special powers is bound to convey the legitimate impression that the finances of the country are meant to be controlled from Whitehall. The transference of financial responsibility to Indian Ministers will be a fiction if specific powers which the Governor-General will possess, according to the agreement arrived at at the Third Round Table Conference, are coupled with a further indefinite power of interference to safeguard the credit of the Federation.

There is an aspect of the exercise of these special responsibilities by the Governor-General which, both from the constitutional and administrative point of view, require very careful consideration. The White Paper contains the following provision:

"The Governor-General's Instrument of Instructions will accordingly contain *inter alia* provision on the following lines:

"In matters arising in the Departments which you direct and control on your own responsibility, or in matters the determination of which is by law committed to your discretion, it is our will and pleasure that you should act in exercise of the powers by law conferred upon you in such manner as you may judge right and expedient for the good government of the Federation, subject, however, to such directions as you may from time to time receive from one of our principal Secretaries of State.

"In matters arising out of the exercise of powers conferred upon you for the purpose of the government of the Federation other than those specified in the preceding paragraph, it is our will and pleasure that you should, in the exercise of the powers by law conferred upon you, be guided by the advice of your Ministers, unless so as to be guided would, in your judgment, be inconsistent with the fulfilment of your special responsibility for any of the matters in respect of which a special responsibility is by law committed to you; in which

case it is our will and pleasure that you should, notwithstanding your Ministers' advice, act in exercise of the powers by law conferred upon you in such manner as you judge requisite for the fulfilment of your special responsibilities, subject, however, to such directions as you may from time to time receive from one of our principal Secretaries of State."

So far as the Reserved Departments are concerned, the Governor-General is the agent of the Crown, and must be subject to the control of the principal Secretary of State. These large departments cannot be administered according to whims and caprices of an individual, however exalted he may be. It is impossible to visualize a position where the Governor-General administers the affairs uninfluenced by criticism and unhampered by control from above. The theory of a reserved subject is that parliamentary control is still exercised over the administration of such a subject, and Parliament can exercise its responsibility through the Secretary of State, who must be in a position to direct and control the Governor-General. It is, however, in the second set of powers that the intervention of the Secretary of State seems to be unnecessary and perhaps even mischievous. It is intended that the instrument of instructions will lay down that "in the fulfilment of the Governor-General's special responsibilities he will be subject to such directions as he may from time to time receive from one of the principal Secretaries of State." Some of these special responsibilities may not rouse serious criticism if the Governor-General is treated as an arbitrator and permitted to give his award as an individual. But they are far more objectionable and assume a sinister aspect if in the exercise of these functions he becomes an agent of an authority far removed from India. To take a concrete instance, the Governor-General has a special responsibility for safeguarding the legitimate interests of minorities. Apart from the criticism made against the vesting of such powers, one can question how in the discharge of this duty he can be guided by the Secretary of State. The Governor-General on the spot will be in a position to realize the action and interaction of

policies and to know the extent to which a minority right is infringed. Whitehall is the last place which can with knowledge or propriety intervene in such a matter. The special responsibility for preventing commercial discrimination is another instance in point. As regards the exercise of powers to safeguard financial interests, nothing will be more inappropriate and less politic than the subjection of the Governor-General to the dictates of the Secretary of State. It is a notorious fact that a large section of Indian opinion believes that in financial matters the administration has so far been guided by the dictates of the City of London rather than by considerations of what is really good for India. If, therefore, the Secretary of State is given the power of intervention, every act of the Governor-General will be understood to have been dictated by the London money market. To the extent that special responsibilities in the transferred field vest in the Governor-General, he must be unhampered in their exercise. There does not appear to be any strong constitutional objection in entrusting him with arbitral power in these matters. It will be a tragedy if on every occasion that these special responsibilities are exercised the Governor-General is understood to be a mechanical agent of the Secretary of State.

There is a further objection to the exercise of control by the Secretary of State over the Governor-General in the discharge of his special responsibilities. These powers are intended to be applicable only during the transitional period. They have been agreed to, to allay the apprehensions of several sections of public opinion that in the initial stages of the working of the Federation their position may be prejudiced by a nascent Cabinet or a Legislature. It is the earnest hope of all, including the sections which entertain these apprehensions, that in course of time, and within the transitional period itself, these powers may be proved to be unnecessary and thus fall into desuetude. The existence of a supervising authority controlling the exercise of these powers, and on occasions dictating a positive course to be pursued by the Governor-General, will naturally tend

to make them positive functions and prevent their falling into desuetude.

The reservations and safeguards in the Constitution have been considered at some length, since the constitutional fights of the future will centre around them. The transfer of reserved subjects to the field of responsible administration and the disappearance of safeguards will be the ultimate and permanent solution of Indian politics. The White Paper recognizes that the conversion of the present system of government into a responsibly governed federation of State and Provinces can be qualified by limitations in certain directions *only during a period of transition*. Neither the White Paper nor the Constitution makes any provision for ending this period of transition. Nor is the nature or extent of this period defined. Suggestions have no doubt been made that a definite period for ending the transition should be prescribed in the Constitution Act. They have been met by the argument that it is impossible to suggest a definite date, as it will depend upon varying circumstances. And, further, that if a definite period should be fixed at all, it would be a much longer period than Indian opinion would accept at present.

To attempt to solve the question at the present moment appears to be an unprofitable undertaking. The welding together of what are apparently heterogeneous elements in Indian politics, the progress made by her statesmen in evolving a new structure during the next few years, might lead to a precipitation of a constitutional crisis much sooner than anyone to-day can expect. On the other hand, progress may be hampered by new and unforeseen circumstances, which Merriam—American writer and scholar—has described as the “non-rational and incalculable facts of the social politic,” and so prolong the transitional period. Though the Constitution Act might not provide for an ending of this period, it must be recognized that an institution has been found for the solution of this problem. That institution is the Round Table Conference, which in 1930 was a novel experiment without a precedent in the history

of these two great nations. To-day its value is universally admitted, and it stands as an unrivalled mechanism for the solution of vital problems confronting two great countries. Ten or fifteen years hence, when another Round Table Conference is convened, the representatives of a new and rejuvenated India will have to take up the threads from where they have been left off by Sir Tej Bahadur Sapru and his colleagues, and weave a better fabric of more consistent and variegated texture, so ensuring a more perfect relationship between the two countries.

CHAPTER VII
FEDERAL FINANCE

THE functions which a State performs depend upon its resources; in the modern State, and particularly in States with representative and responsible institutions, these functions have increased in number and complexity. In democracies the primary emphasis is on the services which the State should render to the people, and the problem is therefore not to equate expenditure to revenue, but normally to regulate resources so that they might be adequate to the expenditure necessitated by such functions. It is true that a State cannot incur expenditure without any possible reference to its resources, but the pressure of public opinion is more often in the direction of forcing Governments to devise sources of revenue than of curtailing expenditure on necessary services. Finance has therefore come to play a very important part in the successful functioning of the State.

In a Federal Constitution the problem is more complicated than in a unitary State. The Federation and each of the units have to discharge their functions efficiently, and the resources which each can command must be adequate for this purpose. It will be a misunderstanding of the functions of Governments if exclusive emphasis is laid on the need for adequate resources either for a unit or the federation. For if the task of government is the promotion of the happiness and welfare of society, it has to be efficiently discharged by both the Federal and Provincial Governments, which have divided the functions between themselves. Discussions with reference to Indian finance have sometimes revealed a distinct bias for a provincial unit commanding sufficient resources at the expense of the Federation or a predilection for a financially strong Federal Government irrespective of the financial difficulties of Provinces. The truth is that a financially stable Province is as essential as a financially sound Federal administration. If a number of Provincial

administrations were to find it impossible to balance their budgets and were to indulge in a policy of borrowing, the reactions on Federal finance are bound to be serious. If, again, Provincial administrations were to so curtail their expenditure in their anxiety for budgetary equilibrium as to starve the social services—the nation-building activities as they have been described in India—it would result in such acute internal discontent as to render the task of administration difficult and a proper system of Federal finance almost impossible.

On the other hand, the existence of well-filled coffers in Provincial exchequers will not redeem the situation if the Federal Government is rapidly moving towards a state of bankruptcy. The external credit of India will depend on the financial position of the Federal Government. International trade and commerce will be seriously affected if they are not paralysed by Federal insolvency. It is therefore essential to have the dual consideration of Provincial solvency and Federal credit in mind in devising and allocating the resources between the Federation and the units.

The Constitution provides that the Federation should be given certain legislative powers in relation to taxation and the raising of revenue, and that the Provinces should have similar powers. In the chapter on the allocation of subjects the nature of these powers has been dealt with. The Federation will have exclusive power in regard to the following subjects:

“The regulation of the import and export of commodities across the customs frontiers of the Federation, including the imposition and administration of duties thereon.

“Salt.

“The imposition and regulation of duties of excise, but not including duties of excise on alcoholic liquors, drugs, or narcotics (other than tobacco).

“Imposition and administration of taxes on the income or capital or corporations.”

It will also have power with reference to the following subjects:

“Imposition and administration of taxes on income other than agricultural income or income of corporation, but subject to the power of the Provinces to impose surcharges.

“The imposition and administration of duties on property passing on death other than land.

“The imposition and administration of taxes on mineral rights and on personal capital other than land.

“The imposition and administration of terminal taxes on railway, water, or air-borne goods and passengers, and taxes on railway tickets and goods freight.

“Stamp duties which are the subject of legislation by the Indian Legislature at the date of Federation.

“The imposition and administration of taxes not otherwise specified in this List or List II, subject to the consent of the Governor-General, given in his discretion after consulting Federal and Provincial Ministers or their representatives.”

The Provinces will have exclusive powers of taxation with reference to the following subjects :

- “1. Revenue from the public domain, including lands, buildings, mines, forests, fisheries, and any other real property belonging to the Province.
2. Revenue from public enterprises such as irrigation, electric power, and water supply, markets, slaughter houses, drainage, tolls and ferries, and other undertakings of the Province.
3. Profits from banking and investments, loans and advances, and State lotteries.
4. Fines and penalties arising in respect of subjects administered by the Government of the Province.
5. Fees levied in the course of discharging the functions exercised by the Government of the Province and local authorities, such as court fees, including all fees for judicial or quasi-judicial processes, local rates and dues, fees for the registration of vehicles, licences to possess firearms and to drive automobiles, licensing of common carriers, fees for the registration of births, deaths, and marriages, and of documents.
6. Capitation taxes other than taxes on immigrants.
7. Taxes on land, including death or succession duties in respect of succession to land.
8. Taxes on personal property and circumstance, such as taxes on houses, animals, hearths, windows, vehicles;

- chaukidari taxes; sumptuary taxes; and taxes on trades, professions, and callings.
9. Taxes on employment, such as taxes on menials and domestic servants.
 10. Excises on alcoholic liquors, narcotics (other than tobacco) and drugs, and taxes on consumption not otherwise provided for, such as cesses on the entry of goods into a local area, taxes on the sale of commodities and on turnover, and taxes on advertisements.
 11. Taxes on agricultural incomes.
 12. Stamp duties other than those provided for in List I.
 13. Taxes on entertainments and amusements, betting, gambling, and private lotteries.
 14. Any other receipts accruing in respect of subjects administered by the Province."

"Revenues derived from sources in respect of which the Legislature of a Governor's Province has exclusive or concurrent power to make laws will be allocated as provincial revenues."

"Revenues derived from sources of which the Federal Legislature has exclusive power to make laws will be allocated as Federal revenues," subject, however, to certain assignments to Provinces or States from Federal revenues. It will be noticed that the Federation has powers of taxation in respect to two sets of subjects. There is a vital distinction in the purposes for which such taxation is to be raised with reference to these two sets of subjects. In the first case the proceeds of such taxation will accrue to the Federal fisc and will be utilized exclusively for Federal purposes. The proceeds of all taxation derived from customs duties, from the manufacture and sale of salt, from various excise duties, and from corporation taxes, will be credited to Federal revenues.

With reference to the second set of subjects the position is radically different. Excluding income tax, the revenue derived from other sources set out in the second list will be credited solely to the Provinces. The revenue from income tax on what may roughly be described as personal income will be shared in certain proportions by the Federation, Provinces, and such States as will accept Federal jurisdiction in this matter. The Constitution provides :

"Duties on property passing on death (other than land).

"Taxes on mineral rights and on personal capital (other than land).

"Terminal taxes on railway, water or air-borne goods and passengers, and taxes on railway tickets and goods freights.

"Stamp duties which are the subject of legislation by the Indian Legislature at the date of federation."

"A prescribed percentage not being less than 50 per cent nor more than 75 per cent of the net revenue derived from the

"Taxes on income (other than agricultural income) except taxes on the income or capital of companies."

Federal officers or taxes on income attributable to Chief Commissioners' Provinces and other Federal areas) will be assigned on a prescribed basis to the Governors' Provinces."

"Provision will be made enabling this arrangement, with such modifications as may be found necessary, to be extended to any State member of the Federation which has agreed to accept Federal legislation regarding the taxes on income referred to in the margin as applying to the State."

"For each of the first three years after the commencement of the Constitution Act, however, the Federal Government will be entitled to retain in aid of Federal revenues out of the moneys which would otherwise be assigned to the Provinces (the amount distributed to the Provinces being correspondingly reduced) a sum to be prescribed and for each of the next seven years a sum which is in any year less than that retained in the previous year by an amount equal to one-eighth of the sum originally prescribed. But the Governor-General will be empowered in his discretion to suspend these reductions in whole or in part, if after consulting the Federal and Provincial Ministers he is of opinion that their continuance for the time being would endanger the financial stability of the Federation."

"The Federal Legislature will have power to impose surcharges for Federal purposes on taxes on 'income other than agricultural income,' no part of the proceeds of which will be assigned to Governors' Provinces or other units."

While such surcharges are in operation each State

"The net revenues derived from the sources specified in the margin will be assigned to the Governors' Provinces. The Federal Legislature will in each case lay down the basis of distribution among the Provinces, but will be empowered to impose and retain a surcharge on such taxes for Federal purposes.

(exclusive of any surcharges imposed by the Provinces, and of revenues derived from taxes on the official emoluments of

member of the Federation (unless it has agreed to accept Federal legislation regarding taxes on income as applying to the State) will contribute to Federal revenues a sum to be assessed on a prescribed basis! These provisions embody the permanent arrangements for the raising of revenues for the Federation and the Provinces. The strength and weakness of these financial proposals can best be appreciated by an examination of the general principles which have been adopted in various Federations in the allocation of resources and the levy and collection of taxes. In some of the earlier Federations the need for a clear demarcation of the spheres of taxation was not recognized, and so long as the requirements of the State were few and the resources amply sufficient to cover them, no great difficulties were felt in carrying on the administration. But when the time came for the Federation to take upon itself onerous duties requiring large financial resources and the units were similarly called upon to undertake responsibilities involving financial obligations, that the weakness of the system came to be seriously felt. It is a tribute to the genius of the American statesmen, and particularly to the political sagacity of a series of jurists who occupied the position of Chief Justice of the Supreme Court and not a compliment to the rigid Federal Constitution, that America has been able to adjust its financial resources to its needs during the last hundred and fifty years. The doctrine of implied powers, the judicial interpretation of what constitutes direct and indirect taxes, and various other expedients which both the Federal Governments and the States have resorted to form a feature of the American system of finance, and not its most satisfactory feature either. The competition for taxation between the States and the Federation, the uncertainty which prevails owing to the fact that the same business or property is taxed under different names by different authorities and the conflict of jurisdictions which it has been impossible to avoid in some cases mark the unsatisfactory features of the American system, and are a lesson to newly formed Federations. It is not surprising, therefore, that the Constitution of the German Republic

makes specific provisions against such evils. Article 11 states :

“In the course of legislation, the Federal Government may draw up regulations as to the admissibility and mode of collection of State taxes, in so far as they are requisite for the purpose of preventing—

1. Loss of revenue or action prejudicial to the commercial relations of the Federation ;
2. Double taxation ;
3. Charges for the use of public lines of communication and their accessories, which are excessive, and constitute a hindrance to traffic ;
4. Assessments which are prejudicial to imported goods, as opposed to home products, in dealings between the separate States and parts of a State ; or
5. Bounties on exportation ;

or for the protection of important social interests.”

The principles of the allocation of revenues between the Federation and the States has been the subject of careful study by a Commission on Taxation which reported on ✓—Australian finances in 1923. The Commission reported that the following principles should be adopted :

- “1. It should not have any tendency to weaken the Federal spirit.
2. It should be capable of early application.
3. It should in the first instance be by voluntary agreement between the Commonwealth and the States.
4. It should be reciprocal.
5. It should not involve the financial embarrassment either of the Commonwealth or of any State.
6. It should sensibly reduce double taxation, the duplication of effort, and the unnecessarily large expenses involved in the existing system.
7. It should attach to the respective authorities the spheres of taxation which seem most appropriately to belong to them.”

How far do the proposals in the Indian Constitution satisfy the requirements of sound Federal finance? The Peel Committee which first examined the question at the Round Table Conference recommended that any scheme of Federal finance should be such as to secure “a consider-

able degree of elasticity in the financial framework." To what extent has this elasticity been secured? Double taxation and the conflict of jurisdiction in fiscal matters are the two danger points which have to be avoided. Are the Indian proposals reasonably free from these dangers?

