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CONTENTS.

	PAGE
TOPICS OF THE WEEK	208
ARTICLE :—	
Martial Law in the Punjab. By Sir P. S. Sivaswamy Aiyer, K. C. S. L., C. I. E. ...	208
SPECIAL ARTICLES :—	
Imperial Preference. By Prof. V. G. Kale ...	212
The Franchise Report. By Satyananda Bose ...	213
A LETTER FROM LONDON	214
CORRESPONDENCE :—	
Unqualified Disapproval. By R. G. Pradhan	215

TOPICS OF THE WEEK.

MR. MONTAGU'S references to reform in his Budget speech, a detailed summary of which has just reached this country, inspire the hope that he may yet be able to carry through, without any serious whittling down, the Scheme which stands in the name of Lord Chelmsford as well as himself, but from which Lord Chelmsford, unfortunately, must now be said to have virtually resiled. "The keystone of the reforms," Mr. Montagu declared, "was the transference of power from the bureaucracy to the people," which "must be real and substantial at every stage." He said that the Bill he would introduce would substantially carry out the M.-C. proposals and adjured the Joint Committee, which would presently be appointed, not to whittle down the scheme. Referring to the Government of India's dispatch, he said that some amendments suggested therein would be embodied in the Bill, and that he would invite the Committee to decide against the others.

WE would challenge anyone to mention a single departure from the Joint Scheme suggested by the Government of India which does not curtail, in greater or less degree, the power proposed to be conferred on the people in the Report. The withholding of the power of the purse, the assigning an impossible position to the ministers and the removal of all safeguards with regard to "reserved" legislation—these nullify the whole Scheme, both in letter and spirit. They at any rate, we hope, are among the features which Mr. Montagu will direct the Committee to reject. For, if adopted, they would make the executive thoroughly irresponsible, and his scheme of "dyarchy" would be open to the very same objection which he urges against the alternative plan of local Governments. In dyarchy Indians are prepared to acquiesce as a

temporary arrangement if by means of it liberal application is given to the announcement of 1917. But the "dyarchy" which the Government of India propose is uniarchy except in the name, and Indians will have none of it. If Mr. Montagu is to remain true to his pledge to carry out the pronouncement adequately and to withstand any narrowing of the scope of the reforms promised in the Joint Report, he must resolutely oppose every one of the alterations proposed in the Government of India's dispatch. The Joint Scheme must, at the very least, be preserved intact.

THE suggestion made by Mr. Pradhan in his letter, published elsewhere, deserves to be promptly carried out. A sullen mood has come upon the country; the Government of India's dispatch has filled public men with gloom and alarm. A silence at this moment would be disastrous. The country must ring with an emphatic and uncompromising disapproval of the Government of India's recommendations. A special duty devolves upon the Moderates to express their unfaltering opposition to them inasmuch as they have generally supported the M.-C. scheme. No supporter of that scheme can conscientiously do aught but resist the retrograde proposals of the Government of India. The Indian Association of Calcutta has telegraphed its strong disapprobation; but an organised expression must be given to the Moderate view in the All-India Moderates' Conference, and we hope steps will be taken forthwith to convene the second session of the Conference for this purpose.

A CHANGE of policy is in sight in the Punjab. In order that it may not seem too abrupt, it is made to appear as if it was contemplated and is being inaugurated by Sir Michael O'Dwyer himself. It is to be hoped that his successor, who seems to enjoy the reputation of a just-minded ruler, will take speedy measures to restore, not the sullen quiet—that has been done by Sir Michael—but the confidence of the people. The withdrawal of martial law, we trust, will soon be complete and the enquiry promised by Mr. Montagu will be instituted without unnecessary delay. In the meanwhile, it is of the utmost importance that immediate steps be taken to appeal against several savage sentences passed by the special tribunals, and funds collected to this end. Mr. Andrews's appeal, we hope, will touch a responsive chord in the heart of every lover of the country, and a final attempt

will be made to redress such injustice as may have been committed.

* * *

ONE stands aghast at the coolness with which the Government of India dismisses the provision for budget control, which is found in the Joint Report, as being made "by inadvertence" (*vide* last sentence of para. 73 in their dispatch of March 5). The Joint Report sums up its proposals regarding provincial finance thus: "Except in so far as the Governor exercises this power (of certification) the budget would be altered in accordance with the resolutions carried in council." The Government of India have the presumption to explain away the scrapping of this capital provision from their dispatch by representing that it was heedlessly introduced into the Reforms Report. The whole provincial arrangement has this power of the purse for its pivot, upon which everything turns, and it is inconceivable that such a vital feature of the reforms would have been incorporated in the Report except with deliberate purpose. The Government of India may, if they so desire, remove it and smash the whole Report; but they should seek a more decent excuse to do so than by pretending to believe that the provision was not advisedly made. It is most surprising that the Viceroy should be a party not only to the emasculation of reforms by depriving them of this cardinal feature, but to a misrepresentation of the intentions of the Report, of which he was joint author. If budget control was inadvertently provided in the Report, "the gradual development of self-governing institutions with a view to the progressive realisation of responsible government" and the "substantial steps in this direction" which are promised in the announcement and on which the Report is based,—these, too, may have been possibly just the outcome of a freak of the British Parliament and the Government of India need not even be at the pains to consider the Report.

* * *

THE Government of India advise the abandonment of the proposal to appoint additional members without portfolio, but propose to secure the same end by the addition of a *pucca* European councillor where the Governor is from England. The avowed reason for the original proposal and its substitute is that official experience must be represented in the Government in sufficient strength, but an additional unavowed reason is that the Indian element must be kept in due subordination. If a large number of departments is transferred to non-official control two ministers will certainly be required in the three presidencies, and an executive Government with three Indians and two Europeans cannot be thought of. One more European must therefore be added to restore the balance of power between the Indian and the European elements. We are justified in assuming this motive on the part of the authorities, for the Government of India themselves confess in their dispatch that the device of added members was

proposed in order "to provide against the preponderance of Indian opinion which would occur in the joint deliberations of both halves of the Government." The additional members had at any rate no vote, but the addition of another member with the power of vote would considerably weaken the Indian member's position in the executive council, as he will have to contend against three Europeans. The proposed change is thus not to our advantage. It is therefore satisfactory to read in the cablegram regarding Mr. Montagu's memorandum appended to the Reform Bill that he insists upon equal proportions being maintained in the executive council between Europeans and Indians. "If a second European member," runs the message, "is added, there will also be a second Indian member."

* * *

THE Government of India understand the provisions in the Joint Report regarding the Governor's power of certification in a sense which the provisions obviously do not bear. They advise that this power should be freed from embarrassing restrictions, and cite the authority of the para. 252 in the Report to prove that the intentions of its authors were identical with their proposal. They further recommend the elimination of a preliminary reference to the Government of India on the issue of the certificate and assert that the reference was not intended "to determine the propriety of the certificate, but only the question of fact," whether or not the bill deals with a reserved subject. Neither of these interpretations is correct. It is wrong to say that the Report contemplated that the Governor should be free to certify any bill on a reserved subject that may be introduced. The Report, on the contrary, is anxious that this power to carry a bill over the heads of the legislature "shall not be used arbitrarily or without due necessity" and has provided certain safeguards with that view, one of them being that in the Governor's Instrument of Instructions there should be an instruction setting forth the reasons justifying recourse to the certificate, and the council can make an appeal on the question as to whether "the certificate has been *properly* given" in accordance with the terms of this instruction. It will thus be seen that, in the intention of the authors of the Report, the Government of India were to decide the propriety of the certificate; indeed, if it were not so there would be no use for any instruction to the Governor on this score. The March dispatch takes away this safeguard, whatever it may be worth, but we must protest against the attempt to show that this and some of the other retrograde proposals contained therein are consonant to the wishes of the authors of the Reform Scheme.

* * *

READERS of this paper will remember our criticism on the provision in the Reforms Report regarding mixed legislation. Whereas a bill dealing wholly with a reserved subject must, under the

proposals of the Report, go to a grand committee on its being certified, a bill dealing mostly with a transferred subject but invading, and certified as so invading, the reserved subjects in some clause or amendment may be dropped altogether by the order of the Governor. We had fully expected that this anomaly would be righted immediately after it was brought to notice. The Government of India, however, make it much worse by (1) enlarging the Governor's power of certification, and (2) allowing him to stop the proposed legislation even before it is formally introduced. As proposed in the Report, a bill relating to a transferred subject, on its first introduction, may be challenged as trenching on the reserved field of legislation, and if the Governor issues a certificate to that effect he will have it within his power to drop the bill. Now, the Government of India desire that the Governor should be allowed to certify a bill not only when it encroaches on the reserved subjects, but also when, in his opinion, the peace, safety and tranquillity of the province for which he is personally responsible are in a general way affected. The effect of the certificate will be that he will be enabled, if he adopts that alternative, "to stop (the bill) at any stage, whether antecedent to actual introduction or after introduction." This entails a serious contraction of the rights now enjoyed by a non-official member, and the deprivation is utterly without justification.

TRUE to their character, the Madras Government have proposed the abolition of grand committees and a provision instead that, after the manner of the Egyptian Organic Law, all bills relating to reserved subjects should be deemed to have passed the council, whatever be the amount of support they might have received in that body. In Egypt the Organic Decree of May 1, 1883, conferred upon the Legislative Council and the General Assembly the right only to be consulted on all questions of importance, and the further right to require the Government to state the reasons for rejecting their advice when they should decide to do so. The General Assembly was also "endowed with an absolute right to veto, in respect of any measure involving the imposition of fresh taxation." The Government of India reject the device recommended by the Madras Government, but so deprive the grand committee plan of all its safeguards that in effect it does not differ at all from what Lord Pentland's Government suggested. It would thus be seen that, so far as "reserved" legislation and power of taxation are concerned, the rudimentary representative bodies of Egypt are more favourably situated than the legislatures proposed to be constituted in India in the age of self-determination. With regard to legislation, under the Government of India's proposals, the official Government are free to disregard the majority opinion in the council, as in Egypt, but they are not under an obligation to communicate the reasons for doing so, as is provided for in that country. With

regard to taxation, they can get all their proposals for additional taxation carried through grand committees, whereas in Egypt the approval of the Assembly is required for every proposal to levy a new tax.

IN England the question is once again raised as to whether "State subventions can rightly be paid to institutions in which a particular form of faith is taught." Several eminent Free Churchmen have memorialised Mr. Fisher drawing his attention to the injustice done to the country at large by the support which the educational institutions founded by the Church of England receive from the public funds, and urging that such denominational schools shall receive no grants. Observe that there is no question here of any one being compelled against his wishes to send his children to schools where religious instruction not to his mind is imparted. That is provided against by the conscience clause, but the complaint is that it does not afford sufficient protection. While this is the state of things in England where the controversy lies only between different sects of Christianity, in this country the authorities think it essential to provide, even in the so-called charter of India's constitutional liberties, against the possibility of a future enactment of the conscience clause by the insertion of an instruction to that effect in the Governor's Instrument of Instructions, thus denying to Indians, now and for a long time to come, protection against a compulsory indoctrination of an alien religion!