The Federation has an exclusive power of legislation with reference to death duties, taxes on mineral rights, terminal taxes, and certain stamp duties. The proceeds of these taxes, however, will be credited to the Provinces. The report of the Federal Finance Committee, 1932, states in justification of this proposal:

"One fact which has come out clearly in our investigations is the widespread recognition of the need for uniformity of taxation throughout India in certain fields. It is for this reason that we have already suggested that the Federal Government should retain the power of legislation in regard to certain sources of revenue levied for the benefit of the units. The allocation to the Federal Government of the power of taxation in these fields in no sense implies that the actual collection of the taxes concerned should necessarily be placed in the hands of Federal officers, and it may be worth noting that the collection of the existing duty on petroleum products in British India is carried out by officers in the service of the Provincial Governments."

The advantages of a uniform level of taxation throughout British India, and of common principles of assessment and collection, have been secured by such a provision. The levy of terminal taxes by the Federation may be justified on another ground also. A complete latitude to Provinces in these matters may seriously affect the railway earnings of the Federation. In many municipalities where the system of octroi is in force "there appears to be a tendency to substitute for the general levy of dues on all goods entering the municipal boundaries the simple alternative of a terminal tax collected at the railway station, and there is already a danger that this habit may result in diversion of traffic to the roads." But while the advantages of a centralized system of the levy and collection of these taxes are obvious, its disadvantages cannot be overlooked. The first anomaly that strikes one is the fact that the responsibility of taxation

falls on one set of authorities, while the benefit of it accrues to another. The Federal Legislature must undertake the odium of levying these taxes if the Provinces are agreed that the taxes are necessary and that agreement can be obtained only by taking the wishes of the Governments into account. If the members of the Federal Legislature reject the proposals for taxation, they may either prejudice the position of Provincial Governments or hamper their progress. If they adopt the proposals, they may be acting contrary to the wishes of their electorates. The problem is all the more complicated because the voters for the Federal Legislature are more limited than those for the Provincial Legislatures.

Again, on what basis should the Federal Government decide to raise these taxes? Is it with the unanimous consent of all the Provincial Governments, or with the consent of the majority of them? If it is only with the consent of a majority of Provincial Governments, the anomaly will arise of a Province obtaining the resources of a taxation which it does not need out of a tax which it does not desire. A cardinal principle in the theory of taxation that no more taxes should be raised than are necessary for the purposes of a State will have been violated. These difficulties are not solved by the curious provision in the Constitution that—

“Legislation concerning any of the forms of taxation mentioned in the three preceding paragraphs which directly affects any revenues assigned to the Provinces under these paragraphs will require the previous consent of the Governor-General given in his discretion after consultation with the Federal and Provincial Ministers.”

But the fashionable device of making the Governor-General a *deus ex machina*, whenever inscrutable and insoluble problems arise, does not provide a happy solution.

The provision relating to the levy of income tax raises even more difficult issues. It has been proposed that as a permanent feature of the Federal financial system, the proceeds of the taxes on personal income should be divided in certain proportions between the Provinces and the Federation, the Federal Legislature again acting as the

instrument for the levy of such taxation. The dilemma presents itself in this case also of either unwanted resources being thrust on a State or of essential income being denied to another. In fact the dilemma presents itself in a more acute form because in this case not merely the needs of the different provincial units, but also those of the Federation have to be considered. It has been suggested that a minimum of 50 per cent of the proceeds of the tax should be handed over to the units. If the Provinces are in need of augmenting their resources by the levy of income tax, the tax has to be fixed at such a rate as to yield not merely the amount required for the Provinces, but an equal amount for the Federation, whether it is required by the Federation or not. Conversely, if a certain amount is required for the Federation, the pitch of the taxation should be so high as to yield an equal amount for distribution among the Provinces.

There is another strong and overwhelming objection to such taxation forming a permanent feature of the fiscal system of the Federation. One class of units of the Federation, the Indian States, have not accepted the levy of taxes on personal incomes in their areas. Though provision is made enabling any State member of the Federation to accept Federal legislation regarding taxes on personal income, it is difficult to see why any State should voluntarily undertake this burden. In these circumstances a system of taxation whereby some of the units of the Federation alone continue to bear permanently the burdens of such taxation cannot by any canons of financial propriety stand justified. Equality of burdens of taxation among the units of the Federation for Federal purposes is of the essence of a Federal system of finance. By equality of burden is not meant that each unit of the Federation should pay an identical amount to the Federation, and in fact such a condition would result in greater iniquity. The question whether State representatives can share in the deliberations of the Legislature when measures of taxation of this kind are under discussion presents itself in an acute form. Money Bills are of more than ordinary importance to any Govern-

ment, and the temptation to use the State bloc which is not affected by such legislation to pass these measures would be very strong to a harassed Finance Minister. Nor can the non-intervention of the State representatives be left to the growth of conventions. A Government which makes the passage of a money Bill a vote of confidence in itself can easily require and justify the participation of State representatives. Difficulties and anomalies can be multiplied. The fact is that as a permanent feature the proposal about income tax on personal property is not justified, and is opposed to the recommendations of the Round Table Conference. The Report of the Committee of the Round Table Conference on Federal Finance says :

“The aims which we have kept in view may be summarized as follows: to provide that all Provinces may start with a reasonable chance of balancing their budgets; to afford them the prospect of revenue sufficiently elastic for subsequent development; to assure the solvency of the Federation; and to ensure *that after an initial period the Federal sources of revenue shall be derived from British India and the States alike.*”

The Committee therefore proposed that :

“In order to ensure the solvency of the Federal Government until the existing abnormal conditions have passed and sufficient time has elapsed for the development of new sources of revenue, it is proposed that out of the provincial share of taxes of income the Federal Government should retain a block amount for a period of ten years. On the question whether the initial amount should continue in full for the entire period of ten years, we do not express a final opinion, but on the whole we think it would be better to divide that period into two parts. On this basis *the amount would be fixed for a number of years, and would then be gradually reduced to zero, on a scale provided under the Constitution during the period of ten years.*”

These provisions are understandable. India is not writing on a clean slate. Certain transitory provisions are necessary whether they are just or not. The recommendations of the Committee are on the basis that the unequal provisions will be for only a transitory period, and that the normal system will be one wherein the Federal sources of revenue will be

derived from all units alike. The Constitution provides for the transitory arrangement not wholly in accordance with the recommendations of the Committee :

“For each of the first three years after the commencement of the Constitution Act, however, the Federal Government will be entitled to retain any aid of Federal revenues out of the moneys which would otherwise be assigned to the Provinces (the amount distributed to the Provinces being correspondingly reduced) a sum to be prescribed, and for each of the next seven years a sum which is in any year less than that retained in the previous year by an amount equal to one-eighth of the sum originally prescribed. But the Governor-General will be empowered in his discretion to suspend these reductions in whole or in part if, after consulting the Federal and Provincial Ministers, he is of opinion that their continuance for the time being would endanger the financial stability of the Federation.”

Where the White Paper has differed from the recommendations is in making the Federation share permanently a portion of the proceeds of taxes on personal income, which are leviable only in Provinces and not in States.

There is another source of revenue proposed for the Federation, but which will not be shared by all the units of the Federation. The railway administration of India will be a Federal subject, but with certain limitations. So far as railways owned and managed by Indian States are concerned, they will be subject to Federal legislation, and to a limited extent the policy that should be adopted in their management will be laid down by the Federal Government. The ownership of these railways being vested in the Indian States, the profits arising from them will be appropriated by the States concerned. The British Indian Railways, on the other hand, come under the complete control of the Federation, though they will be administered by a statutory railway authority. A Committee which sat recently to consider proposals for the future administration of Indian Railways has recommended that “after meeting from receipts the necessary working expenses (including provision for maintenance, renewals, depreciation, bonus, and interest on provident funds, interest on capital and other

fixed charges, payments to companies and Indian States under contracts or agreements) the surplus will be disposed of in such manner as may be determined from time to time by the Federal Government under a scheme of appropriation running for a period not less than five years."

A considerable portion of the railway contribution will be set off against the provision made by the Federal Government for the amortization of that part of the public debt which represents "capital at charge" in the railways. This is a fair arrangement, as the capital has been used for the development of purely British Indian railways. But to the extent that the Federation receives any portion of the railway earnings which are not offset by any amortization charges, revenue derived from a part is credited to the whole. This and similar anomalies may be defended on the ground that the Federation has undertaken the payment of subventions either permanently or for a definite period to some of the British Indian Provinces.

Finally, there are two sources of revenue which have been allocated to the Federation, not as normal sources, but as sources which may be availed of in exceptional circumstances. In an emergency the Federation has the power to impose a Federal surcharge on those revenues which it raises for the exclusive benefit of the Provinces. It has further power to impose a surcharge on personal income tax. The Constitution provides :

"The Federal Legislature will have power to impose surcharges for Federal purposes on taxes on income (other than agricultural income), no part of the proceeds of which will be assigned to Governors' Provinces (or other units). While such surcharges are in operation, each State-member of the Federation (unless it has agreed to accept Federal legislation regarding taxes on income as applying to the State) will contribute to Federal revenues a sum to be assessed on a prescribed basis."

The Federal Finance Sub-Committee in explaining the need for this power observed :

"In addition to the normal powers of the Federal Government we also contemplate as an integral part of the scheme

special powers to meet such a situation as might arise if the Federal budget, initially balanced by the amount retained from the Provinces, failed to remain balanced despite increased taxation upon existing sources and the development of new sources of revenue permanently allocated to the Federation; it is implicit in the scheme that the Federal Government should do its utmost to develop its permanent resources from the outset. It is accordingly proposed that so far as British India is concerned the Federal Government should have power to levy for its own purposes additional tax on the heads of income tax permanently assigned to the Provinces. Whenever this is done the Federal Government would also levy proportionate contributions on a determined basis from States as prefer not to come into a Federal income tax."

Apart from the question of the basis on which contributions may be levied from the States, the scheme presents difficulties. The Federal Legislature may in this case include the State representatives when it decides on the question of surcharge, as the States will be affected, though not directly by the surcharge itself, still as completely by the contributions which must necessarily accompany the surcharge. But this proposal only emphasizes the unworkability and impropriety of the proposal which has already been criticized that as a permanent feature of the financial arrangements a share of the personal income tax should be credited to the Federal fisc. The power of surcharge is an emergency one, to be utilized when all other normal sources of revenue have been found insufficient to meet the demands of the Federation. If the Federation can raise the level of income tax as a normal source of revenue, when can the emergency arise for a surcharge? Viewing the problem from another angle, when and how can it be determined that an increase in the income tax is a normal development of the resources of the Federation or an abnormal measure or a surcharge necessitating a proportionate contribution from the Indian States? Does it really depend upon a little terminological juggling on the part of the Federal Government? If the rate of income tax is raised by a pie, is it a normal expansion of Federal revenues? If, on the other hand, the Bill provides that the rate of income tax will be raised by another 5 per

cent, does it become a surcharge? An answer to these conundrums can only be found in a radical alteration of the provisions relating to personal income tax.

Whatever may be the period during which a share of such income tax is credited to the Federal fisc, a permanent arrangement can only be based on the allocation of the entire tax to the British Indian Provinces. After the transitory period, the Federation must rely only on its power of surcharge. Under this arrangement an increase in the level of income tax will be made either when the Provinces make a unanimous demand for the purpose, in which case it will be clear that the Federation legislates only for their benefit, or if the Federation needs these resources, in which case it will take the form of a surcharge, the proceeds of the additional taxation being credited to the Federal fisc. If only a single Province or some of the Provinces desire to augment their resources by an increase of the income tax within their area, power may be given to the Provincial Legislature or Legislatures to levy a surcharge. There must be a limit, however, to the extent of this surcharge, for if it were unlimited the power of the Federal Government to impose its surcharge may be rendered nugatory. The Constitution therefore provides :

“The Provincial Legislatures will be empowered to impose by their own legislation surcharges on taxes on personal income of residents in the Province, the net proceeds going to the Province. Collection would be carried out by Federal agency. It is intended that an upper limit for such surcharges should be imposed, fixed at 12½ per cent of the rates of taxes on income in force at any time, exclusive of Federal surcharges.”

The extent of the permanent resources of the Federation, their elasticity, and their sufficiency may now be examined. The Constitution has avoided the adoption of any rigid principle relating to the distribution of direct and indirect taxes. It would be noticed that the Federation has the control of both direct and indirect taxes. The most important source of indirect taxation is the revenue from customs duties, which in the year 1931 amounted to 50 crores of

rupees, while the total expenditure of the Central Government was 80 crores. The first consideration that strikes one on a study of these figures is that the receipt from indirect taxation is proportionately very high. In the United States in 1926-27 the revenue from taxes amounted to 86.44 per cent of its total revenue, of which income tax contributed 40.16 per cent, the estates duties 2.8 per cent, customs 14.43 per cent, and excises 17.41 per cent. In Switzerland in 1925 72.8 per cent of the revenues was derived from indirect taxes, of which customs contributed 61.22 per cent. In the new German Republic in the year 1927-28 indirect taxes were estimated at 16.54 per cent of the total revenue, while direct taxes formed 35.57 per cent. In Australia in 1924-25, out of a total tax revenue of 52.8 millions, direct taxes contributed 15.6 millions, the remainder coming from excise, customs, and receipts. The danger of too great a reliance being placed on receipt from customs for Federal expenditure cannot be disregarded. The present economic position due to the fall in prices of commodities and consequent depression in trade has already brought this home to the Indian and to the Indian Government. Customs revenue has steadily declined during the last few years in spite of an increase in tariffs and surcharges. Moreover, India is at the present time strongly dominated by a protectionist policy. The peak of high tariffs appears to have been reached, and in the case of some commodities at least the law of diminishing returns has begun to operate. Sugar which was imported in large quantities into India and a duty on which yielded a substantial sum to the Exchequer is to-day imported in negligible quantities. In 1921-22 the yield from customs duties was 34 crores of rupees, and in the pre-war days it was much less. The phenomenal rise has been almost entirely due to the strong protectionist trend in India. The effect on customs revenue of this policy may result in a virtual embargo on the import of many commodities and a consequent reduction in the revenue.

On the other hand, an exactly contrary tendency may

produce much the same result. There has so far been no strong voice raised in India in favour of a policy of free trade. Political motives have been even stronger than economic considerations in the adoption of the policy of high tariffs. The free trader has been hushed into silence by the political forces which have been necessarily most active in a period of transition and great political upheaval. If the country settles down to peaceful and constructive internal administration under the new dispensation, one may confidently expect the voices of the raw producer and the consumer to be heard more distinctly in the Assemblies. This factor again will have a considerable effect on the yield from customs duties.

The Federation is therefore provided with a counter-vailing excise duty which may mitigate the loss due to high tariffs. If the import of sugar falls very considerably on account of high tariff rates, it is not unfair that the internal industry which has received a special impetus, and has been able to establish itself as a prosperous concern, should be made to contribute to the Exchequer. An excise duty on sugar manufacture in the country may therefore balance the loss from customs revenue. Similar excise duties may be imposed on commodities even when a high tariff does not prevail, if during a period of protection the industries so rationalize their plants as to sell their products at less than the selling prices of imported commodities, and thus lead to diminution in the imports of the commodities and a falling off in customs revenue.

An important source of Federal revenue will be what has been termed the corporation tax. The imposition and administration of taxes on the income or capital of corporations will accrue to the Federal centre. The corporations referred to are commercial corporations, companies carrying on business in India. In addition to this the income tax levied on Federal officers, the income tax collected in Federal areas as distinguished from States and Provinces, from individuals, the income tax on Government of India securities, and the tax on the income of persons not resident

in British India, would accrue to the Federal Exchequer. It is estimated that at present this tax would yield $5\frac{1}{2}$ crores of revenue from British India alone. As a permanent feature of Federal finance the tax will be levied on companies whether they are in British India or in Indian States. The Indian States have agreed to come into this scheme only to the extent of having their companies subjected to a tax by the Federation. The agreement is valuable not only from a pecuniary point of view, but also from a national point of view. If the corporation tax had applied to purely British Indian companies, then a migration of companies into the States would be facilitated. For the existence of cheaper and less organized labour conditions in the States, and the facilities which some States have offered to companies in the form of free grants of lands or otherwise, have resulted in concerns run by British Indians being established in State areas. Labour legislation will not apply to the Indian States, and if to all these advantages the additional privilege of an exemption from income tax is added, or a low level of State taxation, = ✓ there is more than a likelihood of companies migrating.

The surcharges which the Federation can levy on the taxes which are primarily credited to the Provinces form again a valuable asset, and will contribute substantially to the elasticity and expansibility of Federal revenues. To these sources of revenue must be added the contribution from railway earnings and a share of the profits of the Reserve Bank. It is difficult to foresee what demands will be made on the Federal Exchequer. But taking as long a view as possible of the whole position, the resources of the Federation do not appear to be inadequate to meet all contingencies. The possibility of economies, particularly in the military expenditure of the country, cannot be overlooked. But a note of caution must be sounded against any tendency to consider that the inauguration of the new Constitution will synchronize with a period of low taxation. ✓ Neither in the Provinces nor at the centre will it be possible to substantially reduce the level of taxation if the emergency surcharges of the last two years are not taken into con- ✓

sideration in fixing the level. What is possible in the India of the future is an allocation of expenditure along more fruitful lines than has hitherto been possible, so as to ensure "maximum social advantage" accruing to the community.