ALL the Nationalist papers chorus approval of Sir Sankaran Nair's masterly minute of dissent. This brings us particular joy, as Sir Sankaran's position is identical with the position which the Moderates have consistently taken up ever since the publication of the Reform Scheme. He in terms "accepts" the Scheme in a general way in so far as it refers to the provinces and asks for a division of subjects in the central Government. He resists firmly any whittling down of the reforms outlined in the Report, but it is clear that he is a warm supporter of the M.-C. proposals. We notice that with regard to many of the detailed provisions of the Scheme Sir Sankaran takes the same view as this paper ventured to take against the prevailing opinion. We find, for instance, that he attaches great value to the fact that, under the Report Scheme, taxation proposals can be initiated only with the approval of ministers; he regards this as a great power whereby the ministers and the council can indirectly control the supply for the reserved services to a large extent—a position hotly contested in these columns by Mr. A. Rangaswami Aiyengar. Verily, it is when a thing is denied to you that you begin to appreciate its worth. But we cannot understand for the life of us how the Nationalists who are ecstatically encomiastic of Sir Sankaran Nair's minute could consistently denounce the supporters of the Scheme as the very embodiment of unwisdom and pusillanimity.

MARTIAL LAW IN THE PUNJAB.

BY SIR P. S. SIVASWAMY AIYER, K. C. S. I., C. I. E.

WHILE the administration of martial law in the Punjab has been widely discussed in the press, the legal aspects of the subject have received comparatively little attention from the public. It is neither practicable nor desirable to go into the merits of any individual case, but it is worth while considering the scope and effect of the regulations and ordinances under which action has been taken and the powers of the Crown and the military authorities apart from any specific enactments.

The regulation under which martial law has been introduced in the Punjab is the Bengal State Offences Regulation, 1804, which has been declared to be in force in the Punjab by section 3 of the Punjab Laws Act, 1872. Section 2 of this regulation empowers the Governor-General-in-Council to suspend or direct the suspension of, wholly or partially, the functions of the ordinary criminal courts and to establish martial law therein during the existence of any war or open rebellion against the authority of the Government and also to direct the immediate trial by courts-martial of all persons owing allegiance to the British Government, who may be guilty of certain offences. The only offence which can be taken cognizance of are those specified in the second paragraph of section 2. The persons who can be tried by courts-martial under this regulation are subjects of the British Government, who shall be *taken*

1. in arms in open hostility to the British Government; or
2. in the act of opposing by force of arms the authority of the Government; or
3. in the actual commission of any overt act of rebellion against the State; or
4. in the act of openly aiding and abetting the enemies of the British Government within any part of the territories in question.

The punishments provided by section 3 are death and forfeiture of property. Having regard to the severity of the punishments provided and the language of sections 1 and 2 and the whole scheme of the regulation, there can be no doubt as to the correctness of the opinion of Advocate General Spankie that the manifest intention of the regulation was, that none but cases of the simplest and most obviously criminal nature should be the subject of trial by the courts-martial, that only persons who were *taken* in the actual commission of overt acts of rebellion or hostility should be tried by such courts, and that complex cases depending upon circumstantial proof and requiring either a long examination of facts, or a discriminating inference from facts, in themselves equivocal, were purposely withdrawn from the cognizance of these tribunals. Where persons concerned in acts of rebellion were not taken in the actual commission of the offences specified in the regulation, the intention of the legislature evidently was

that they should be handed over to the civil power for trial by the ordinary criminal courts, as will appear from the instructions issued by the Governor-General on the 11th April, 1805. (See Harrington's Bengal Regulations, Edn. of 1821, p. 350.)

The Martial Law Ordinance—I of 1919 recites that the functions of the ordinary criminal courts have been suspended in respect of the offences described in section 2 of the regulation and provides for trial in respect of such offences being held by commissions of three persons appointed by the local Government instead of by courts-martial. The object of this substitution was presumably to secure the presence in the tribunal of judges in the civil employ of the Government. As a consequence of this constitution of the tribunal, the right of the accused to challenge the members of the tribunal has been excluded, and the necessity for confirmation of the finding and sentence as required by sections 94 and 98 of the Army Act has also been provided against. Though this ordinance came into force at mid-night on the 15th April, 1919, it was expressly rendered applicable to all persons referred to in Regulation 10 of 1804, who were charged with any of the offences therein described, committed on or after the 13th April, 1919. The question has been raised in some quarters whether the ordinance is valid, in so far as it purports to give retrospective effect. To the mind of a lawyer there can be no doubt as to the validity of an express provision of this sort. Though the inclination of the courts would be against the retrospective operation of penal laws in cases in which the language of the statute admits of reasonable doubt, there can be no question as to the validity of an express provision for giving retrospective effect. The only offences which can be taken cognizance of by the commissions under this ordinance are those described in section 2 of the regulation above referred to. It is not every offence under Chapter VI of the Penal Code that could be brought under this ordinance; for instance, section 124-A dealing with sedition, would fall outside the class of offences described in the regulation; so also offences under section 129. Whether offences under section 121-A or 123 of the Penal Code could be taken cognizance of or not under the martial law ordinance would depend upon the circumstances of the case. The martial law ordinance does not authorise the military authorities to enact any rules or regulations or to create any new offences in respect of infringement of any rules or orders, which may be issued by them. Whether, apart from the provisions of the martial law ordinance, the Crown or the military authorities have any power to issue such regulations and how breaches of such regulations may be punished are distinct questions, which will be examined later on. As regards the sentences which may be imposed by a commission constituted under this ordinance, they could not pass any sentence except that of capital punishment, and forfeiture of the property of the person convicted was an automatic and

necessary result of the conviction under section 3 of the regulation. To obviate this hardship the martial law (sentences) ordinance was issued on the 18th April, 1919, and it enabled the tribunals to pass any sentence of transportation for life or for any period not less than 10 years or of rigorous imprisonment for a term of not less than 7 and not more than 14 years, and it further provided that forfeiture of property should not follow a conviction automatically, but only when so directed by the court or commission. The only other ordinance which it is necessary to notice is the martial law (further extension) ordinance, which was passed on the 21st April, 1919. This ordinance gives an extraordinary extension to the scope of the martial law ordinance-I of 1919. Whereas by the first ordinance only persons charged with the offences described in section 2 of the regulation could be tried, the fourth ordinance provides for the trial of any person charged with any offence committed on or after the 30th March, 1919. It may be anything punishable under the Indian Penal Code or, for the matter of that, even under a special or a local law. The offence may be simple trespass, defamation, bigamy or nuisance. It need not involve the safety of the British possessions or the security of the lives and property of the inhabitants. Of course, it is not at all likely that such cases will be actually tried by the commission; for this extended jurisdiction of the commissions is made dependent upon a general or special order to be issued by the local Government, and they are not likely to refer ordinary cases not connected, in their opinion, however directly or indirectly, with the recent disturbances. The provision is referred to here merely for the purpose of showing how entirely it is left to the local Government to displace the ordinary criminal courts and introduce the procedure of courts-martial. Under the regulation it is, no doubt, open to the Governor-General-in-Council to direct any public authority to order suspension of the ordinary criminal courts, wholly or partially, but the extent to which such suspension of the ordinary criminal courts may take place, may be gathered from the general scheme of the regulation. The suspension of the functions of the ordinary criminal courts and the exercise of jurisdiction by courts-martial constituted under the regulation are co-extensive. Inasmuch as the jurisdiction of courts-martial under section 2 of the regulation is confined to the four classes of crimes described therein, which are all more or less overt acts of hostility (or rebellion) to the State, the functions of the ordinary criminal courts cannot also be suspended to any greater extent, or except as regards these crimes. Even in respect of the crimes specified, the regulation (section 4) displays a solicitude to avoid the institution of courts-martial, except where trial by them appears to be indispensably necessary. In view of the facts that martial law was established in exercise of the powers conferred by section 2 of the regulation, that the procedure of courts-martial was also in-

troduced in exercise of the same powers, that the commissions appointed under the martial law ordinance are only a convenient substitute for the tribunals prescribed by the Indian Army Act of 1911 and that the procedure to be followed by these commissions is the procedure prescribed for courts-martial by the Indian Army Act, the legality of the extension of the scope of the martial law ordinance to persons other than those referred to in regulation 10 of 1804 and other than those subject to the Indian Army Act and to all kinds of offences, even those not falling under the regulation of the Army Act, appears extremely doubtful. In passing it may be observed that a sentence of whipping would not be a legal punishment either under regulation 10 of 1804 or under the martial law (sentences) ordinance of 1919 or under the Army Act. Though corporal punishment is permitted under the Army Act it is only in respect of persons subject to the Act and under the rank of warrant officer. Any sentence of corporal punishment can only be justified under the ordinary criminal law. It is conceivable that a military officer charged with the duty of suppressing a rebellion may have to resort to corporal punishment, but it can only be inflicted as a matter of unavoidable military necessity and not under the show of any legal trial.

It may perhaps be argued that, notwithstanding the fact that ordinance 4 of 1919 was intended to extend the scope of the martial law ordinance, which was brought into existence under the conditions described in regulation 10 of 1804, it is open to the Governor-General to do anything he may please in the exercise of his powers under section 72 of the Government of India Act, 1915. Under this section the Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made has, for the space of not more than six months, the same force of law as an act passed by him in legislative council. The power is subject to the same restrictions and disallowance as an Act of the Indian legislative council. It may be said that the ordinance-making power of the Governor-General is practically unlimited and that it is legally open to him to suspend all courts or to abolish the evidence act or to order any and every offender to be tried by courts-martial. There are, however, two conditions laid down in the section, that it must be a case of emergency and that the ordinance must be for the peace and good government of the country. Whether in the existing circumstances in the Punjab the ordinary criminal courts should be regarded as unfit for bringing offenders to justice or whether it is indispensable for the peace and good government of the province that their functions should be suspended and offenders should be tried by the procedure of courts-martial, is a question of fact upon which a divergence of views may be reasonably possible, and it would be a

matter for regret if the Government were not guided by the same solicitude for preserving the jurisdiction of the ordinary criminal courts as is apparent in regulation 10 of 1804. *Prima facie*, one would be inclined to think that this unlimited delegation to the local Government of the power to suspend the functions of the ordinary criminal courts in respect of offences outstrips the necessities of the case. It seems a reasonable view to take that the power conferred by section 72 of the Government of India Act represents the prerogative of the Crown, which has been defined as the residue of discretionary authority, which at any given time is legally left in the hands of the Crown, or, in other words, the executive Government, and that the exercise of the emergency power under section 72 should, in practice if not in theory, be guided by the same considerations and limitations as the exercise of the prerogative by the Crown under similar circumstances in England.

The circumstances under which martial law may be proclaimed in the case of a rebellion, the significance of the proclamation and the validity of measures taken upon such proclamation have been discussed by eminent text-writers, and the weight of authority is in favour of the view that, while it is the duty and the prerogative of the Crown to suppress revolts and it is also competent to employ military force so far as may be necessary for the purpose, it is illegal for the Crown to resort to martial law for the purpose of punishing offenders. In his *History of the Criminal Law of England*, Mr. Justice Stephen sums up the result of his discussion on pages 215 and 216 of Volume I as follows :

- (i) Martial law is the assumption by officers of the Crown of absolute power exercised by military force for the suppression of an insurrection and the restoration of order and lawful authority.
- (ii) The officers of the Crown are justified in any exertion of physical force extending to the destruction of life and property to any extent and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable civilly or criminally for such excess. They are not justified in inflicting punishment after resistance is suppressed and after the ordinary courts of justice can be reopened.
- (iii) The courts-martial by which martial law is administered are not, properly speaking, courts-martial or courts at all. They are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government.