There is, however, an aspect of Federal finance which cannot fail to impress one as unsatisfactory, but for which there appears to be no proper solution. In the chapters on "Allocation of Subjects between the Federation and the Units" and in "States and Federation" it has been pointed out that some States can exclude certain subjects or aspects of Federal administration of those subjects without militating against the principle of Federation. In the light of such exceptions, one may ask what exactly will be the contribution of such States to the Federal fisc? The problem presents itself in its acutest form when the position of some of the maritime States is taken into account. The State of Nawanagar appropriates all the customs revenue which it derives from its ports with reference to all articles consumed within the territory of the State. Again, the Nawanagar Darbar undertook so to regulate the production of salt in its territory for the consumption of its inhabitants alone. The State therefore does not contribute to the revenue derived from salt of the Federation. The possibility of an excise duty within the area or of a corporation tax is negligible owing to the lack of commercial development. What is the extent of contribution of such a State to the normal revenues of the Federation? The only appreciable contribution will be an emergency one when the Federation raises emergency revenue through surcharges.

Nawanagar is not unique, and names of many other States more or less in similar position come up to the mind. At the other extreme is a State like Mysore, which has been contributing to all the indirect taxes of the Central Government, and will continue to do so to the Federation. In addition, it pays a tribute of a substantial amount to the paramount power creditable to the Federal revenues. It has been generally agreed that the payment of tributes is inconsistent with the status of Federal units, but practical financial

considerations appear to have dictated the limits within which such tributes can be waived immediately. Mysore will be relieved of only half the amount of its tribute on the inauguration of the Federation, and must await a more auspicious opportunity for a cancellation of the whole. These are some of the inequalities and injustices which force themselves on the attention of a student of Federal finance in India.

If attention has been directed to the anomalous position of certain States in relation to Federal finance, it is only fair that reference should be made to the position of certain Provinces. The obligation has been cast on the Federation of making subventions from Federal revenues to some of the Provincial Administrations either permanently or for a definite period of years. Subventions, grants, and assignments from the Federal centre to the units have been features of the financial systems of several Federations. In particular, at the initiation of a Federation such subventions have been found necessary to start the units on an even financial keel. The British North America Act contains the following provision:

"The following sums shall be paid yearly by Canada to the several Provinces for the support of their Governments and Legislatures:

	<i>Dollars</i>
Ontario	80,000
Quebec	70,000
Nova Scotia	60,000
New Brunswick	50,000
	\$260,000

and an annual grant in aid of each Province shall be made, equal to 80 cents per head of the population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick by each subsequent Decennial Census until the population of each of those two Provinces amounts to 400,000 souls, at which rate such Grant shall thereafter remain. Such Grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada

shall deduct from such Grants as against any Province, all sums chargeable as interest on the Public Debt of that Province in excess of the several Amounts stipulated in this Act."

"New Brunswick shall receive by half-yearly payments in advance from Canada, for the period of ten years from the Union, an additional allowance of 63,000 dollars per annum; but as long as the Public Debt of that Province remains under 7,000,000 dollars, a deduction equal to the interest at 5 per centum per annum on such deficiency shall be made from that allowance of 63,000 dollars."

The Constitution of Australia provides:

"That during a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such conditions and terms as the Parliament thinks fit."

The financial position of many of the Indian Provinces is at present precarious. Their resources have been insufficient to meet the growing demands of administration. The manner in which they have been formed into administrative units has in some cases inevitably resulted in financial maladjustment. The causes which led to the formation of such Provinces were political, and financial considerations did not prevail in the decision to integrate them into such areas. The North-West Frontier Province came into existence as a military necessity. Assam was made an administrative unit when the partition of Bengal had to be cancelled and a settled fact had to be unsettled. On the eve of the Constitution of the new Federation two new Provinces have been carved out of older administrations—Sindh and Orissa—owing to political rather than to administrative reasons. These Provinces will find it impossible to balance their budget with the resources at their disposal, even if income tax is made a provincial source of revenue. They cannot be left in that helpless position without serious detriment to the Federation as a whole. The White Paper states:

"It is anticipated that certain Provinces will be in deficit under the proposed scheme (of allocation of revenues to Pro-

vinces). The North-West Frontier Province will, as now, require a contribution from the centre in view of its special position. — The new Provinces of Sindh and Orissa will not be able to start as entirely self-supporting units. Some of the existing — Provinces, notably Assam, are likely to need assistance, at least for a time. It is intended that these Provinces should — receive subventions from Federal revenues. These subventions may be either permanent or terminable after a period — of years.”

It will be necessary at as late a stage as possible before the new Constitution actually comes into operation to review in the light of the then financial and economic conditions the probable financial position of both the Federation and the Provinces. It is only in the light of such review that it will be possible to settle such matters as the amounts and periods of the Provincial subventions, the percentage of taxes on income to be permanently allocated to the centre and the amount to be retained by the Federation temporarily out of the normal Provincial share of taxes or income. It is accordingly proposed that the determination of such matters should be by “Orders in Council, the drafts of which would be laid before both Houses of Parliament for approval.”

The subventions proposed under this scheme are not open to the objections that have been advanced against grants and assignments to Federal units. These subventions do not involve any measure of central control. Their payment is not coupled with any conditions as to the method of expending them, and autonomy of the Provinces is in no wise violated by receipt of such subventions. In many Federations, grants and assignments have been made units for specific purposes. The United States of America assists the units to promote vocational education, to ensure hygienic conditions, or to maintain highways by making such grants. The cantons of Switzerland receive similar grants for rendering social services. Similar grants are paid by Germany, Canada, and Australia. Though these grants are made primarily for the purpose of co-ordinating the units with the Federal centre, and not for the purpose

of controlling the administrations, an element of supervision or control is necessarily involved in such grants. The Indian scheme, however, definitely precludes such control.

To enable the Federal Government to grant these subsidies it is proposed that a large portion of the income tax should be retained by the Federation for a temporary period and that a certain percentage of it should be retained permanently to meet permanent subventions. This is one of the reasons why the proposal referred to earlier of 25 to 50 per cent of the income tax being retained for Federal purposes has been made. The amount of income tax so retained will, according to present calculations, vary from 3 to 6 crores. If the subvention to the North-West Frontier is excluded and the subvention to Sindh is fixed for a period of twelve years till the Sukkar Barrage scheme begins to be a remunerative concern, it will be found that the share of the Federation will be in excess of the amount that it has to pay by way of subventions. The subvention to the North-West Frontier Province must be a concern of the whole of India, as the military considerations which necessitated the formation of that Province apply to Indian States as much as to British India. It is clear, therefore, that too much consideration has been paid to the possibility of Indian States contributing for purely British Indian purposes, and that these proposals have been devised to avoid even the remotest chance of such a contribution!

The position of Bengal requires separate treatment. Its financial position is most unsatisfactory. Its deficit in the last Budget came up to over 2 crores of rupees. Many outside Bengal have attributed this disastrous position to the existence of the permanent revenue settlement and to the inelasticity of land revenue which has formed the mainstay of the finances of other Provinces. A few have suggested that there is some weakness in the administration, notably in the collection of excise revenue, which yields a very small amount relatively to the size and population of the Province. The smallness of the amount may have been

viewed with satisfaction, if any policy of prohibition had been adopted and enforced in the Province.

But in the absence of such a policy it has seemed to them that there is an unnecessary loss from this source. The advocates of Bengal have, on the other hand, pointed out that the Province contributes largest through the income tax—this amount being 4 crores out of a total of 13.50 crores of personal income tax other than super tax on companies. They have further remarked that the cultivation of jute is the largest agricultural occupation of the Province, and that owing to the levy of export duty by the Central Government, the Provincial Administration is unable to levy any taxes on such cultivation. The suggestion has therefore been put forward that for the stabilizing of the finances of the Province it should be given a share of such export duty. The Constitution provides that “in the case of export duties on jute or jute products an assignment to the producing units will be compulsory and will amount to at least 50 per cent of the net revenue from the jute industry. As jute is virtually a monopoly of the Province of Bengal, a very small portion of it being grown in the Province of Madras, the relief is intended mainly for Bengal.

Export and excise duties have been classed as Federal sources of revenue. In a large continent like India the excise duties on particular articles will virtually be levied from certain Provinces alone, where such articles are grown or manufactured. Cotton is grown in only some of the Provinces of India. If an excise duty on cotton were necessitated, and the contingency is not unlikely if the policy of high tariffs is pursued, will Madras and Bombay, the chief cotton-producing areas, be entitled to claim a share of such duties? If an excise duty on sugar were to be levied, would the United Provinces, Bombay, and Madras, be entitled to a share therefrom? The Constitution does not provide for it, and rightly so. The special provision with reference to Bengal is a breach in the principle of excise duties, and, though it may be justified by special conditions, cannot form a precedent. The resort to a subvention has not been

adopted as the amount involved is large and the payment of it would further reduce the revenue from income tax available for distribution to Provinces. It is difficult to find a logical basis or a proper justification for such differentiations. One must accept as a justification the phrase, which is so commonly used by politicians, and which serves to cloak many illogicalities and inconsistencies—the phrase “practical considerations.”

The position of the Provinces may now be examined. It will be seen from the list of subjects of taxation, which are exclusively Provincial, that all sources of revenue at present available to the Provinces are intended to be reserved for them in the future also. In addition, there are certain fresh sources of revenue which the Provinces will hereafter command. There are the taxes which can be raised only by the Federation, but the proceeds of which will be distributed entirely to the Provinces. These are the death duties, terminal taxes, and certain stamp duties which have already been referred to. There is, again, a large source of revenue derived from taxes on income, other than the corporation income tax, which will to an increasing extent be available for distribution to the Provinces. The Provinces also will have, further, individually the right to levy a surcharge on the income tax up to 12½ per cent—a source of revenue which cannot be considered negligible. Above all, the deficit Provinces will receive subventions of prescribed amounts either for a stated period or permanently, and Bengal will be credited with at least 50 per cent of the revenue from export duty on jute or jute products. These provisions indicate that care has been taken to ensure, as far as legislative provisions can, the financial stability of the Provinces. Whether in actual practice every Province will be on a sound financial basis or not must depend on various factors outside the scope of legislative enactments. The capacity of the people to bear taxation, the development of trade and commerce, and in agricultural Provinces the blessings of Heaven, and finally the courage of Ministers and political legislators, will all play a part in bringing about the desired end.

The list of sources of taxation for the Federation and the Provinces has been drawn up with the greatest care, and it is impossible to foresee any fresh sources of taxation for either the Federation or the Provinces at the present juncture. But conditions may change and sources of taxation may be available which do not now find a place in either of these lists. The contentions which have arisen in other Federations, whether a particular source of taxation belongs to the Federation or the units, have been avoided in the Indian Constitution, and it will not surprise the reader to find that it is the interposition of the Governor-General which solves the difficulty. The Constitution provides that—

“sources of taxation not specified in any schedule will be provincial, but the Governor-General will be empowered, after consultation with Federal and Provincial Ministers or their representatives, to declare in his discretion that any unspecified source of taxation should be Federal.”

Perhaps in this instance the rough-and-ready method of an arbitral decision by the Governor-General is as good as any that can be devised for the solution of such moot questions.

The imposition of taxes by the Federal Legislature for allocation of the proceeds in whole or in part to the Provinces raises a very important and not the least difficult question of the basis on which such allocation should be made. The distribution of revenue from death duties or terminal taxes is a comparatively simple matter. The source of taxation is ascertainable, and the proceeds will be distributed according to this test. The question of the distribution of income tax is, however, of a much more complicated nature. The Federation will not have the right to distribute it according to its notions of what is right and proper. The Constitution Act will lay down, probably through statutory rules framed thereunder, the methods of such distribution. The exact manner in which these should be distributed have not yet been decided upon, and it may be useful to discuss suggestions made in this respect. The Federal Finance Committee was of the opinion that a proper basis of distribution of income tax receipts must satisfy three fundamental tests:

- “(a) It should be simple, easily understood, and administratively workable.
- (b) It should give results as between Province and Province which are likely to be accepted as fair on the whole.
- (c) It should not be incompatible with the idea of a Federation of autonomous units.”

They proceed to examine the various bases which have been suggested in the light of these principles. The problem is really that of determining the economic allegiance of the individuals where there are competing authorities claiming the tax. The four factors which have to be considered in determining the economic allegiance of an individual are the acquisition of wealth, the location of wealth, the enforceability of rights to wealth, and the consumption of wealth. Corresponding to these four considerations would be “the four points which become of significance in considering the proper place of taxation. The principle of acquisition corresponds to the place of (1) origin of the wealth; the principle of location to that of (2) *situs* of the wealth; the principle of legal rights to the place of (3) enforcement of the rights to wealth; the principle of consumption or appropriation or disposition to the place of (4) residence or domicile.”

The first basis which obviously suggests itself in the distribution of income tax to the Provinces is the basis of collections! The Provinces would receive according to this criterion the amount of income tax collected from its area. This basis would lead “to gross injustice as between Province and Province. Companies often operating over large areas are assessed at a single place, the head office, which in most cases is located in the industrially more advanced Provinces. There is no reason why merely because of the accident that income is assessed or tax collected there, these Provinces should benefit at the cost of others in which the income accrues or the taxpayer resides.”

Population by itself cannot serve as an index for the distribution of revenues as among the Provinces. The third basis suggested is that of origin. As a scientific method for

allocation, there is much to be said in favour of it. It has, however, been pointed out that it is not administratively workable; it would be difficult to trace the sources of incomes of individuals, and "even in respect of the income of companies it would be workable only if the allocation were to be made wholly on arbitrary grounds, either by investing income tax officers with unlimited discretion or by laying down uniform rules of allocation, irrespective of widely varying conditions."

The last method which has been suggested for the allocation of revenues is the basis of residence or domicile. Each Province will, on this basis, be credited with the tax paid by persons resident in it. This gives rise to no difficulty either in the ascertainment of income tax paid by individuals or personal super tax, since such super tax is not collected at source but after formal assessment. The income of non-residents and the undistributed profits of companies create a difficulty. A tax on such incomes cannot be distributed on the basis of residence. It has been suggested that the revenue from these taxes should be distributed on the basis of population. The Federal Finance Committee propose a scheme of distribution of the income tax between the Federation and each of the Provinces which takes into consideration some of the principles suggested above:

"On the basis that we have recommended, and on the data available to us, we estimate that the proceeds of taxes on income would be divided between the Federal Government and the Provinces in the following manner:

	<i>In Lakhs</i>
Total gross yield of income tax	18,00
Less cost of collection	80
	<hr/>
Net Yield	17,20
	<hr/>

Super tax on companies, tax on salaries of Federal officers, and personal income tax and super tax levied in Federal Areas (to be retained by the Federal Government)	3,70
Balance available for distribution to the Provinces ..	13,50

“Of this sum about Rs. 2,00 lakhs represent collections of personal super tax (i.e. other than company super tax) and would be distributed on the basis of actual collections from residents. Of the balance of 11,50, about one-seventh would approximately represent the estimated tax on the undistributed profits of companies and on the incomes of persons resident outside British India; and we suggest that this fraction of the income tax receipts should be distributed on the basis of population. The remaining six-sevenths would be distributed on the basis of the estimated share of personal income tax creditable to each Province. The following Table sets out the position.”

The units of the Federation which do not come under the scheme of Federal taxes on income are under an obligation to contribute to Federal revenues on a prescribed basis if a surcharge on income tax is levied for the benefit of the Federation. The important question therefore arises as to the principle of allocation to be adopted for the contributions which these units may be called upon to make. These units of the Federation are the Indian States which do not come under the Federal scheme of income tax. Three possible bases of allocation have been suggested. The first is the basis of the revenue of the units. This basis would be an easy and workable one, disturbing the finances of the State to the minimum extent and distributing the burdens according to the wealth of each State. Unfortunately, owing to the special administrative arrangements in each State, this does not appear to be feasible. There are no proper budgets in many of the States, showing the income and expenditure of the States.

The second basis is the application of a formula devised after a scientific survey of the relative taxable capacities of the States. This, while theoretically perfect, is an impossible basis in the absence of such a survey. The last basis is that of population. After the Federal surcharges are levied and the amount determined, the States as a group will be called upon to pay a proportionate sum. It is the distribution of this sum among the States that is now under consideration. The Federal Finance Sub-Committee proposes that where a State has a proper budgetary system

DISTRIBUTION OF INCOME TAX
(IN LAKHS OF RUPEES)

Province	2 Crores on Collections of Personal Super Tax	One-seventh of 1½ Crores on Basis of Personal Income Tax without Federal Salaries	Six-sevenths of 1½ Crores on Basis of Personal Income Tax without Federal Salaries	Total
Madras	7	30	1,46	1,83
Bombay	50	14	2,79	3,43
Bengal	1,10	32	2,63	4,05
United Provinces	8	31	84	1,23
Punjab	2	15	74	91
Bihar and Orissa	18	24	65	1,07
Central Provinces	3	10	46	59
Assam	1	6	22	29
North-West Frontier Province	1	2	7	10
Total	2,00	1,64	9,86	13,50

FEDERAL FINANCE

the revenue should be taken as the basis, and where it has not, the population. "Any units which are unable to present returns to the Federal Government on the lines laid down by the Auditor-General might be assessed on a population basis, the amount of the total contribution being divided for this purpose in proportion to population between these units and those accepting the revenue basis." The temporary financial arrangements which have been suggested for the Federation may now form subjects of investigation. It is not possible to start with a clean slate in Federal finance any more than in any other aspect of Indian administration. Past liabilities and commitments of the Government of India have necessarily to be taken into account. Indian States have put forward two conditions precedent for their entry into the Federation. They have suggested that the Federation should start with a balanced budget. They do not desire to enter into a partnership with an insolvent concern. It is most unlikely that the new Constitution will be started in such inauspicious circumstances. But the States cannot be taken to suggest that new Federal taxes should not be levied or the old rates of taxation increased for maintaining budgetary equilibrium on the inauguration of the Federation. The note of caution which the States have sounded can only be interpreted to mean that the emergency powers of the Federation cannot be used, and that the States cannot be called upon to make special contributions to the Federation at its inception.