It may be taken as settled law in England that if in the suppression of a rebellion and the effort to restore peace and order any subjects of the Crown are punished or put to death by a trial under court-martial, such punishment may be challenged in the ordinary courts after the restoration of order and can only be justified on the ground of necessity which must be proved as a

fact. Necessity is the measure of the duration and extent of the force to be employed. The fact that the summary execution of rebels, whose crimes can be punished by the ordinary courts of law, may check the spread of treason does not show that the execution is necessary or legal. (See Appendix, Note X on Martial Law, Dicey's "Law of the Constitution," 7th edition, pages 538 to 554.) In opposition to the view put forward by Professor Dicey, it is urged by Sir Erle Richards that inasmuch as military operations cannot be conducted in time of war or rebellion without interference with rights of property and person and such interference is according to the authorities not contrary to law, it follows that the interference must include also the right of trial and the infliction of punishment. (See *Law Quarterly Review*, Vol. XVIII, page 139.) The conclusion deduced from the premises is, by no means, necessary. Sir Erle Richards assumes that if a commanding officer has the power of controlling the movements of the civil population, he must also have the power of punishing those who are guilty of a breach of his orders. An infringement of the orders of the military authorities may be either an offence or not an offence. If it is an offence, the civil courts can punish a breach. If it is not an offence, the civil courts cannot punish and the military authorities also should not interfere by way of punishment. Sir Erle Richards does not sufficiently distinguish between the nature of the coercive measures which may be taken to prevent a breach or avert its consequences and the measures necessary by way of punishment for a breach. The former class of powers must necessarily vest in the military authorities, but the latter power is not so vested. The necessity for the trial and punishment of civilians by the military authorities may conceivably exist in some cases; as, for instance, where it is impossible for the ordinary civil courts to exercise their functions. But, even in such cases, the correct view to take is that put forward by Mr. Justice Stephen that the courts-martial are merely committees formed for the purpose of carrying into execution the discretionary power of the Crown. The case of *Wright vs. FitzGerald*, 27 *State Trials*, page 765, is opposed to the contention of Sir Erle Richards, who relies chiefly upon the decision of the Privy Council in *Ex-parte Marais* (1902), A.C. 109. This decision has been canvassed at length by several critics, and the most acceptable view is that the courts will not and cannot interfere with actual military operations or whilst war is actually raging entertain proceedings against military men and others for acts done under the so-called martial law. The judgment of the Privy Council asserts nothing as to the jurisdiction of the courts when peace is restored in respect of acts done during time of war and eminent jurists have held that even in time of war the exercise of jurisdiction by the ordinary courts is rather rendered impossible than superseded. (See Dicey's "Law of the Constitution," 7th edi-

tion, page 546.) With reference to this case of *Ex-parte Marais*, the remarks in note (d) on page 403 of Vol. 6 of Halsbury's "Laws of England" are of interest when it is remembered that the judgment of the Privy Council was delivered by Lord Halsbury. Here it is said, it is doubtful how far sentences of fine and imprisonment passed by courts-martial upon civilians would be valid in law after the war or insurrection is over. According to Sir Frederick Pollock, the only point decided by *Ex-parte Marais* was that the absence of visible disorder and the continued sitting of the courts are not conclusive evidence of a state of peace. Sir Frederick Pollock holds the view that the justification of any particular act done in a state of war is ultimately examinable in the ordinary courts, and that a person justifying his act must show not merely that he acted in good faith but also that there was reasonable and probable cause according to the apparent urgency of the circumstances. (See *Law Quarterly Review*, Vol. XVIII, pages 156 to 158.) Sir Frederick Pollock's view is criticised at length by Professor Dicey at pages 551 to 554 of note X in the Appendix to his "Law of the Constitution." The difference between the two eminent jurists consists in this: that the tests proposed by Sir Frederick Pollock would justify acts not dictated by immediate necessity, while according to Professor Dicey and a number of other jurists immediate necessity is the sole ground of justification.

It will be clear from the foregoing statement that in England there cannot at common law be any supersession of the civil courts by the exercise of the prerogative of the Crown. If, however, the disturbance of the country renders it impossible for the ordinary courts of law to sit or enforce the execution of their judgments, in such cases martial law is indulged rather than allowed as a law, and it is a rude substitute for the ordinary courts. In the language of Sir James Mackintosh, while the laws are silenced by the noise of arms the rulers of the armed force must punish as equitably as they can those crimes which threaten their own safety and that of society, but no longer. While the closure of the courts owing to the impossibility of exercising their functions is a reason for indulging martial law, the fact that the courts may be actually sitting is not *conclusive* evidence of a state of peace. The ordinary courts of justice may, as a matter of fact, will be exercising their functions as a matter of sufferance by the military authorities. (See *Ex-parte Marais*, 1902, Appeal cases 109; *Elphinstone vs. Bedree Chund*, I Knapp, P. C. 316.)

Applying these principles to the case of the Punjab, could it be said that it was impossible for the ordinary courts to sit or exercise their functions, or that if they did it was only by sufferance of the military authorities. There is nothing to show this. It does not appear that the establishment of martial law in respect of offences other than those specified in regulation 10 of 1804 was called for by

the impossibility of the ordinary courts exercising their functions. The fact that trial by courts-martial is bound to be swifter or would serve as an example of terror to others and to keep the rest in due awe and obedience is not a sufficient justification in policy for the establishment of martial law. Even taking it for granted that the establishment of martial law was originally justified, the question whether the state of open rebellion or such circumstances as justified the introduction of martial law have continued in existence so as to justify the continuance of martial law, is also a question of fact.

One question which naturally arises with reference to the administration of martial law is, whether the Crown or the military authorities have any power at common law to create any new offences. According to the law in England, they clearly do not possess any such power. Where it is necessary to enable the military authorities to issue any rules or regulations affecting civilians and where it is necessary to treat any infringements as offences, the practice in England has been to confer such powers by statute, witness, for instance, the English Defence of the Realm Consolidation Act, 1914, 5 Geo. 5 Chapter 8. Section I of the statute expressly confers power to issue regulations and authorise trial and punishment by courts-martial. It will be interesting to note that by the Defence of the Realm Amendment Act, 1915, 5 Geo. 5 Chapter 34, Section I, any person not subject to the naval discipline act or to military law, who is alleged to be guilty of an offence against any regulations made under the Defence of the Realm Consolidation Act, 1914, is entitled to be tried by a civil court with a jury instead of being tried by court-martial.

The officer administering martial law in Lahore has issued a large number of proclamations partaking of the character of regulations and providing for the trial and punishment of persons guilty of an infringement of these regulations. These proclamations merely recite that the Government of India have proclaimed martial law, and that superior military authority has appointed him to administer martial law. No other source of authority, is quoted and while the officer in charge was entitled to take measures reasonably necessary for the safety and peace of the area under his command, he had, to all appearance, no valid authority empowering him to create any new offences or to try and punish civilians for infringements of his regulations. The Government of India, no doubt, are empowered by the Defence of India Act, IV of 1915, section 2, to make rules for securing the public safety and the defence of British India and to create offences in respect of contraventions of such rules, but it does not appear that the Governor-General-in-Council has any power to delegate his powers under section (2) to the military authorities. We do not know whether the officer administering martial law tried and punished any persons for infringements of his

regulations, but if he did his proceedings cannot be treated as *ipso facto* valid. A perusal of the different orders passed by him also creates a doubt whether they were called for by the military necessities of the situation or by a desire to strike fear into the minds of the inhabitants by a show of exuberant severity or to secure certain conveniences for the public or particular sections thereof which would have been secured by the civil Government. Whatever might have been the reason of the regulations, any infringement of them could not be an offence unless it was one under some other law.

IMPERIAL PREFERENCE.

AMONG the several sweeping changes brought about by the war in English politics, the triumph of the advocates of tariff reform at the last general election was not the least important. The British public mind was strongly impressed, during the time of war, by the necessity of revising the trade policy of England with a view to bind the Colonies closer to the Mother Country by the ties of preferential tariffs. The part which the Dominions played in the prolonged and strenuous struggle, the varied restrictions which had to be imposed on the freedom of trade owing to the exigencies of the war and the special economic agreements which had to be made with the Allies with the object of rendering co-operation more effective, paved the way for the initiation of a preferential tariff. The resolutions of the Paris Conference had given clear indication of the direction in which things were moving; and when Mr. Lloyd George found himself at the head of a large majority of Conservatives and ex-Liberals like himself in the House of Commons, the last obstacle in the way of tariff reformers was swept away. Rightly or wrongly, the Asquithian Liberals, the staunchest supporters of free trade, had lost public confidence, and an alliance had been struck between the Conservatives and the followers of Mr. Lloyd George. The omens were, therefore, favourable for a determined, though cautious, attack upon the stronghold of free trade and the planting of the flag of protection upon the economic citadel tenaciously guarded by the Liberal garrison. The budget for the new year afforded an opportunity for the onslaught, and Mr. Austen Chamberlain was the proud leader of the attack which his father had vainly struggled to engineer. The Chancellor of the Exchequer was more anxious to commit the Parliament to a new economic policy than to achieve any striking financial results. His proposals were avowedly intended to introduce the thin end of the protection wedge, and he had taken great care to disarm opposition by studiously refraining from taxing food and raw materials and from making commodities of ordinary consumption dear.

The principle underlying Mr. Chamberlain's scheme of tariff reform consists in the preference given to Empire imports on the existing duties

by a reduction of one-sixth on tea, coffee, sugar, tobacco and other articles of the kind, and a reduction of one-third on cinema films, clocks and watches, motor cars and cycles and musical instruments. The idea is to encourage industries in the Empire even at the cost of a temporary reduction of revenue, and this policy is calculated to promote the economic development of the Empire and to bind the Dominions and Great Britain more closely together. The immediate effect of the preference proposals embodied in the budget will, of course, be very slight. Mr. Chamberlain observed: "From the small beginnings of to-day I hope that many members of the House will live to see raised a really wider structure of inter-imperial trade." The Indian and Ceylonese teas will become cheaper in England and that imperial industry will receive a stimulus; but the other industries affected are not likely to show any beneficial effects for a long time to come. The adoption of Imperial Preference is said to have been welcomed in the Dominions, but we must wait and see how it is regarded by the Allied nations and what reciprocal action is taken by the Colonies. In the meanwhile, the Conservatives are chuckling over their triumph, and the Liberal free traders are furious in their condemnation. The *Nation*, for instance, characterises the preference proposals as a novelty 'of a particularly ugly nature.' The issue is bound to be fought in England on party lines, and we shall hear a lot about it in the near future.

What will be India's position in a scheme of Imperial Preference, is the most important question that we, in this country, have to face. We are told that the Government of India will soon consider how the Indian tariff should be modified in response to the concessions offered by Great Britain. Now, unlike the Governments of the Dominions, that Government does not enjoy any power of independent action in framing its own tariff and has often deplored and always chafed at its helplessness in the matter. Nor is our Government amenable to popular control or influence, and there is positive danger of British manufacturing interests exerting their pressure on it to our detriment. The constitutional reforms which are coming are not expected to improve our position in the least, and fiscal autonomy for India, by which the people of this country have laid so much store, will only prove to be an idle dream. It is incontestable that India's ambition to protect and promote her industries in every suitable way is perfectly legitimate. We have always held that, as a partner in the Empire, India will cheerfully bear her burdens; but that it is necessary that she should also be allowed to enjoy the privileges of her position. India will not and ought not to grudge willing participation in the Imperial Zollverein. But her interests must be duly safeguarded and not be subordinated to those of British manufacturers. It is not possible to write in more specific terms on

this aspect of the subject till we know how the Government of India will shape its fiscal policy by way of reciprocating with Great Britain. It is likely that our Government may be called upon to discriminate in favour of Lancashire goods by lowering in their case the existing import duty of $7\frac{1}{2}$ per cent., say to $3\frac{1}{2}$ per cent. or by enhancing that duty in the case of foreign cloth. A similar discrimination may be effected in the matter of export duties on jute, for instance. Manipulation of our tariff on these lines must result in the reduction of our revenue when the immediate financial needs of the country can hardly allow any weakening of our position in that respect. Customs duties must be the sheet-anchor of our finance in the near future, and we can ill afford the sacrifice of any part of that revenue. England already enjoys a predominant position in the Indian market, and the collapse of enemy nations which competed with her for years, renders it unnecessary to modify our tariff in the direction of Imperial Preference. Discrimination in favour of Empire manufactured imports will again not be conducive to the development of our indigenous industries which will have to face keen competition at a time when they require all the help that can be given to them. All these factors require careful consideration, and we must be watchful of our interests while a scheme of Imperial Preference is being formulated and India is assigned a definite part in it.