Understood in this sense, the condition is not unreasonable, and its fulfilment may not be difficult. It has not been equally easy to deal with the second condition which the States have put forward. They have claimed that they should not be made liable as units of the Federation for any charges which British India may have incurred before the Federation was started. There are three classes of such charges, the liability for which the States have expressed an unwillingness to undertake. The pre-Federation debt of India, the pensionary charges which have to be paid for services rendered to British India, and any central charges which

may have to be incurred purely for British Indian purposes are the three liabilities which the State members of the Federation are not willing to undertake. *Prima facie* the position taken up by the States seems reasonable and not open to criticism. A closer examination will, however, reveal that there is not much substance in the objections put forward by the States. The total pre-Federation debt on March 31, 1931, was 11,82,67.17 lakhs of rupees.

				Rs.
Interest-bearing liabilities				11,87,47.25
Non-interest-bearing liabilities				29,89.28
				<hr/>
				12,17,37.13
Less liquid assets				34,69.96
				<hr/>
Total liabilities Lakhs				11,82,67.17

The assets of the Government of India may now be examined. The Federal Finance Committee estimated the assets of the commercial departments at 7,67,63.17 lakhs. The basis of their valuation was the capital shown as debited to these departments in the statement of the public debt of India. In the case of some of the commercial departments, notably the railways, the actual value of the assets would be very much greater as the charges for them were incurred at a time of low costs; in other words, if the railways had to be rebuilt and the other commercial departments of the Federation equipped afresh, the cost at present-day prices would be very much higher than that mentioned above. The interest-earning debts due from Provincial Governments are estimated at 1,51,82.53 lakhs. Other interest-earning advances made to Indian States and other authorities amount to 19,45.18 lakhs. The sums outstanding in respect of the commutation of pensions is 1,89.95 lakhs. The total interest-bearing assets of the Government of India amount therefore to 9,40,80.83 lakhs.

Besides this, the Government of India owns large properties which will be transferred to the Federal Government on its inauguration. The book value of these assets, some of

which yield a return in the form of rents, is estimated at 87,44.00 lakhs. The Finance Committee observe "the total value of the identifiable assets to be taken over by the Federal Government amounts there to 10,48,13.21 lakhs, without taking into account the numerous items for which no data are available."

It will be seen that there is a difference between the total liabilities and the total assets of over 100 crores. The Committee further add an item of 14,97.81 lakhs, the loss on the sale of silver up to March 31, 1931, to the total value of identifiable assets raising such assets thereby to 10,63,11.02 lakhs. They advance as a justification the curious reason, "had this loss been met from the Gold Standard Reserve, the currency assets to be taken over would have been correspondingly reduced, and this portion of the debt would not have existed." Even adopting this view, the difference between the liabilities and the assets is about 119 lakhs of rupees. The Committee state: "Having regard to the fact that the public debt has been taken at its nominal figure, and that irredeemable loans raised at 3½, 3, and 2½ per cent have not been reassessed on the basis of the more recent loans at higher rates of interest, and that the figure of 10,63,11.02 lakhs (the assets takes no account of a large and valuable block of assets), we do not hesitate to report that if the Federal Government assumed responsibility for the whole of the pre-Federation debt its obligation would be covered by the assets also taken over." Notwithstanding this, the States have complained that the amount of 119 crores is a deadweight debt, the service of which is not met by any resources, and to that extent the States should not be held liable.

The pensionary contributions of officers who have served British India and have retired before the inception of the Federation should in many cases be a liability of British India alone. Political and territorial pensions can, however, be treated as a Federal charge, as they have been incurred for defence purposes. The total amount of civil pension charge in the year 1930-31 was 273 lakhs. After analysing

various items of these charges the Federal Finance Committee states:

"The conclusion, then, is that, at the beginning of Federation there will be a rapidly declining non-effective liability in respect of ordinary and family pensions which is not likely to exceed 80 or 90 lakhs per annum. This liability should, theoretically, be apportioned between the various Provinces. Such an allocation, even if the necessary records exist, would, however, involve an expenditure of labour out of all proportion to the theoretical improvement in the presentation of the true position. It seems clear that the Federal Government will in effect retain out of the proceeds of income tax paid only in British India a much larger sum than the annual liability for pensions which are properly a charge against British India alone, at least for so long as such liability is of sufficient magnitude to be worthy of consideration. We therefore recommend that no attempt be made to show this 'central' liability of some 80 or 90 lakhs as a separate item in the superannuation charges (of something over 2½ crores per annum), which will appear in the Federal budget."

The third item of liability, the amount of central charges—is negligible, and is not a subject of serious controversy. It will be seen from the foregoing analysis that the Federation will have to incur liability for a number of years for certain charges which should be met by British India alone. It would result in serious administrative inconvenience if a separate account were to be maintained of these rapidly diminishing charges, and the necessary revenue raised separately from British India. The Constitution therefore provides that these charges should be made Federal from the outset, but having regard to the objections of the States a contribution is virtually levied from the Provinces much in excess of the amount required in part permanently and in part a temporary provision. The temporary provision is embodied in the following paragraph of the White Paper:

"For each of the first three years after the commencement of the Constitution Act, however, the Federal Government will be entitled to retain in aid of Federal revenues out of the moneys which would otherwise be assigned to the Provinces (the amount distributed to the Provinces being correspondingly reduced) a

sum to be prescribed and for each of the next seven years a sum which is in any year less than that retained in the previous year by an amount equal to one-eighth of the sum originally prescribed. But the Governor-General will be empowered in his discretion to suspend these reductions in whole or in part, if after consulting the Federal and Provincial Ministers he is of opinion that their continuance for the time being would endanger the financial stability of the Federation."

✓ The proposal is based more on grounds of expediency to facilitate the entry of the States into the Federation than on grounds of abstract justice.

Lastly, there remains the question of the borrowing powers of the Federation and the Provinces. The finance of the Federation will, like all other subjects except those included in the reserved departments, be entrusted to the Minister. "Unless occasion arises for the exercise of the Governor-General's special powers, it will therefore be for the Minister and the Minister alone to take decisions on all such matters as the means to be used for raising the necessary revenues, for allocating expenditure in the responsible field, and for the programme of external and internal borrowing."

The Constitution provides therefore :

✓ "The Federal Government will have power to borrow for any purposes of the Federation upon the security of Federal revenues within such limits as may from time to time be fixed by Federal law (9 and 10 Will. III, c. 44, sections 75 and 86, which necessitates the existing East India Loans Act procedure in relation to Indian sterling borrowing, will cease to have effect).

"The trustee status of the existing India sterling loans will be maintained, and will be extended to future sterling Federal loans."

✓ As regards the Provinces, complete freedom will be given to a Provincial Government to raise a loan within its own area, provided, however, that there is no loan outstanding made by the Federal Government or guaranteed by that Government.

✓ The Federal Government is empowered to grant loans or to guarantee a loan by any Governor's Province, or by any State member of the Federation on such terms and

under such conditions as it may lay down. As there is no Province which is not indebted to the Government of India at present, the freedom to raise internal loans without reference to the Federal Government cannot be availed of for some time to come. The Constitution further provides that no loan shall be raised by a Province outside India without the consent of the Federation. As external borrowing can have an effect on the political and economic relations of India with the countries where such loans are raised, it is only proper that the Federal Government should be consulted and its permission obtained before such loans are raised. Besides, the effect of granting unconditional freedom to the Provinces to borrow outside India may be to reduce the value of Federal loans already raised. It will also affect prejudicially the capacity of the Federation to raise further loans at a low rate of interest.

This concludes a survey, though of a sketchy character, of a very important aspect of Federal administration. Federal finance will form the keynote of the new Constitution. On the successful handling of financial problems will depend the status of the Indian Federation, not merely in the eyes of the outside world, but, what is more important, also in the estimation of the citizens of the land. The financial stability and credit of the country will be an asset which no Finance Minister can undervalue. At the same time the justification for new Constitution will be largely in the measures which are adopted for promoting social services and increasing the happiness and contentment of the people. At a time when the Finance Ministers of the world are finding themselves in extreme difficulties, and have been forced to curtail expenditure on necessary services, it is perhaps unwise to paint the future of India in rosy colours. But man lives in hope, and nothing except the hope that in the new dispensation their lot will be better, not indeed by a reduction of taxation but in the amelioration of social conditions, will reconcile the people of India to the new Constitution.

CHAPTER VIII

MINORITIES AND A SOCIAL FEDERATION

THE position of minorities in India has been the subject of careful consideration at every stage when the Indian Constitution came under revision. India is a great continent consisting of various races professing diverse religions. Not all of them have the same linguistic ties and cultural affinities. These considerations have in the main been responsible for the notion which is so prevalent among those unacquainted with Indian conditions that a sense of nationalism does not prevail in the country and that elements so heterogeneous in character with such apparently conflicting ideals and interests cannot form the basis of a common democratic system of government. Such a view mistakes the incidental attributes of nationalism for its essence. What, indeed, does nationalism imply, and what are those attributes which a people must possess to be considered a nation? It has often been assumed that there are certain objective criteria by which the fact of nationalism might be determined. A common race, a common language, and a common religion have been put forward as forming the basic tests of a nation. A passing examination of the conditions prevalent in various countries, and of the characteristics, which by common consent are treated as nations will serve to show how fallacious these tests are. What is a common race? Ethnological investigations have seriously disturbed the equanimity of those who believe in racial uniqueness. Neither the Englishman nor the Frenchman, nor even the Nazi who claims Aryan ancestry, can be treated as pure racial types differing from each other. Nor are the people residing within a State and claiming a single nationality members of the same race, even in its extended sense. The British nation, consisting as it does of Englishmen, Scots, and Welshmen, affords a classic instance in point. Religion as a test of nationalism is equally un-

availing. If there is a people which claims to be a united nation, and if there is a country where the spirit of nationalism has been excessive, it is Japan and her people, and yet Buddhism and Christianity flourish side by side. There is, further, a peculiar inappropriateness almost bordering on the sacrilegious in making religion—man's quest from the *unreal to the real*, from the mundane and the material to the spiritual and transcendent—the basis of so secular an ideal as nationalism. Language is an even poorer proof to rely upon if it is to be one of the foundations of nationalism. Bilingual Belgium and trilingual Switzerland—would be out of the picture if a test of a common language is insisted upon as the basis of nationalism. The Dominion of Canada has found it possible to develop the Canadian nation, proud of its heritage and of its long association in the task of administering that land, out of heterogeneous elements differing in race, religion, and language. The Frenchman and the Englishman, the Catholic and the Protestant, the people of Upper Canada speaking French dialect and those of Lower Canada speaking the English language, are a nation, notwithstanding these differences, which show no signs of disappearing. Even more striking is the example of the United States of America, whose people are a fine mosaic of several races, speaking divergent languages and professing different creeds. But the American nation is an aggressive entity, forcing its attention on the peoples of the world and proclaiming its organic unity in confutation of those theorists who believe that a nation can only be formed of people who are "cabin'd, cribb'd, confined" within the limits of a uniform race, religion, and language.

If all these tests are unavailing, there must be some characteristic which will enable us to determine when a people can be said to be a nation. The basis of nationalism lies in the subjective impulses of individuals, not so much in their objective characteristics. There is great truth in Professor Zimmern's statement that nationalism "is a form of corporate consciousness of peculiar intensity, intimacy,

and dignity, related to a definite home country. A nation is a body of people united by such a common consciousness." If this test be adopted, then the Indian people can with appropriateness be described as a nation. Nothing can be stronger than the tie which binds the Indian, Moslem, or Hindu to his homeland, and whether one turns to the west for prayer or to the rising sun for invocation one is constantly and inevitably attracted to his motherland and thinks of its future. From one end to the other there is an urge for a higher political status, a desire that the Indian should be in his land what a national is in the most insignificant of the newly constituted States of Europe—an urge and a craving not confined to any particular section or community, but equally felt by the rural peasant and the urban commercial magnate, and, in short, by every community in India. But this universal feeling has not precluded certain sections and communities from desiring a guaranteed position in the councils of the land and the administration of the country. This desire concretized as a demand forms the problem of minorities in India. It is essentially different from that which presented itself to European statesmen whenever new States were formed, and which came into great prominence in the integration of new republics on the conclusion of the Great War. A comparative study of the nature and extent of these two problems in post-War Europe and India will enable one to realize the significance of the Indian solution and may help to controvert some of the misleading suggestions which have been advanced to meet the demands of the minorities.

The existence of a heterogeneous population in a State has always given rise to great anxiety and concern lest the position of minorities may be rendered intolerable at the hands, directly or indirectly, of a powerful majority. Religious and cultural protection for the minorities has always been considered a fundamental necessity, and any encroachment in these directions has been viewed with severe disapproval by civilized States. So early as in 1814, when the Kingdom of the United Netherlands was created by

the Congress of Vienna and peoples differing in language and religion were brought together, special safeguards were provided ensuring them against either of these forms of persecution. Similarly, when the kingdom of Greece was formed in 1830, the protocol signed by the three Powers—Great Britain, France, and Russia—contained the provision:

“the plenipotentiaries of the three allied courts being desirous moreover of giving to Greece a new proof of the benevolent anxiety of their sovereigns respecting it and of preserving that country from the calamities which the rivalry of religion therein professed might excite, agreed that all the subjects of the new State, whatever may be their religion, shall be admissible to all public employments, functions, and honours, and be treated on a footing of perfect equality without regard to difference of creed in all their relations, religions, civil, or political.”

Similar provisions have been required from time to time of many States which have come into independent existence or have had areas added to their territories through the help of some of the great Powers. But it was left to the Great War, and the reorganization on an unprecedented scale which followed it, to focus the attention of the nations on this particular problem and to compel them to devise safeguards for the protection of these minorities. Central Europe has often been responsible for disturbing the peace of the Continent, and nothing has been a greater disturbing factor to the pacific relations of European States than the treatment which was meted out to minorities by one State or another. The victory of the Allied Powers resulted in the dismemberment of the overgrown German, Austrian, and of the Ottoman Empires, and of the consequent distribution of areas among various other States, many of whom were newly created republics. These additional territories contained in many instances peoples who differed in race, language, and culture, and sometimes in religion, from the inhabitants of the original country. They were also in some instances members of the race which had ruled over the original country, and not altogether in the most equitable or just manner. To subject such people to the uncontrolled

administrative sway of the newly liberated republics was to offer them a terrible temptation and to put a premium on the chances of persecution, religious and political.

The great Allied Powers, who were acutely conscious from past experience of the dangers of the persecutions of minorities, and were directly responsible for the creation of these republics, felt that they had a right to dictate the conditions under which these newly created States could exercise their powers with reference to the minorities.

Poland was one of the first republics to be so created, and the observation of Monsieur Clemenceau in the course of a letter to Monsieur Paderewski in connection with the signing of the Polish Minorities Treaty is interesting :

“The principal allied and associated Powers are of opinion that they would be false to the responsibility which rests upon them if on this occasion they departed from what has become an established tradition. In this connection I must also recall to your consideration the fact that it is to the endeavours and sacrifices of the Powers in whose name I am addressing you that the Polish nation owes the recovery of its independence. It is by their decision that Polish sovereignty is re-established over the territories in question, and that the inhabitants of these territories are being incorporated in the Polish nation. It is on the support which the resources of these Powers will afford to the League of Nations that for the future Poland will to a large extent depend for the secure possession of these territories. There rests, therefore, on these Powers an obligation which they cannot evade to secure in the most permanent and solemn form guarantees for certain essential rights which will afford to the inhabitants the necessary protection whatever changes may take place in the internal constitution of the Polish State.”

The Treaty which the principal allied and associated Powers made with Poland contains several provisions relating to minorities which Poland undertook to recognize as fundamental laws incapable of modification by any law, regulation, or official action of the State. Some of the rights of the minorities thus guaranteed by the Treaty are contained in the following articles, which have been set out in some detail in order that it might be compared with the rights of minorities in India.

Article 2

"Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race, or religion.

"All inhabitants of Poland shall be entitled to the free exercise, whether public or private, of any creed, religion, or belief, whose practices are not inconsistent with public order or public morals."

Article 3

"Poland admits and declares to be Polish nationals *ipso facto* and without the requirement of any formality German, Austrian, Hungarian, or Russian nationals habitually resident at the date of the coming into force of the present Treaty in territory which is or may be recognized as forming part of Poland, but subject to any provisions in the Treaties of Peace with Germany or Austria respectively relating to persons who became resident in such territory after a specified date."

Article 6

"All persons born in Polish territory who are not born nationals of another State shall *ipso facto* become Polish nationals."

Article 7

"All Polish nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language, or religion.

"Differences of religion, creed, or confession shall not prejudice any Polish national in matters relating to the enjoyment of civil or political rights, as, for instance, admission to public employments, functions, and honours, or the exercise of professions and industries.

"No restriction shall be imposed on the free use by any Polish national of any language in private intercourse, in commerce, in religion, in the Press, or in publications of any kind, or at public meetings.

"Notwithstanding any establishment by the Polish Government of any official language, adequate facilities shall be given to Polish nationals on non-Polish speech for the use of their language, either orally or in writing, before the courts.

Article 8

"Polish nationals who belong to racial, religious, or linguistic minorities shall enjoy the same treatment and security in law, and in fact as the other Polish nationals. In particular they shall

have an equal right to establish, manage, and control at their own expense charitable, religious, and social institutions, schools, and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

Article 9

“Poland will provide in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are resident adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such Polish nationals through the medium of their own language. This provision shall not prevent the Polish Government from making the teaching of the Polish language obligatory in the said schools.