V. G. KALE.

THE FRANCHISE REPORT.

THE recommendations of the Franchise Committee appear to have been conceived, on the whole, in a liberal spirit. The Congress-League scheme is largely in evidence and some of its important proposals have been accepted. In the provincial councils, the broadening of the franchise, the introduction of direct election, the large proportion of elected element in councils varying from $\frac{3}{4}$ ths to $\frac{4}{5}$ ths of their total strength and the removal of many existing disqualifications for candidates for election will generally commend themselves, and these provisions, if carried out, will constitute a good foundation for responsible government. The franchise has been made low enough for the present conditions of the country; it is already feared that it will cause a deadlock in elections, at any rate at the start. It is also apprehended that the professional middle classes may not be sufficiently represented in the councils as the electors in the general constituencies will, for some time to come, be under the influence and control of the land-holders. Whatever ground there may be for these apprehensions in the present circumstances, it is certain that they are destined to disappear with the spread of education amongst the masses and the establishment of a closer union between them and the middle classes. A broad and liberal franchise is the chief plank in a system of responsible government, and we must be prepared to submit to any inconvenience

at the beginning. The removal of residential qualification for candidates at elections in Madras and Bengal is another important concession, and it is a pity that this has not been extended to other provinces.

While dwelling on these features of the Committee's report, we cannot shut our eyes to others which are of an objectionable nature. It is not possible to reconcile oneself to the extension of communal electorates which the Committee have recommended, contrary to the direction of the Joint Report. The European community, who may be said almost to be over-represented on the commercial and industrial side, at least in Bengal, has no rightful claim to a separate, commercial electorate in addition. The same objection holds good in respect of the zamindars of Bengal and possibly of other provinces, who will be returned in large numbers from the rural constituencies. The education qualification might have been added as an alternative of property qualification for electors. There is precedent for such practice in Belgium, Hungary and some of the Dominions overseas. We are glad to observe that the Committee have adhered to the compact between Hindus and Mahomedans arrived at in the Congress of 1916.

With regard to the Indian legislature, the recommendations of the Committee are not at all satisfactory. It is somewhat strange that the provincial legislative council should return members both to the Legislative Assembly and the Council of State. The Committee's proposal may be accepted in regard to the latter. But for the Assembly a wider electorate, say in the shape of an electoral college; should be constituted. Direct election is perhaps beset with difficulty at the present moment; but it must come in the near future.

It is worthy of note that the depressed classes will have a representative in the provincial council. But for a province like Bengal, the provision of a single member is inadequate in view of their numbers, the multiplicity of castes and the progress of education amongst them.

The Government of India have taken a very reactionary attitude with respect to some of the proposals of the Committee. They have, for instance, opposed the university seat, the retention of any but property qualification and the non-adoption of residential qualification for electors in Bengal and Madras. They have also suggested in fact, though not in words, a departure from the Congress compact in the matter of Mahomedan representation in Bengal. The views of the Government of India in respect of elections to the Indian legislative bodies are of an advanced character and will meet with considerable support from the public.

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A LETTER FROM LONDON.

(FROM OUR OWN CORRESPONDENT.)

LONDON, MAY 1.

THE REFORM BILL.

PROMINENT Indians are coming here in increasing numbers, now that to some extent, the barrier against travel to Europe is raised. Mr. S. R. Bomanji arrived here a few weeks ago, but has been obliged to go to Paris to undergo an operation, from which he is now recovering. He has, I believe, been able to put his wide experience of Indian industrial conditions at the disposal of his compatriots who are engaged officially there, and has thereby rendered useful service to India. Sir Vithaldas Thackersey is soon expected, and he, too, will be of service to his country's interests when the question of legislation to enforce the recommendations of the Holland Commission comes forward. Sir Prabhaskar Pattani arrived yesterday, looking very well. Mr. V. R. Gupte, of the Deccan Sabha, who has come primarily on private business reached London the day before, and Messrs. Samarth and K. C. Roy are expected to-night. Soon there will be quite a nucleus of Indians of standing in London, who will be able to speak with weight and authority on the many matters affecting the welfare of India. I am told that Mr. Montagu hopes to have his Bill, at which he is hard at work just now, in shape before the end of the present month, and possibly by the time this reaches you, your readers will be acquainted with its main provisions. I am informed that it will be cast in a bolder mould than might have been anticipated, though this is in the nature of prophesy. Time will show. There is no doubt that Sir James Meston will have great weight when he comes here, in regard to the financial clauses of the Bill, but it is hoped that qualified persons like Sir William Meyer may be able to counteract any mischief that may arise from the pressure that, I understand, the Government of India are endeavouring to bring to bear upon the Secretary of State.

MR. HORNIMAN'S DEPORTATION.

The cabled news has just reached here that, on the motion of the Bombay Government, Mr. Horniman has been deported from India by the order of the Government of India, and is now on his way to this country. No reasons are forthcoming, but it is presumed that the Government must be very sure of their ground to take such drastic action. Some such move on the part of the Bombay Government has been rumoured for some time, and the news, when it came, was not altogether unexpected. It is difficult to comment on such a matter in the absence of anything definite to go upon. The only other thing we know at the moment is that Mr. Gandhi has issued a statement expressing at the same time sorrow and pleasure at the Government's action. He is stated to have described Mr. Horniman as a brave and generous Englishman who fearlessly exposed the wrong he had seen, and as an ornament to his race. But this does not carry us much further, for we are still in the dark as to the pretext upon which the Bombay Government have acted. Reuter informs us that an order has been served upon the *Bombay Chronicle*, requiring the directors of the paper to submit all their matter to the Government before publication, but that they had decided to suspend publication, rather than submit to a censorship that would be humiliating and would prevent free expression of public opinion. On the face of it, the Government seem to have gone much further than the necessities of the case required, and the

onus of satisfactory explanation of this attempt to gag the Press lies upon them.