“In towns and districts where there is a considerable proportion of Polish nationals belonging to racial, religious, or linguistic minorities, these minorities shall be assured an equitable share in the enjoyment and application of the sums which may be provided out of public funds under the State, municipal, or other budget, for educational, religious, or charitable purposes.

“The provisions of this Article shall apply to Polish citizens of German speech only in that part of Poland which was German territory on August 1, 1914.”

Article 11

“Jews shall not be compelled to perform any act which constitutes a violation of their Sabbath, nor shall they be placed under any disability by reason of their refusal to attend courts of law or to perform any legal business on their Sabbath. This provision, however, shall not exempt Jews from such obligations as shall be imposed upon all other Polish citizens for the necessary purposes of military service, national defence, or the preservation of public order.

“Poland declares her intention to refrain from ordering or permitting elections, whether general or local, to be held on a Saturday, nor will registration for electoral or other purposes be compelled to be performed on a Saturday.”

The rights guaranteed by these Articles have formed in the main rights of minorities in Austria, Czechoslovakia, Yugoslavia, Greece, Roumania, Bulgaria, Hungary, and Turkey. There are additional provisions with reference to individual States, some of which are highly interesting. The Minorities Treaty of Yugoslavia has the following provision :

"The Serb-Croat-Slovene State agrees to grant to the Musulmans in the matter of family law and personal status provisions suitable for regulating these matters in accordance with Musulman usage. The Serb-Croat-Slovene State shall take measures to assure the nomination of a Reiss-Ul-Ulema. The Serb-Croat-Slovene State undertakes to ensure protection to the mosques, cemeteries, and other Musulman establishments. Full recognition and facilities shall be assured to Musulman pious foundations (Wakfs) and religious and charitable establishments now existing, and the Serb-Croat-Slovene Government shall not refuse any of the necessary facilities for the creation of new religious and charitable establishments guaranteed to other private establishments of this nature."

Other European States have been obliged to sign declarations to the same effect as a condition precedent to their being admitted as members of the League of Nations. The Albanian State has agreed to provisions similar to those contained in the Treaty of Yugoslavia, and a special stipulation that "an electoral system giving due consideration to the rights of racial, religious, and linguistic minorities will be applied in Albania" has been incorporated in the declaration.

It has not always been possible to safeguard the rights of minorities or to instil confidence into them even by provisions of this nature. In some cases the radical remedy had to be applied of an exchange of population, a course most inconvenient to the people, causing the severest hardship and loss, and yet perhaps inevitable. By the Treaty of Veully a voluntary reciprocal emigration of Greeks and Bulgarians, and by the Treaty of Lausanne a compulsory exchange of Moslems from Greece against Greeks from Turkey, had to be arranged. In the latter instance a million and a half Greeks from Smyrna and Eastern Thrace left their properties in these areas and returned to Greece, and a similar Turkish population had to return to Turkey.

A mere enunciation of the rights conferred on minorities by these treaties and declarations cannot convey an accurate impression of the actual position of these minorities in Europe. The minorities live in States which are self-governing, and the only method by which an invasion of

their rights can be remedied is by an appeal to the League of Nations. The procedure whereby such an appeal can be heard by the League is of a special kind, and had to be prescribed with due regard to the status of the countries concerned. Appeals to the League cannot be made either by individual members of the minority or by associations. Minorities are not "legal persons"; they cannot have direct access to the Permanent Court of Justice or to the League of Nations. They can send petitions to the Secretariat of the League, but no action can be taken on these petitions unless a member of the Council of the League is satisfied that a right of the minority has been infringed and that the intervention of the League is called for. It is undeniable that the League's intervention has on several occasions during the last decade protected minorities from serious political persecutions. But it is equally true that the machinery of the League by its very nature can only move slowly, and that in some instances at least, owing to mixed political motives, may not move at all.

The problem of minorities in India differs radically, both in its nature and in the solution suggested, from that in Europe. The minorities in India form part of a single nation. They are not aliens in any sense of the term. No question of naturalization arises in their case. In spite of a few suggestions to the contrary by irresponsible spokesmen of some of the minorities that their allegiance may possibly be to Powers outside India, no minority in India, not even the Moslems, entertain ideas of extra-territorial patriotism. Religious affinities may rouse sympathies in case co-religionists in other countries are subjected to political attacks, but that is a natural feeling not special to the Moslem community, and can be traced through all ages from the days of the Crusades. The Indian Moslem, it should be said to his credit and in fairness, is as anxious to preserve the independence and integrity of India as the members of any other community, and history abounds with instances of Moslem fighting against Moslem in defence of the country. There is no reason, therefore, to

expect that in the future he will not be as loyal to his country in which his lot has been cast and where he has an assured position. The same can be asserted of every other minority in India, and therefore the main problem of Europe, that of an alien minority, does not apply to India.

The guarantee of religious freedom and the protection of culture and language which forms so large a part of the scheme of safeguards of minorities in Europe are relatively minor issues in India, and have never vexed Indian politicians. The principle of religious toleration has been firmly implanted in Indian public life, and, notwithstanding accounts, often exaggerated, of acute religious differences in the recent past, those who are most intimate with Indian conditions feel that they are at the worst passing phases of a political ferment and not chronic problems for the future. If proof were needed for this statement, it may be found in the readiness with which proposals for ensuring such freedom have been received at all times in India, and the Nehru Constitution and Round Table Conference bear ample testimony to this fact.

What, then, is the Indian problem?

A bare recognition of the rights of citizenship, the grant of franchise, equal civic rights, and protection of culture have not satisfied minorities in India. They have claimed more definite and positive rights—special representation in the Legislatures and a definite place in the administration of the country. It is true that in the beginning minority claims were more restrained than they turned out to be at a later stage—a fact which can be explained partly by the attitude adopted by certain individuals towards such claims. These individuals seem to have been swayed by the notion that the grant of franchise is a panacea for all the ills of the body politic, that it was an end in itself, and that there could be no room for complaint on the part of any individual or section if equality was guaranteed at the polling booth. To them the ballot box was the altar of Democracy, and the decision of the ballot box the Judgment of Minerva.

But the wiser men of India, who had a better grasp of the problems of democracy, a keener understanding of the limitations of the ballot, and a clearer vision of the fundamental basis of representative institutions, felt that the claims of minorities could not be brushed aside by airy notions of majority rule. A just and even a generous treatment of the claims of minorities would, according to them, lead to an earlier and a more certain establishment of brotherhood which ought to be the aim of all Indians, and for which forms of government are only the means.

Moreover, in this world there are no absolute values; every light has its shade. The principle of majority rule, of undoubted value as a working proposition, cannot be elevated to the status of an immaculate doctrine of perfection. While their faith in the sense of justice of a majority was undiminished, their anxiety to instil confidence into minorities led them to examine their claims with sympathy and tolerance. It is a cardinal principle of the best legal systems that an accused person should not merely have justice meted out to him, but that he should feel at every stage of the trial that he is having fair and just trial. And so in politics, and in the treatment of political minorities, it is not sufficient to confer rights; it is equally important so to confer them and in such abundance as to create a feeling of equality and security among the minorities of India. The proceedings of the Minorities Committee will disclose the existence of this feeling among a large section of the Indian public, and when the charge is levelled against Indians that they have been unable to solve the problem of minorities or to satisfy their claims, it may be urged in mitigation that many Indian politicians have recognized that a generous and human treatment of the question is ultimately the wisest course. The failure to reach an agreed settlement was really due to an onerous condition which was unfortunately insisted upon that there should be unanimity in the settlement of such issues. The more extreme elements on both sides, partly from thoughtlessness and partly from reasons of a personal and less defensible

nature, made the fulfilment of such a condition absolutely impossible.

But the labours of the well-intentioned many were not altogether futile. Their suggestions had ultimately to be incorporated in a decision by the Government which fixed the number of seats in the various Legislatures and the method of election for the different communities of India. This decision, which has been termed the "Communal Award of the Government," is not the result of the cogitations of Governments in a vacuum. They embody in essence the suggestions of reasonably minded sections of the community, and the approval which has been accorded to this award is, therefore, not so much a measure of the wisdom of the Government's decision as a testimony of the support which the nation has extended to the suggestions of the more far-seeing of their countrymen. It also establishes the fact that the general Indian public are not torn by dissensions about majorities and minorities, and that the communities, which are in a majority, entertain feelings of the utmost good will towards minorities. If further proof were required of the fact, it may be found in the readiness with which an agreement which is more challenging to preconceived notions of majority rule, arrived at between the depressed classes and Mr. Gandhi, has been received by all Hindus.

According to the award of the Government, the minorities generally have been granted representation to the councils through separate electorates composed entirely of members of such minority communities. The extent of their representation has varied from Province to Province, but in every case the principle of weightage has been accepted, and more seats have been given to the minorities than would have been their share on a strict population basis. The objection to the creation of communal electorates is so obvious that it need not be detailed at length. It was Burke who first propounded the theory that when a member has been returned to Parliament he is a representative not merely of the constituency which elected him but of the ✓

entire country. The recognition of this principle is made more difficult if the limitation of community is added to that of territory. But the argument may be carried too far. If, according to the opponents of communal electorates, there is no difference in interests between community and community, there is no reason why a representative of a communal electorate should not give expression to general and national views on all questions. The probabilities are, and experience justifies the statement, that except where special communal interests are involved a representative from a communal electorate will not lag behind others in voicing the interests of the country as a whole, and where he tries to safeguard the interests of his community he must be deemed to be discharging his legitimate task. This consideration appears to have weighed with Mr. Gandhi when he accepted the proposal for a primary election by the depressed classes themselves to elect candidates who may contest for seats reserved to them in joint and general electorates of Hindus.

It has not been suggested by anyone that separate electorates should form a permanent feature of the electoral system in India. Some contemplate its early abolition, while others feel that it will take some time before minorities can be induced to give up what they now consider a most valuable safeguard. Its abolition will really depend on the harmonious working of representative institutions and on the confidence which majorities will inspire in minorities.

The Indian solution of the problem of minorities has thus been of a special and unique character. The elementary rights conferred on minorities in Europe—freedom of religious worship, protection of cultural and linguistic rights, and the protection of life and liberty—have never been subjects of contention in India, and have been readily recognized in the Constitution. The right “for admission to public employments, functions, and honours, or the exercise of professions and industries,” has not only been recognized, but minorities have been placed in a privileged position by special safeguards in these matters. The Moslem,

the Sikh, the depressed classes, the Anglo-Indians, and Europeans can not only share in the public offices and honours of the State and carry on their business unhampered, but they have been accorded special facilities for doing so. Where the Indian solution has gone further than any so far attempted is in the grant of a special place for these minorities in the legislatures and administrations of the country. The responsibility laid on the Governor-General and on Governors to attempt to provide for the representation of minorities in Cabinets has been dealt with in another connection. The Indian solution may and has been severely criticized as illogical, but its justification lies in its recognition of the human element. Democracy reposes on the triple foundation of liberty, equality, and fraternity. Nations which have been subject to the domination of an alien Power have naturally laid the emphasis on liberty, and have not always been alive to the claims of equality or the principles of fraternity. India, thirsting for a new freedom, might easily have focussed its attention on the grant of liberty and missed the equally important principles of equality and fraternity. This danger has been avoided, and the solution of the communal problem marks a recognition of the value of all these principles in the building up of a democratic State.

Political institutions in modern times minister not only to the primary needs of life and liberty; they concern themselves with ensuring a positive social existence for the individual as well. The significance of such representation will be appreciated if this modern trend of development is rightly understood. The political federation in India will concern itself more and more with building up India anew, and in this task everyone's co-operation is necessary. Minorities, having obtained rights, have therefore duties to perform, and it may not be out of place if emphasis is now laid on their obligations. One can reasonably hope that the subjective ties of nationalism will be strengthened and a social federation—the complement of a political federation—will be gradually evolved. What the structure and fine notes

of the social federation will be it is too early and impossible to predict. Suffice it to point out, in the words of Dante :¹

“Of diverse voices is sweet music made ;
So in our life the different degrees
Render sweet harmony among these wheels.”

¹ *The Vision of Dante, Paradise, Canto VI.*

CHAPTER IX

JUDICIARY

THE establishment of a Federation with a careful allocation of functions between the Federation and the units involves the creation of an authority which could adjudicate in cases of dispute as to the proper exercise of these functions. It has been generally recognized that this task can best be performed by a judicial tribunal. A Federal Court, which would interpret and safeguard the Constitution and decide in cases of conflict of jurisdiction, has therefore been realized as a necessity in every Federation.

The Indian Constitution, therefore, provides for the establishment of the Federal Court, to which will be entrusted the task of interpreting the Constitution and Federal laws. The Federal Court will have an original and appellate jurisdiction. It will have "an exclusive original jurisdiction" in:

"1. Any matter involving the interpretation of the Constitution Act or the determination of any rights or obligations arising thereunder, where the parties to the dispute are—

- (a) The Federation and either a Province or a State; or
- (b) Two Provinces or two States, or a Province and a State.

"2. Any matter involving interpretation of, or arising under, any agreement entered into after the commencement of the Constitution Act between the Federation and a Province or a State, or between two Provinces, or a Province and a State, unless the agreement otherwise provides."

On its appellate side its primary function will be to act as guardian of the Constitution. Any decision given by a High Court in British India or a State Court in Indian States will be subject to the appellate jurisdiction of the Federal Court if it involves the interpretation of the Constitution Act or of any rights or obligations arising thereunder. The right of appeal may, however, be restricted by rules, which may lay down a pecuniary limit in civil cases.

The Federal Court cannot revise the decision of the High Court or State Court on facts; it can only decide on the law applicable to the facts stated.

"The process of the Federal Court will run throughout the Federation, and within those territories all authorities, civil and judicial, will be bound in any place within their respective jurisdictions to recognize and enforce the process and judgments of the Federal Court; and all other Courts within the Federation will be bound to recognize decisions of the Federal Court as binding upon themselves."

The Governor-General has been empowered to refer to the Federal Court for its advisory opinion on any justiciable matter involving a constitutional issue of public importance. This provision is based on the analogy of the power possessed in Great Britain by the Crown, which by Section 4 of the Judicial Committee Act, 1833, can obtain the opinion of the Privy Council on similar justiciable matters. The relationship of the Privy Council to the Federal Court has been carefully considered, and the conclusion has been arrived at that the jurisdiction of the Privy Council cannot be removed. The controversy on the subject at the time of the framing of the Australian Commonwealth Act has already been dealt with. Section 74 of the Australian Constitution provides:

"No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."

The royal prerogative to grant special leave of appeal from the High Court to the Privy Council is, however, preserved, but the Australian Parliament may make laws limiting the matters in which special leave of appeal may be asked, the only restriction being that the Bills must be reserved by the Governor-General for His Majesty's pleasure. At the Imperial Conference of 1926 the delegates from the

Commonwealth expressed the opinion that such a reservation was futile, as the Governor-General was appointed by the Crown on the advice of the Dominion Cabinet. They did not, however, press this point of view too far; they did not assert that the power of reservation in the case of merchant shipping legislation and the Colonial trustee loans was unnecessary. The Imperial Conference of 1929 took another step in the evolution of Dominion autonomy: it asserted with propriety that the power of reservation implied control by the British Cabinet, and that therefore it degraded Dominion autonomy. The claim put forward by the Dominions was finally accepted at the Imperial Conference of 1930 by all, including the United Kingdom.

But on the legal side the expedient devised is not quite satisfactory. The Statute of Westminster does not repeal this power; it still remains as part and parcel of Dominion Constitutional Law, though in practice it is very doubtful whether a Governor-General can ever reserve Bills for royal assent, especially when they deal with matters relating to judicial jurisdiction. The Indian Constitution provides:

"An appeal will lie without leave to the King in Council from a decision of the Federal Court in any matter involving the interpretation of the Constitution Act, but, subject always to the grant of special leave by His Majesty, in any other case only by leave of the Federal Court, unless the value of the subject-matter in dispute exceeds Rs. . . ."

"There will be no appeal, whether by special leave or otherwise, direct to the King in Council against any decision of a High Court in cases where, under the Constitution Act, an appeal lies to the Federal Court, either as of right or by leave of the Court."

The indefiniteness and consequent controversies with regard to the jurisdiction of the Privy Council are thus avoided by the Indian Constitution. It is difficult, however, to justify the normal right of appeal to the King in Council in matters involving the interpretation of the Constitution Act.

The appointment of the Chief Justice and judges of the Federal Court will be made by His Majesty the King, and

they will hold office during good behaviour, provided that the tenure of office of any judge will cease on his attaining sixty-two years. Similar provisions are made for the appointment of judges of the Supreme Court of Appeal, should the Federal Legislature establish such a Court, and for the appointment of judges of all Provincial High Courts, the provision following the existing practice with reference to High Courts. The argument that is advanced in justification of it is that judges of these Courts should be beyond the influence of political parties, and the conferment of this right of appointment on the executive will lead to political influences asserting themselves in such matters.

It must, however, be stated that this is in direct contradiction to the practice in the Dominions, and that the possibilities of political influence have been exaggerated. In Australia, the Justices of the High Court are appointed by the Governor-General in Council, but cannot be removed except by the Governor-General in Council on an address by both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity. The British North America Act provides that "the Governor-General shall appoint the judges of the Superior, District, and County Courts in each Province." The Constitution of South Africa provides that :

"the Chief Justice of South Africa, the ordinary judges of appeal, and all other judges of the Supreme Court of South Africa shall be appointed by the Governor-General in Council, and shall not be removed from office except by the Governor-General in Council on an address from both Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity."

These provisions are modelled on well-established principles relating to the appointments and removals of judges of Great Britain.

"Appointment by a formal act of the head of the State on the advice of the Ministry represents indeed the most effective guarantee against political favouritism and corruption. The high authority of the office, the publicity of the appointment, and the

definite location of the responsibility for it with the executive, tend, as English experience would seem to show, to prevent a partisan exploitation of the power to which it might in theory seem to be exposed."¹

The Dominion Constitutions further provide that the judges shall receive such remuneration as the Dominion Parliaments may fix, but the remuneration cannot be diminished during their continuance in office. The clauses in the Indian Constitution do no justice to the sense of responsibility either of the Federal and Provincial executives or of the corresponding legislatures. The independence of the judiciary ought to be the first concern of every citizen, and British India, more than any other country, has come to believe that judicial impartiality and integrity are the real bulwarks of the citizen. The judicial system has, moreover, reached a high stage of perfection in the country, and it is therefore difficult to justify the suspicions regarding political influences which have been responsible for these provisions. In actual practice it is difficult to see how Ministerial advice can be excluded in the appointment of these judges, and it seems the better course to throw the entire responsibility on the Ministries, subjecting them to legislative and public criticism if undesirable appointments are made.

The Supreme Court of Appeal for British India visualized in the Constitution raises certain interesting and important issues. The Constitution provides for the powers and functions of the Supreme Court, but leaves it to the Federal Legislature to decide when such a Court should be established. This clause excludes the possibility of the Federal Court acting as a Supreme Court and makes the two Courts distinct entities. There does not appear to be any logical ground for so clear-cut a distinction; the judges of the Federal Court could have been enjoined the duties of the judges of the Supreme Court, and it would have been equally feasible to demarcate their respective functions on the Federal and Supreme side. Such an arrangement would

¹ Leo Kohn, *The Constitution of the Irish Free State*, pp. 337-8.

{ have been more economical and given a higher prestige to the Court as a whole.

✓ - "The Supreme Court will be a Court of Appeal from the High Courts in British India, whether established by Letters Patent or otherwise."

"Appeals to the Supreme Court in civil cases will be subject to the provisions now applicable to appeals to His Majesty in Council, including appeals by special leave, but power will be reserved to the Federal Legislature to limit the right of appeal, so far as it depends on the value of the subject-matter in dispute, to cases in which the value exceeds a specified amount not being less than Rs. 10,000 (the existing limit in the case of appeals to the King in Council)."

"Appeals in criminal cases will lie only where a sentence of death has been passed or where an acquittal on a criminal charge has been reversed by a High Court, and also where leave to appeal has been given by the Supreme Court on consideration of a certificate by a High Court that the case is a fit one for a further appeal."

"On the establishment of the Supreme Court a direct appeal from a High Court to His Majesty in Council in either a civil or a criminal case will be barred. An appeal from the Supreme Court to His Majesty in Council will be allowed in civil cases only by leave of the Supreme Court or by special leave. In criminal cases no appeal will be allowed to His Majesty in Council, whether by special leave or otherwise."

The Supreme Court is a court of appeal from the High Courts in British India, which are generally called Chartered High Courts. In some Provinces there exists a Chief Court or a Court of the Judicial Commissioner exercising the same jurisdiction as Chartered High Courts. Provincial Legislatures have, under the present Constitution, no right to confer any jurisdiction on a High Court, this power being vested in the Legislative Assembly. The division of functions between the Federation and the Provinces, and the exclusive jurisdiction which is conferred on Provincial Legislatures in certain matters, necessarily involves a right on the part of Provincial Legislatures to confer jurisdiction in relation to exclusively provincial subjects. The Constitution therefore states "that, subject to any provision

which may be made by the Federal Legislature or by any Provincial Legislature within their respective spheres, the High Courts will have the jurisdiction, powers, and authority vested in them at the time of the commencement of the Constitution Act."

A prominent section of opinion, however, strongly holds the view that the judiciary should come under the control of the Federation. It recognizes that there is a constitutional anomaly in entrusting a body maintained by funds voted by one Legislature coming under the control of another. But it claims that this reform is necessitated by the desire to free the judiciary from all political influences. Party factions in the Provinces and political prejudices in an area over which the High Court exercises jurisdiction will, it is suggested, affect the prestige and impartiality of the High Court and subject the institution to the intolerable pressure of controversial politics.

While the excellence of its motives may be admitted, the wisdom and practicability of the proposal are very much open to question. To transfer the control of the High Court from the vortex of provincial politics to the equally seething complexities of Federal politics, from the known political prejudices of the Provinces to the unknown, inscrutable politics of the future Federation is to risk all the dangers of political influences and to ensure none of the advantages of an atmosphere free from such bias. Moreover, the provisions for the appointment and the tenure of judges, and in particular those relating to the expenditure required for these Courts, are such as to considerably allay, if they do not completely remove, the fears and apprehensions of political interference. The more statesmanlike course is, therefore, to continue the present system and trust to the development of that sense of responsibility in this as in other matters which alone can make for the successful working of democratic institutions.

The Federal Legislature has, however, been entrusted with the right of regulation of powers of superintendence exercised by High Courts over subordinate Courts in the

Province. The effect of these proposals is to alter the existing judicial system of the country as little as possible. Only such new judicial institutions will be brought into existence as are obviously necessitated by a change from the unitary to a Federal system of government and by the new States of India.

It is impossible to foresee how the judicial system will shape itself and what part the Federal Court will play in the further development of the Constitution. The analogy of the American precedent may be misleading and inapplicable to a Constitution where the Cabinet system prevails. In the American Constitution the separation of legislative and executive functions, carried to a logical excess, has been responsible for keeping the executive outside the Legislature and not giving it that leadership in legislation which is the essence of the Cabinet system. The result has been comparative poverty of legislative achievement. This has necessarily given a greater scope and freedom to the Supreme Court to interpret the Constitution in such a manner as to suit the altering circumstances of the times. And "judge-made" law has become a special feature of the American system. The process has been facilitated by the peculiarly fortuitous but happy circumstance that the Chief Justiceship of the Supreme Court has been held by a line of illustrious and far-seeing judges like Chief Justice Marshall and Justice Holmes. In the Indian Constitution the scope for such development of the power and authority of the Federal Court is necessarily limited. It may, however, be expected that the Indian Federal Court will develop into a real and effective protector of the rights of individuals or groups against unauthorized invasions by the Federal Executive or Legislature. Dicey's maxim that a Federation substitutes "litigation" for "legislation" is of doubtful validity. In any case where the Cabinet form of government prevails, legislation will form the dominant part of social development, and litigation may, after all, be the complement of legislation in such development.

CHAPTER X

SERVICES

WHATEVER form of government a country may possess, its actual administration is carried on by a Civil Service. In a democratic form of government the Civil Service has come to play a very important part. The social activities of the State have necessarily increased under a form of responsible Government, and a large Civil Service has therefore come into existence to carry out these activities. This development of the Civil Service has necessitated a closer examination of its states and functions, its rights, privileges, and responsibilities.

Constitutional writers have suggested a clear demarcation of functions between the political executive and the permanent executive, between the Ministers and the Civil Service. The former is a political group, and is responsible for the initiation of policies; it lays down the principles which ought to be followed in the administration of the country, and very often with the help of the Legislature enacts them into laws. The Civil Service, on the other hand, has no politics: its members not only do not take part in politics, but are supposed to have no political opinions. It cannot enunciate any policies in the administration of the country, but must carry out those functions which are devolved upon it either by executive orders or by legislative enactments. In the main and in theory these fundamental propositions are not open to question; but in practice the line of demarcation is not quite so clear, and a Civil Service has been known to play a larger part than is possible under these limitations.

Though Cabinets are responsible for policy, suggestions often come from members of the Civil Service. Again, rarely can a Cabinet Minister venture to lay down a new policy unless it has been the subject of close scrutiny by the permanent executive, and often unless it has met with their

approval. The status, therefore, of the Civil Service is not that helpless one of the mere executor of policies dictated from above. Cabinets come and Cabinets go, but the Civil Service goes on for ever. This permanence which the Civil Service enjoys as a superior attribute clothes it with a knowledge which is incomparable and gives it a special status. The very basis of democratic government involves a change of Cabinets from time to time, and it is in such Governments, therefore, that the Civil Service enjoys its highest status. It is perhaps not quite accurate to suggest that the Civil Servant has no politics. The working of the individual mind cannot be controlled even when it is that of an ideal Civil Servant. Political bias, a predilection for one school of thought rather than for another, and enthusiasm for one set of ideas, and a reluctance towards another—these cannot altogether be absent in a Civil Servant. All that can be required of him is a certain amount of mechanical obedience to the dictates of high policy laid down by Cabinets and Legislatures and the execution of functions without the betrayal of personal bias. To the extent that the Civil Service succeeds in this task, to that extent alone can it justify the confidence reposed in its honesty and integrity.

The need for an honest and unprejudiced functioning of the Civil Service has been felt so keenly that special measures have been evolved for its recruitment which are calculated to ensure that result. In the early years of the last century positions in the public service went by favour; the Cabinets possessed the valued privilege of patronage, and appointments to the public services were the result mostly of recommendations and personal considerations. In America till very recently the "spoils system" prevailed, and though it is not entirely absent at present, its worst features have disappeared.

The idea that the Civil Service must be recruited on the basis of the merit of the candidate and his capacity to discharge the functions entrusted to him gradually evolved, and is now a firmly established doctrine of the administration of Great Britain. It is interesting to note that this

doctrine was first made applicable to the recruitment of officers for the East India Company; the old civilians of that company, the men who are supposed to have shaken the pagoda-tree effectively, were the nominees of influential patrons, and political considerations played a very vital part in such nominations. The privileges which the East India Company obtained, the very renewals of its charters depended on the extent to which its directors were willing to yield to the demands and importunities of influential political leaders at Westminster. In 1833, at the time of the renewal of the charter, an innovation was made for the first time whereby four candidates were nominated for every vacancy, and an examination was held to choose the best among them. This half-hearted attempt at extinguishing undesirable patronage did not prove satisfactory, and it was not until 1853 that the principle of open competition was accepted at the instance of Macaulay.

But during all these years the administration in Great Britain was unreformed; the system of patronage was in full force, and Ministries owed their existence often to the "loaves and fishes" which they were able to distribute to their followers.

"There were, just before the end of the eighteenth century, about three hundred officials of high and subordinate classes in the central offices, and several thousands—about fourteen thousand—of customs and excise jobs and local postmasterships scattered throughout the land. All these were the subject of political chaffering, and the calculated incomes for one's children. The offices had become so much the currency of politics that the market dealt even in 'futures,' and those who could not be immediately brought over by immediate deliveries were consoled with 'reversions.' 'Reversions'—that is, the prospects of office—were literally bought and sold. The Grenvilles appointed relatives at the age of four to the reversion of clerkship in the Privy Seal Office. Sir Robert Walpole gave his son Horace the leisure to savour the literary seductiveness of the Parisian Salon at the expense of clerkships and collectorships paid for by the nation. Those with the highest salaries rarely looked inside their offices. Those with the small salaries were fearful of a change of Ministry. Five hundred and thirty placemen went in and out, up and down

between the Great Commoner's resignation in 1761 and Lord Chatham's resumption of power in 1766. Ireland and the American colonies were the happy hunting-grounds of absentee salary takers."¹

The reform of the Indian administration gave an impetus to the reform of the Civil Service in Great Britain, and the open competition system has since been very largely adopted. In India, though the system has been in operation in regard to some of the superior Civil Services, it has been of very little application in the recruitment of most of the other services. There have been complaints from time to time of patronage being exercised to the prejudice of individuals and the detriment of the Service. A Royal Commission on the public services, of which Lord Islington was the Chairman, made elaborate investigations regarding the position of the services in India, and recommended various forms which could not, however, be carried out during the Great War. Meanwhile, the enactment of the Government of India Act of 1919 and the conferment of partial responsibility in the administration of the Provinces brought about a new situation. The framers of the Bill became suddenly alive to the need for regulating the recruitment of the public service in India, particularly the subordinate services, and considered that the introduction of party politics and the appointment of Ministers in charge of the administration of big departments required the removal of the Civil Service from political influences. So long as the Minister had the right to recruit those who were to serve in his departments, he would, it was alleged, be subject to political pressure and the influence of his supporters in the Council. Section 96 C of the Government of India Act provides:

"1. There shall be established in India a Public Service Commission, consisting of not more than five members, of whom one shall be chairman, appointed by the Secretary of State in Council. Each member shall hold office for five years, and may be reappointed. No member shall be removed before the expiry of his term of office, except by order of the Secretary of State in

¹ Herman Finer, *The Theory and Practice of Modern Government*, Vol. II.

Council. The qualifications for appointment, and the pay and pension (if any) attaching to the office of chairman and member, shall be prescribed by rules made by the Secretary of State in Council."

"2. The Public Service Commission shall discharge in regard to recruitment and control of the public services in India such functions as may be assigned thereto by rules made by the Secretary of State in Council."

It was expected that the example thus set by the Central Government would be followed by the Provincial Governments, and the necessary authorization was provided for by Sub-section 2 of Section 96 (*b*) of the Act:

"1. Subject to the provisions of this Act and of rules made thereunder, every person in the Civil Service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed. If any such person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a Governor's Province, and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may, without prejudice to any other right of redress, complain to the Governor of the Province in order to obtain justice, and the Governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable."

"2. The Secretary of State in Council may make rules for regulating the classification of the Civil Services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to Local Governments, or authorize the Indian Legislature or local Legislatures to make laws regulating the public services."

"Provided that every person appointed before the commencement of the Government of India Act, 1919, by the Secretary of State in Council to the Civil Service of the Crown in India shall retain all his existing or accruing rights, or shall

receive such compensation for the loss of any of them as the Secretary of State in Council may consider just and equitable."

"3. The right to pensions and the scale and conditions of pensions of all persons in the Civil Service of the Crown in India appointed by the Secretary of State in Council shall be regulated in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council, and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the Service appointed before the date hereof."

"Nothing in this section or in any rule thereunder shall prejudice the rights to which any person may, or may have, become entitled under the provisions in relation to pensions contained in the East India Annuity Funds Act, 1874."

"4. For the removal of doubts, it is hereby declared that all rules or other provisions in operation at the time of the passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the Civil Service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied, or added to by rules or laws made under this section."

The local Governments and Legislatures were not keen on adopting the suggestion for the establishment of a Provincial Public Services Commission in the early years of the diarchic Constitution. It was considered that the establishment of such a Commission involved the recognition of the principle of free and open competitive examinations, and there were many Indian statesmen who, without the least desire to imitate the Walpoles and the Grenvilles, felt that the system was not suitable to Indian conditions. The method of recruitment by competitive examinations attracts a special class of individual to the services—those who study in the larger universities and have been brought up under special conditions. It has been suggested even in England that the specialized training, while perfecting intellectual efficiency, does not provide for that contact with the wider world and its human problems. The classic mind of such a Civil Servant is often at a disadvantage when it has to deal with complicated social problems—the solution of which does

not depend upon a formal application of rules and regulations. In India where the Civil Servant's lot is cast among people who are less educated and politically minded, where the Civil Servant still plays, and must for a long time continue to play, the part of a guardian of the masses, the quality of intellectual aloofness is more a handicap than a help. Moreover, educational progress has been more rapid among some communities than in others, and the various communities are at different levels of literary efficiency. Given time and opportunity and adequate facilities, every community would be in a position to produce from among its members men who will be able to take their proper share in such competitive examinations. But that time has not yet arrived, and the result of a free and open competitive examination will be to load the Civil Service with members of particular classes and communities. These considerations have been responsible for the hesitation in setting up a Public Services Commission, and it was not till a solution was found for the difficulties stated above that Provinces have begun to legislate for the establishment of such Commissions. The solution has been found to be the adoption of the system of "limited competitions."

The Civil Service plays a much greater part in India than in any other country in the world; in the past it has not merely been an administrative service, but also a political service in the highest and best sense of the word. The determination of policy was part of the legitimate work of a Civil Servant. The collector often laid down the policy to be followed in the administration of his district; the Commissioner that of his division; the Executive Councillor that of the Province; and the member of the Governor-General's Executive Council the policy for India as a whole. Such a result was inevitable where a bureaucracy was in charge of the entire administration, and the control from Whitehall was necessarily of a general character and often intermittent.

The change in the system of government will undoubtedly alter this state of affairs, but the long tradition established

will be slow in disappearing. The anxiety, therefore, to make the Civil Service fairly representative of the profession and not the preserve of a single intellectual class may be understood and even sympathized with. Many Indian politicians have therefore rightly laid great stress on the adoption of a system of competitive examinations which will give a fair and adequate share in the services to the different communities. A limited form of competition whereby the most efficient members of each community are selected has come to be recognized as the system best suited for Indian conditions. It has no doubt met with severe criticism in some quarters; vested interests have a habit of dying very slowly, and a fight to the last trench is one of their characteristics. It was not till twenty years after the introduction of the system of open competitive examinations in England that the advocates of patronage were silenced. India is often described as a continent, and to possess as many differences and characteristics as the whole of Europe. The analogy of the League of Nations, in whose Secretariat the representation of different nationalities seems to be a vital factor, may not be very remote. It should, however, be added that the system of limited competition is not intended to be a permanent feature in India, and that its replacement by open competitive examinations will synchronize with a common educational advancement of all the communities.

The superior Civil Services in India have in the past been largely recruited from Great Britain. The process of Indianization has been accelerated during the recent past, and the introduction of partial responsibility in provincial administration has expedited it. It is recognized that the grant of provincial autonomy postulates a right in the provincial administration to recruit its own services. Two exceptions have, however, been made to this general proposition. The Indian Civil and Police Services will continue to be recruited on an All-India basis, and therefore not by a Provincial Government but by a central authority. The Constitution provides :

“That the Secretary of State will, after the commencement of the Act, make appointments to the Indian Civil Service, the Indian Police, and the Ecclesiastical Department. The conditions of all persons so appointed, including conditions as to pay and allowances, pension, and discipline will be regulated by rules made by the Secretary of State.”

This provision has legitimately met with strong criticism, and it has been suggested that the recruiting and controlling authority in the future should be the Government of India. It should be left to that authority “to decide on all questions relating to conditions of recruitment, service, emoluments, and control.” While it is recognized that for some time to come a portion of these services should be recruited in England, the need for the intervention of the Secretary of State is not admitted. The Government of India will under this scheme act on the advice of the Civil Service Commissioners in England just as the Secretary of State does, but it will be open to them to frame regulations regarding pay, allowances, etc. In framing these regulations they must undoubtedly take into consideration the extremely important fact that the right kind of personnel is attracted to the Service. It would be anomalous if the Secretary of State were to fix the terms of service when financial and administrative responsibility is transferred to India.

The Constitution no doubt provides that this power of recruitment will vest in the Secretary of State for the first five years after the inauguration of the New Constitution. “At the expiration of five years from the commencement of the Constitution Act a statutory inquiry will be held into the future recruitment for those services, except the Foreign Department and the Ecclesiastical Department. The decision on the results of this inquiry, with which the Governments in India concerned will be associated, will rest with His Majesty’s Government, and be subject to the approval of both Houses of Parliament.” This provision does not advance the consideration of the question, but leaves the whole issue to be decided by the British Government—a position which will hardly be acceptable to those who feel

that the recruitment should be immediately handed over to the Federal Government.

Subject to these provisions, the Federal and Provincial Governments respectively will appoint and determine the conditions of service of all persons in the Federal and Provincial administrations. Provision is made for the constitution of Federal and Provincial Public Service Commissions.

“There will be a Federal Public Service Commission and a Provincial Public Service Commission for each Province; but by agreement the same Provincial Commission will be enabled to serve two or more Provinces jointly.”

“The members of the Federal Public Service Commission will be appointed by the Secretary of State, who will also determine their number, tenure of office, and conditions of service, including pay, allowances, and pensions, if any. The Chairman at the expiration of his term of office will be ineligible for further office under the Crown in India; the other members will be eligible for appointment as Chairman of the Federal Commission or as Chairman of a Provincial Commission, and their eligibility for other appointments under the Crown in India will be subject to regulations made by the Secretary of State.”

“The members of a Provincial Public Service Commission will be appointed by the Governor, who will also determine at his discretion their number, tenure of office, and conditions of service, including pay, allowances, and pensions, if any. The Chairman at the expiration of his term of office will be ineligible for further office under the Crown in India, save as Chairman or member of the Federal Public Service Commission. The other members will be eligible for appointment as Chairman or members of the Federal Commission or of any Provincial Commission, and their ineligibility for other appointments under the Crown in India will be subject to regulations made by the Governor.”

“The emoluments of the members of all Public Service Commissions will not be subject to the vote of the Legislatures.”

“The Federal and Provincial Public Service Commissions will conduct all competitive examinations for appointments to Federal and Provincial Services respectively. The Governments will be required to consult them on all matters relating to methods of recruitment, on appointments by selection, on promotions, and on transfers from one service to another, and the Commissions will advise as to the suitability of candidates for such appointments, promotions, or transfers.”

It is not clear why the Secretary of State should appoint members of the Federal Public Service Commission, and it has been suggested that their independence will be sufficiently secured if the Governor-General appoints them even as the Governor appoints the Chairman and members of the Provincial Public Service Commission. These minute provisions of control vested in the Secretary of State are an undue and unjustifiable encroachment on the powers of the Government of India and of the Governor-General, and are not calculated to improve or strengthen the position of the services. The general relationship which should prevail between the Government and services has been dealt with in the chapter on "Reservations and Safeguards," and it appears *prima facie* inadvisable to impose restrictions of a galling nature which will merely cause irritation and produce harm.

The Public Service Commissions will be not merely in charge of initial recruitments, but will play a vital part in protecting the services from an autocratic exercise of authority or disciplinary control by the Governments. The Constitution accordingly provides :

"The Federal and Provincial Governments will also be required, subject to such exceptions (if any) as may be specified in regulations to be made by the Secretary of State or a Governor, as the case may be, to consult the Public Service Commissions in connection with all disciplinary orders (other than an order for suspension) affecting persons in the public services in cases which are submitted to the Governments for orders in the exercise of their original or appellate powers; in connection with any claim by an officer that a Government should bear the costs of his defence in legal proceedings against him in respect of acts done in his official capacity; and in connection with any other class of case specified by regulations made from time to time by the Secretary of State or a Governor, as the case may be. But no regulations made by a Governor will be able to confer powers on a Provincial Commission in relation to any person appointed by the Secretary of State without the assent of the Secretary of State, or in relation to any other person who is not a member of one of the Provincial Services of the Governor-General."

"The Federal and Provincial Governments will be empowered

to refer to the appropriate Commission for advice any case, petition, or memorial, if they think fit to do so; and the Secretary of State will be empowered to refer to the Federal Commission any matter relating to persons appointed by him on which he may desire to have the opinion of the Commission."

The Public Service Commissions will thus play a vital part not merely in the recruitment of capable individuals who will carry on the highly technical functions of a complex administration, but will also be instrumental in promoting efficiency on the one hand and safeguarding the rights of the services on the other. They will gradually come to occupy the position of expert advisers to the Government either in the employment of an adequate staff or in the regulation of their duties. The development of the relations between the superior and subordinate services, the nature and extent to which conditions of service may be altered from time to time, and the manner in which the wishes of service associations will be ascertained must be left to the future Government to decide. It is possible that reforms which have been introduced in Great Britain, the Whitley Councils, may influence the Government and services in India, and result in similar reforms. But whatever alterations may take place, the cardinal principle must be recognized that the security and contentment of the services must be the first concern of all Governments, and that the loyalty and willing co-operation of the services must be their essential characteristic. By some of these provisions the Constitution seeks to avoid the pitfalls into which many democracies have fallen and to profit by their experiences. It may be hoped that the Civil Servant and politician in India will each recognize the important part that the other has to play in the political life of the country, and that mutual regard and understanding will render inoperative the many cumbrous and irritating safeguards which have been devised as a protection for the one or a check against the other.

CHAPTER XI

FUNDAMENTAL RIGHTS

A DECLARATION of fundamental rights has formed a normal feature of recent political Constitutions. The subject, however, has not been free from controversy, and constitutional writers and statesmen, whose regard for personal liberty and individual rights is beyond question, have doubted the propriety and wisdom of the inclusion of such provisions. The matter is of some importance in connection with the Indian Constitution, as publicists and statesmen alike of that land have attached considerable weight to an incorporation of fundamental rights. Individuals who have taken part in evolving a constitutional framework for India, and Committees which have been entrusted with such responsibility, have all, without exception, included such a declaration among their suggestions. The Nehru Committee, to which a reference has been made elsewhere, has embodied in its draft Constitution an exhaustive list of fundamental rights. In the emphasis that Indians of all shades of political thought have laid on this subject they have been to some extent influenced by precedents from various Constitutions, particularly those of post-War Europe.

It cannot, however, be assumed that the need for a declaration of fundamental rights has been universally felt or accepted. There are some who think that the incorporation of these rights in the Constitution detracts from the supremacy of Parliament, and in some instances merely embodies platitudes, which are of no avail on critical occasions, when the individual needs the greatest protection. An appraisal of these divergent views is therefore necessary.

The first written Constitution to embody fundamental rights was that of the United States of America. The ten amendments proposed in 1789, and adopted in 1791, were intended to guarantee to the individual certain inalienable

rights which the State could not disturb or interfere with. The right to keep and carry arms; the inviolability of the residence of the individual save under due process of law; the freedom of persons except under process of law—these and similar rights the framers of the Constitution felt should be permanently and for ever enshrined in the Constitution. The circumstances which led to the birth of the American Constitution explain this incorporation of fundamental rights. Breaking away from the oppressive rule of the United Kingdom, the fathers of the Constitution felt that the liberty they had won after so much travail should be consolidated by the clearest and most explicit declarations possible. Very similar in nature and origin was the declaration of rights of man which emerged out of the sanguinary conflicts of the French Revolution. The *ancien régime* had disappeared; the new State, with its visions of a new order and “progress,” had come into existence. A consolidation of these ideals necessarily implied an incorporation of the “inherent rights of man.”

Most of the post-War Constitutions are agreed in their insistence on the affirmation of fundamental rights in their Constitutions. Once more historic reasons as much as political experience have played their part in such inclusions. The sway of autocratic sovereigns, howsoever their acts might have been shielded under the cover of apparently democratic institutions, had terminated; the peoples of Germany and Austria, the citizens of those newly created States, the countries of the Croats and Serbs, Poland, Latvia, and Esthonia, who have escaped from the double tyranny of irresponsible monarchs and masterful alien majorities, breathed for the first time the fresh air of liberty and independence. Is it any wonder that they should be anxious to conserve their newly obtained liberty by the most sacrosanct declarations?

It will, nevertheless, be a misreading of history and betray an inadequate appreciation of the impulses that led to these declarations to suppose that they do not date earlier than the American Constitution or are the products only of revolutions.

English constitutional history affords proof of the fact that such fundamental rights have been assured to the subject from feudal times, and, incidentally, refutes the suggestion that they are unknown to the Constitution. Magna Charta, by which the King guaranteed certain rights to the barons, who were the main body of "citizens" of that epoch, is a classic instance in point. The "Petition of Right" and later the "Bill of Rights" are other instances of attempts at formal embodiment of what in those epochs were considered the inalienable rights of citizens which must be guaranteed by King or Parliament.

The most important safeguards for personal rights, however, was the common law of England, which, basing itself on "the unalterable principles of reason and revelation," was supposed to embody the "law of nature," which secured certain definite rights to man. The judgments of Chief Justice Coke are replete with references to the Magna Charta and *Jus Naturale*. In a notable case—that of Dr. Bonham—Chief Justice Coke, quoting various precedents, tries to establish that Courts acting under common law and interpreting the *Jus Naturale* possess a power of judicial review over parliamentary statutes which are manifestly unjust and opposed to natural principles.

Notwithstanding these arguments, critics are not found wanting who believe that an incorporation of fundamental rights in a democratic Constitution is essentially unsound. They point out that in many instances fundamental rights are but pious hopes, incapable of securing to the individual the exercise of the rights which have been ostensibly held out to him. The German Constitution provides that "every German should make the best use of his abilities, but should be provided for in case of unemployment"—an exalted ideal, but incapable of being enforced in a court of law. It would therefore be of little consolation to an individual to be informed of the State's desire to help him, but at the same time be keenly reminded of the State's inadequacy of means to satisfy him. One can understand justiciable rights being included in the Constitution; the rights assured

to the individual are real, and are capable of being enforced in a court of law in case they are violated by the State. Further, "non-justiciable" rights would be the opiate of the community. A false sense of security, an undue belief in formulae, and a paralysis of political activity on the part of the community—these might result from an insistence on the inclusion of "phrases of little or no meaning."

Secondly, it is urged that the enunciation of fundamental rights involves a detraction from parliamentary supremacy. To the extent that these rights are guaranteed in perpetuity, to that extent the right of Parliament to enact laws which in any wise tend to modify these rights is removed. Where these rights are of a justiciable nature, the invocation of the jurisdiction of Courts may tend to create an authority more supreme than Parliament itself. "Judge-made" law, resulting from an interpretation of fundamental rights, may become a formidable competitor to Parliament itself.

Thirdly, it is pointed out that fundamental rights have no place in a Constitution based on democratic principles. The authority of a popularly elected Legislature is derived from the people. There is a significance in an autocratic ruler guaranteeing to his subjects certain elementary rights and imposing on himself the consequential limitations. But in a democracy the anomaly arises of the people guaranteeing to themselves certain rights. The source of power of a democratic Parliament is the people; the Legislature consists only of representatives of the people expected to carry out the "mandates" of their electors. These representatives can have neither individually nor collectively a higher authority over the people than they are willing to concede. Parliament cannot, therefore, arrogate to itself the power to guarantee rights to the very people from whom it derives its entire authority.

Fourthly, they have argued that a strict construction of fundamental rights may paralyse the activities of State and Parliament in beneficent directions. The growth of public consciousness has led to an alteration in the values attached to individual liberties from time to time. The functions of

the State, which were once of an elementary character, involving not very much more than "policing," have grown in extent and complexity. The modern State undertakes many duties in the interests of the body politic, which results in the corresponding limitation of personal freedom. The inflexibility resulting from such fundamental rights must arrest the healthy progress of the State. An eminent American constitutionalist has pointed out that one of the reasons for the comparatively few social services which the United States of America has undertaken is due to the rigid insistence of the Constitution on "individualistic fundamental rights." The conception of fundamentality has also changed, and it is impossible to predicate that a set of rights will be considered fundamental for all time to come.

Above all, whatever sanctity may be attached to fundamental rights, their most extreme advocates have agreed to their abrogation or suspension on critical occasions, when the very existence of the State was threatened. The Weimar Constitution, while providing an exhaustive list of fundamental rights, couples them with a limitation which gives the State final authority to limit or abrogate these rights.

"All Germans enjoy the right to travel and reside freely throughout the whole Commonwealth. No limitations may be imposed except by authority of a national law."

"The house of every German is his sanctuary and is inviolable. Exceptions are permissible only by authority of law."

"The secrecy of postal, telegraphic, and telephonic communications is inviolable. Exceptions may be permitted only by national law."

"All Germans have the right of meeting peaceably and unarmed without notice or special permission. Such meetings may be forbidden in case of immediate danger to the public safety."¹

Similarly, in the Constitution of the Irish Free State the enunciation of individual rights is limited by the proviso that "nothing in the Article shall be invoked to prohibit control or interfere with any act of the military force of the Irish Free State during the existence of a state of war

¹ Rene Brunet, *The German Constitution*.

or armed rebellion." The history of the two countries during the last decade seems to show the extent to which it has been found necessary to suspend these rights, and proves their nominal value as a security to the individual. The passage by the Dail, at the instance of President Cosgrave, of the Public Safety Bill as a sequel to the assassination of Mr. Kevin O'Higgins, shows that there is little respect for fundamental rights where the paramount interests of the State are at stake. In Germany, the rapid march of events during the last few months has established one fact clearly: that no citizen is in the enjoyment of fundamental rights when passions run high and the need for their abrogation is felt by those who believe the State to be in danger. Herr Hitler, whose campaign of converting every German citizen to his views has resulted in the abolition of some of the most elementary fundamental rights, still claims to be a faithful adherent of the German Constitution, and has taken oath "to observe the Constitution and the laws of the Federation." If these acts can be perpetrated under the green tree, what may not be done under the dry? If in times of peace such restrictions can be imposed despite the existence of fundamental rights, what cannot be done in periods of war or real national emergency?

The case against fundamental rights has been stated with a certain amount of sharpness, in order to present in its proper perspective the need for such rights. In an earlier section of this chapter a distinction was drawn between justiciable and non-justiciable rights. So far as the former are concerned, the individual or the group obtain a real and effective protection, and the need for their enactment is self-evident. Any violation of these rights can be redressed in a Court of Law. It is the latter kind of rights which has been the object of very severe criticism from those who are inclined to be sceptical of an enunciation of such fundamental rights.

The term "non-justiciable rights" is very misleading; it implies that rights are of only two kinds—those that can be adjudicated upon and those which cannot form the

subject-matter of judicial decisions. The framers of constitutions who insisted on the inclusion of such rights have intended them to enshrine the social philosophy of the times and to serve as a guide to social aspirations of the body politic. These rights, therefore, fulfil a dual function, the one negative and the other positive. They may not arrest the course of legislation; but they serve the highly useful purpose of prominently focussing before the legislator the desirability of proceeding with caution in dealing with issues affecting the rights of either the individual or the group. The legislator treads a path of fire; he has to harmonize the charm of social change with that of political stability, and in this very difficult task he will find guidance in these provisions, though they may not invest either the individual or the group with positive legal rights. Thus a provision that "the right to property is assured to every individual" would act as a deterrent to hasty and ill-advised expropriatory legislation.

The positive assistance which these rights render in realizing social aspirations may now be dealt with. It has been aptly pointed out that law is the result of "a process of action between constitutionally organized initiative and spontaneous social forces." By incorporating such rights, the Constitution serves as a constant reminder of the direction in which legislation must proceed. Like the Laputan flapper, it draws the gentle attention of its august master to the task that lies ahead. A clause that "every German has the right to work," or that "youth shall be protected against exploitation as well as against neglect of their moral, mental, or physical welfare," will contribute its quota to the social forces at work. It is true that aspirations of the type quoted above cannot be immediately realized. But the path leading to the Holy Grail is bound to be strait and narrow, and the quest for it long and wearisome. The framers of constitutions are therefore content with having blazed the trail, leaving it to succeeding generations to follow it up.

The second objection that has been urged against an

incorporation of fundamental rights is that legislative omniscience is interfered with by it. The anomaly that a democratic Parliament by a charter of fundamental rights guarantees those rights to itself, or to the people from whom its source of authority springs, is more apparent than real. Parliamentary Acts are the results of decisions by majorities. The basis of parliamentary supremacy is that "majorities are in the right and can do no wrong." A parliamentary system of Government would be impossible if the decisions of the majority are not loyally accepted by the community for the time being. But the very range of powers which majorities can exercise affords an argument for narrowing them in certain directions. It is not surprising, therefore, that in certain vital and fundamental matters the individual section or group is not prepared to accept as infallible the verdict of the majority. It is no consolation to the individual or group that the wrong inflicted is by a decision of a majority of its citizens. While it may be anomalous to suggest that Parliament guarantees any rights to the community as a whole, there appears to be no valid reason why an individual or small minorities should not have guarantees of protection against invasion of fundamental rights from the majority or the community as a whole. A Legislature may be so obsessed with the needs of the community that it may lose sight of the indefeasible rights of the individual or a group. That is why the enunciation of fundamental rights has been insisted upon by politicians whose faith in democracy is undiminished, but whose understanding of the working of democracies is profound.

These fundamental rights are, in effect, an exception to the rule that the decisions of the majority must be binding on the people. The argument that in times of grave danger to the State or when martial law has to be declared a suspension of fundamental rights is inevitable does not really affect their utility. The citizen is warned during these comparatively infrequent times that special measures have to be adopted, greater restraint has to be imposed on

individuals, and that the overwhelming needs of the State must prevail over all considerations. Curtailments of individual liberty, which may be accepted on these exceptional occasions, only prove the greater need for their ensurement on all other normal occasions. As Lord Justice Scrutton stated in a famous case, "In time of war there must be some modification in the interests of the State. It had been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles of Magna Charta."

Apart from these special instances, reliance has been placed in some quarters on the doctrine of State necessity, and recent happenings in Germany have been quoted as indicating the relative inutility of fundamental rights. It is too early to form an opinion on the tendencies of events in Germany. The incorporation and safeguarding of fundamental rights is really a safety-valve, and is designed as much for the greater security of the State as for the individual. The last chapter of Hitlerism has not yet been written; the result of this violent abrogation of fundamental rights has yet to be seen.

There are certain special and additional reasons for the incorporation of some fundamental rights in the Indian Constitution. It has been affirmed that in democracies "power springs from the people." This statement may be justified where democracies are based on adult franchise, and where every individual has an indirect share in the administration of the country. The Indian Constitution does not purport to base its institutions so widely on popular will. It has been shown in another chapter why immediate adult franchise has been discarded as impracticable, and the suffrage has been extended to a limited set of men and women. The need for guaranteeing fundamental rights to individuals and sections is therefore overwhelming where most individuals and sections are denied the opportunity of influencing the political administration in the country.

Moreover, there is another limitation imposed on demo-

cracy in the Indian Constitution. Certain positive functions are vested in Governors of Provinces and in the Governor-General, who can either by overruling or even without reference to the Legislature enact laws. Even if it be admitted that a popular Legislature need not guarantee to itself or to the people on whose behalf it functions certain inalienable rights, it cannot be denied that where an individual is entrusted with these special powers their exercise should be hedged in by a declaration of fundamental rights. There must be a guarantee to the citizen or group, not only against legislature, but also against "supreme executive" violation of his or its minimum rights.

Yet another overwhelming reason of a psychological nature for an inclusion of fundamental rights exists. The Constitution marks a definite change in the form of Government in India; the bureaucracy, with "its self-imposed limitations," is giving place to representative institutions. The new democracy, albeit of a limited character, is a definite break from the past. It has been stated that "a subject nation has no politics" and therefore no rights; and the people of India have long been accustomed to regard this as the maxim of some of its rulers. The ordinances passed by Governors-General during the past few years have only tended to emphasize this statement. The people have therefore to be educated into the belief that in the new era they have rights to exercise as well as duties to perform. They have to realize that they are the ultimate masters of the machinery that has been set up in their name. The enunciation of fundamental rights will act as a tremendous educative force and will be of supreme psychological importance in changing the mentality of the people from its dispirited, subjective state to a virile, creative condition. It will now be clear why Indian delegates, almost without exception, were unanimous in pressing for an inclusion of fundamental rights. The White Paper makes the following provision with reference to fundamental rights:

"The question of including in the Constitution Act a series of declarations commonly described as a statement of 'Funda-

mental Rights,' which would be designed to secure either to the community in general or to specified sections of it rights or immunities to which importance is attached, has been much discussed during the proceedings of the Round Table Conference. His Majesty's Government see serious objections to giving statutory expression to any large range of declarations of this character, but they are satisfied that certain provisions of this kind, such, for instance, as respect due to personal liberty and rights of property and the eligibility of all for public office, regardless of differences of cause, religion, etc., can appropriately and should find a place in the Constitution Act.

His Majesty's Government think it probable that occasion may be found in connection with the inauguration of the new Constitution for a pronouncement by the Sovereign, and in that event they think it may well be found expedient humbly to submit for His Majesty's consideration that such a pronouncement might advantageously give expression to some of the propositions suggested to them in this connection which prove unsuitable for statutory enactment."

It may be conceded that the declaration of a large number of fundamental rights defeats its very purpose, and the White Paper is justified in restricting them to as small a range as possible. The Constitution is apparently intended to provide for justiciable rights. Other declaratory rights which act as norms to the Legislature are proposed to be included in a Proclamation by the Sovereign. It is difficult to foresee the effect of an inclusion of rights in the Proclamation. Past experience has shown that those who have been entrusted with the task of interpreting these declarations have construed them in such a fashion as to arrest the progress of healthy legislation.

The Queen's Proclamation guarantees religious freedom to the people of India. But, in the name of religion, social obscurantists have tried to block the progress of all social legislation. In the chequered and sad history of India there has not been a solitary piece of legislation, ranging from the Sati Act and the Removal of Caste Disabilities Act to the age of consent legislation, which has escaped the assault of the so-called orthodox! In every instance the declaration contained in the Queen's Proclamation has been invoked,

with the result that Governors and Governors-General have hesitated and sometimes declined to give their assent to such legislation. If any detailed instance is needed to enforce this conclusion, that of the Hindu Religious Endowments Act might be cited. This piece of legislation, introduced by that great statesman whose interest in social reform was matched only by his deep religious convictions, the late Rajah of Panagal, Chief Minister of Madras, met with an opposition the like of which has rarely been accorded to any other measure of social legislation. The authorities in charge of temples, the so-called orthodox, the tenacious critics of a party in power—all grouped themselves into a band to kill or mutilate this measure. And in this opposition they summoned to their aid the Queen's Proclamation. For a while the measure was held up, and it was thought that it would die of anaemia; but the measure was, fortunately, introduced by a great man, whose tenacity and courage helped to surmount this opposition. It would be too much, however, to expect every Minister to "make his will and do his duty." Such masterful personalities, makers of the unwritten Constitution, are bound to be few, and it is not therefore wise to make the proper working of the Constitution rely on the chance appearance of personalities. As the power of giving or withholding sanction to legislation will continue to vest in Governors and Governors-General, declarations of such rights in the Royal Proclamation may act as more severe, real, and effective deterrents to the powers of the Legislature than if they were embodied in the Constitution itself.

The task of building up a new India in which the conflicts of the present will be replaced by an indestructible harmony of all communities will devolve on young India's shoulders. To build up a social federation the complement of a political federation, to give concrete shape to the dynamic idea of "growth" given expression to at the three Round Table Conferences, to evolve a system of democracy which will be built on the sound foundation of social humanity—these are the ideals which the younger genera-

tion treasure, and which they are burning to concretize in legislative enactments. Social forces, unless harnessed to legislative activity, lead nowhere. There is a danger that they may be smothered by a narrow interpretation of the declarations contained in the King's Proclamation. — That way leads to a social revolution—the child of despair. It is therefore very much to be hoped that both in humbly advising His Majesty regarding such a Proclamation, and in the instructions that may be issued to Governors and Governors-General, the Government may take note of = \ these considerations.

CHAPTER XII

EPILOGUE

THE essential features of the Indian Constitution have now been surveyed, and it is hoped that their strength and weaknesses have been properly estimated. It is undeniable that the framing of a Constitution for a country of the size and vastness of India cannot be an easy task, and those who essay it must at some stage or other feel bewildered by the complexity of the work they have undertaken. In fact, there are some whose sincerity of purpose and anxiety to advance India towards the status of a Dominion cannot be questioned, and yet who have felt considerable misgivings about establishing a system of democratic government for the country. To bring 350 million people under a single Federal Constitution, and to make the task of Government of so huge an area and population with unexampled diversities of race and language dependent on the chances of the ballot box, is in their opinion a leap in the dark.

Nor is the moment extremely propitious for the setting up of an unadulterated democracy in a new country. Europe, they point out, is passing through an exceptional phase of political activity. Democratic forms of government are everywhere at a discount; the needs of the hour cannot well be met by institutions whose strength lies in their representative character rather than in the ability of men returned through popular electorates. The spacious days of old, when discussions and debates could be carried on through such institutions without seriously affecting the life of the nation, have given place to times when action has to be taken at every stage and at frequent intervals. The rise of dictatorships in Europe therefore marks a radical change in men's opinions and a negation of faith in democratic institutions. Hitlerism in Germany, Fascism in Italy, and even the establishment of a National Government in Great Britain are unmistakable signposts of a radically different

path which European nations are pursuing. What a tragedy it would be if the outworn and cast-off shibboleths of Europe—democratic institutions which have ceased to serve their purpose—are applied to Eastern countries!

And yet the indictment is not as terrible as it sounds. What is the alternative to democracy? Can dictatorship survive for any length of time, and does it promote the best interests of humanity—the real test of all political institutions? The activities of the storm troops of Germany, the amazing edicts of Herr Hitler, may be a passing phase, but they are nevertheless a portent and a warning. Not even at its best can dictatorship ever be a permanent solution. At a time of supreme crisis it may appear to be a short cut to re-establish national supremacy and glory. But short cuts have often turned out to be the most round-about courses for the ultimate destination. And if the choice were to be between dictatorship and democracy, can India ever be in doubt as to where its choice must be, especially with all its experience drawn from past history?

Nor is the hesitation due to the size and population of the country really well founded. While to a stranger these diversities may be impressive, the Indian himself has ceased to look upon them as impregnable obstacles in the way of the consolidation of the nation. That underlying current of unity, of commonness of purpose, those strands of Indian life which have knit together the various races of India, have always been visible to the discerning student of the country. They will be brought more clearly into vision by a political Constitution which attempts to satisfy the ambitions of national life and yet assures an honoured place to every section of the community.

But the dangers ahead cannot be overlooked. The proposed Constitution cannot satisfy many sections of Indian opinion. Its halting policy has been adverted to in more than one connection in the preceding chapters. In fact, there are some who consider that the Constitution is a Penelope's web: the thread of responsibility woven in one section is unwoven by the conferment of autocratic powers in another.

But even if the Constitution were far more satisfactory, the problem facing Indian political leaders would be as difficult. ✓ The task of creating effective public opinion, the organization of parties based on political programmes, the evolution of sound traditions in the working of political institutions—these must engage the attention of the foremost among them. And much will depend on the type of representatives who are returned to the various Legislatures, on the men who will be called upon to form Ministries and undertake the task of government, on the Civil Service which must be an effective executive and yet an uninterfering organization in political affairs. It is not suggested that there are wanting in India men of the right calibre to undertake these heavy responsibilities; but the method of democracy has often put a severe limitation on the number of such individuals who will be available in any country for the great task. If in India, notwithstanding disappointments due to constitutional imperfections, the best and wisest men are forthcoming for the task of government, it will be found that the workman is far superior to the instrument. They will discover that limitations and safeguards recede into the background in proportion to the skill and foresight, sagacity and statesmanship which they show. Their patriotism, their firmness of purpose, their appreciation of the rights of individuals, of minorities, and of majorities, their sense of justice to the claims of the indigenous citizen and of the uitlander, above all, their pride in the honour and credit of India in the eyes of the world—these will determine the status of India and not its written constitution conceived in suspicion and enacted with hesitation. Such men will be the makers of India's unwritten Constitution.

It is inevitable that a book written by one who belongs to the younger generation should contain some reference to the forces that are at work in that generation. The youth of every country has been stirred to take a much keener interest in its public affairs than in any preceding era. Much lip-service has been paid to the sense of patriotism and unselfishness of youth; but it is not fully realized how

different is the mentality of the coming generation, and how much imbued it is with the spirit of service! It may not be given to even this generation to make a new world, a Utopia where the wicked cease to trouble and the weary are at rest. But if one understands the spirit of the generation aright, one may venture to predict that the youth of India is against all privilege and every kind of monopoly, that it is not obsessed by ideas of caste or race, and that a single purpose runs through them all of making India great nationally and internationally, of ensuring for her her rightful place in the comity of nations, and of enabling India to give its message to the world of toleration and peace. They have been influenced by the writings and speeches of various thinkers, Indian and foreign, foremost among whom has been that great saint and patriot, the Swami Vivekanand.

“Two forces seem to be working throughout nature,” says the Swami. “One of these is constantly differentiating, and the other is as constantly unifying: the one making more and more for separate individuals; the other, as it were, bringing the individuals into a mass, bringing out sameness in the midst of all this differentiation. Since the time when society began, these two forces have been at work, differentiating and unifying. Their action appears in various forms, and is called by various names in different places and at different times. But the essence is present in all, one making for differentiation and the other for sameness; the one making for caste and the other breaking it down; one making for classes and privileges and the other destroying them.

“. . . The absolute sameness of conditions, if that be the aim of ethics, appears to be impossible. What can be attained is the elimination of privilege; that is really the work before the whole world. In all social lives there has been that one fight in every race and in every country. The difficulty is not that one body of men are naturally more intelligent than another, but where this body of men, because they have the advantage of intelligence, should take

away even physical enjoyment from those who do not possess that advantage, the fight is to destroy that privilege. That some will be stronger physically than others, and will thus naturally be able to subdue or defeat the weak, is a self-evident fact, but that because of this strength they should gather into themselves all the attainable happiness of this life is not according to law, and the fight has been against it. That some people through natural aptitude should be able to accumulate more wealth than others is natural, but that on account of this power to acquire wealth they should tyrannize and ride rough-shod over those who cannot acquire so much wealth is not a part of the law, and the fight has been against that. The enjoyment of advantage over another is privilege, and throughout ages the aim of morality has been its destruction. This is the work which tends towards sameness, towards unity without destroying variety.

“Let all these variations remain eternally; it is the very essence of life: you will be wealthy and I shall be poor; you will be strong and I shall be weak; you will be learned and I ignorant; you will be very spiritual and I less so. But what of that? Let us remain so. But because you are physically or intellectually stronger you must not have more privilege than I; and that you have more wealth is no reason why you should be considered greater than I, for the sameness is here in spite of the different conditions.”

It will be the task of the youth of India to bring about not indeed equality, but a situation where equal opportunities may be available for all, and so to hand to the succeeding generation a heritage less burdensome than what has devolved on them.

The constitution and future status of India are of vital importance to the British Empire; not indeed in the sense in which the diehard section of the British public opinion has visualized it to be. It has been suggested that the attainment of self-governing status by India would bring about the dismemberment of the Empire, ruin Indo-British trade, and reduce Great Britain to the status of a Balkan

Power. It is impossible to exaggerate the singularly superficial outlook and short-sighted policy of this class of critic. Their reliance on brute force for the maintenance of trade relations is as great an anachronism as their belief that the Indian peasant is unconcerned about political developments or is casting pathetic longing, lingering looks at those saviours in Great Britain who recollect his existence only for purposes of political controversy. There is no greater fallacy than that of the unchanging East: the Indian peasant patiently tilling his field beneath the blazing sun, the Indian trader selling his petty wares in the crowded streets of Westernized cities, the women of India, some behind the inscrutable veil of the purdah, the merry jostling crowd of youth apparently engrossed in studies for the nerve-racking examinations of Indian universities, even the ideal Civil Servant far removed from the claws of the political agitator—none of them is free from political longings, and the dream of an India equal in status with the other Dominions in the British Commonwealth is not an idle fantasy to them. Their co-operation and goodwill are essential for the permanence of the British Empire and for transmitting it from an Empire-holding sovereignty over subject races into a commonwealth where each nation believes in co-operation with others and so strengthens the whole. India attaining her legitimate status will thus be a powerful factor in the consolidation of the British Commonwealth, and the smaller though more compact League of Nations will be the most potent factor for the preservation of world peace.

Nor are India's constitutional problems the sole concern of Great Britain or of the British Commonwealth. Their reactions on the whole world will be apparent to anyone who considers the present world situation critically. The right solution of the Indian constitutional problem will mark an epoch in the relations between the white and non-white races. All white nations must realize that if the non-white nations are kept in a state of subjection the cataclysmic conflict between the two races is inevitable and cannot long be postponed. Nor is it difficult to see how the existence

of these subject races is hampering the progress even of Western nations and is militating against any true solution of world peace. The nations of Europe benefiting at the expense of subject colonies will have to pay an inevitable penalty unless in good time they follow the advice of the Egyptian deity "and redeem an ancient wrong."

India stands expectant on the threshold of a new era. Her sons and daughters, anxious to use their energies in constructive effort, are looking forward to a realization of their hopes. Great Britain must realize that India's problems can be solved only by Indians. The "theory of trusteeship" can no longer be advanced without raising smiles of incredulity from all classes of Indians. In a realization of the change that has come over India and Indians, in an attempt to harness the good will of a large section of Indians to constructive effort in building up a new commonwealth—the fourth British Empire which will consist of no subject races, a house of many mansions where all shall live in equal status under one common protecting roof—lies the salvation of Great Britain. How far her statesmen will rise equal to the occasion, and to what extent Parliament will reflect the best mind of the British people, the events of the next few months will show!