PROTEST AGAINST THE ROWLATT ACT.

Mr. Tilak, who has not been very well lately, was to address an At Home of Britain and India this week-end, on "What India Wants," but I have just learnt that he has sprained his ankle, and that he may be prevented from fulfilling his engagement. A public meeting of Indians has been announced for May 12, to protest against any attempt to interfere with the sovereignty of the Khalifate (a resolution on this subject will be moved, all being well, by Mr. B. G. Tilak), and against the policy of Western Powers which supports the continuance of differential legislation on racial grounds. A third resolution will denounce the Rowlatt Bill that has just been passed and will demand its disallowance, and a fourth urges upon the British Government the necessity of an immediate reform in the Government of India and declares that no political reforms which fail to make the people of India supreme in the Government of their country will secure permanent peace. It is a comprehensive programme.

EQUALITY OF ALL NATIONALS.

For the moment, the second prospective resolution is the one that interests me especially, for its subject matter has just been thrashed out, to some extent, in Paris. Last February, the Japanese delegates to the Peace Conference were instructed to urge that in the framing of the League of Nations Convention, which had been submitted to a special Commission, special provision should be made to ensure the fair and just and equal treatment by each constituent nation of the League of the nationals of all the other members. Everyone knew, of course, that Japan was raising that most delicate question relating to the treatment of Asiatics by America and the British Dominions. I am unaware that the problem has arisen in any other countries. The Indian delegates were in a difficult position, for they recognised that Great Britain was in a delicate position as regards the Dominions and also as regards her Ally, Japan. It is believed, however, that they strongly supported the Japanese attitude, and the Japanese proposal was submitted for consideration to the Commission, which reported in favour of its adoption by a majority, though unanimity was required. As a result, Japan, who had put forward a modified demand in order to meet the susceptibilities of the other countries concerned, announced her intention to bring forward her original amendment before the plenary sitting of the Peace Conference, held last Monday, when the final draft of the Convention came up for consideration and adoption. Baron Makino, the Japanese spokesman, made a fervent appeal to his colleagues to accept the Japanese amendment and incorporate a safeguarding provision in the preamble of the Convention. He pictured the disappointment that would be felt in some countries, and particularly his own, if no such definite safeguard of racial rights and privileges were inserted in the text of the Convention, when the nationals of the affected countries realised that though, under the Convention, they might be called upon to sacrifice their lives for the protection and defence of the nationals or other members of the League, they would feel that they were not regarded as being of equal status or merit as compared with the nationals of those other countries, and he foresaw that a most difficult situation would thereby be created. Unfortunately, vested interests proved too strong, and realising that he would not be able then to carry his point, he announced that Japan would not press the

amendment at the moment, but that it would be insistently enforced upon the attention of the League when it came into being. That is how the matter now stands. Japan has been technically defeated, but she has gained a moral victory, not for herself alone, but for all the Asiatic peoples that may enter the League of Nations. It is believed that an additional consideration that weighed with her in agreeing for the moment not to press her demand in this matter was that she wished to gain the assent of the Big Three (Signor Orlando, the Italian Premier, having withdrawn to Rome to confer with the Italian Parliament on the subject of the Italian claims in the light of President Wilson's hostility thereto) to her claim to have Kiao-Chau handed over to her, and not handed back direct to China, in view of the Treaty of 1915, by which China agreed with Japan that the port should revert to her through Japan, at such time and on such conditions as the latter might be disposed to assent to. Japan has now gained her desire, and it will be interesting to see how long a time will elapse before Kiao-Chau is returned to her. Will it be another Egypt?

In all likelihood a settlement of the Italo-American (or, rather, the Sonnino-Wilson) imbroglio will soon be reached. The President has the strong support of all independent peoples for his proposition that he cannot make peace with Austria on different principles from those underlying the treaty with Germany. The situation is still delicate and difficult, but it is not incapable of adjustment, if only Italian public feeling is not allowed to get out of hand. Signor Orlando has made a reasonable and moderate speech in the Italian Parliament, which was well received, and it is hoped that an accommodation will soon be achieved. Meanwhile, the German peace delegates and their enormous staff have arrived at Versailles, and will, on Saturday, be called upon to receive and consider a Preliminary Peace Treaty of a thousand clauses and over 120,000 words. They are not to be envied.

CORRESPONDENCE.

UNQUALIFIED DISAPPROVAL.

TO THE EDITOR OF THE SERVANT OF INDIA.

SIR,—I have read with great interest the Hon. Mr. Chintamani's article under the heading, "Uncompromising Opposition," published in the last issue of the SERVANT OF INDIA. I entirely agree with him in his view about the despatch of the Government of India on the reports of the Southborough Committees. I have no doubt that Indian public opinion will, with one voice, condemn the Government of India's proposals as quite reactionary and unacceptable. The Hon. Mr. Chintamani has struck the right key-note when he says that "our attitude towards them must be one of uncompromising opposition." As between the original Montagu-Chelmsford Scheme and the one proposed by the Government of India, we cannot have the least hesitation as to which to prefer, and we must make it quite clear to the British Parliament and the Cabinet that if reforms will be whittled down, as proposed by the Government of India, we can have nothing to do with them. I have full faith in the statesmanship of the Right Hon. Mr. Montagu, and I feel confident that Lord Sinha will never be a party to a scheme which is no improvement at all on the original scheme, except in the sense, as Sir Dinsha Wacha well expressed it, that it is "an improvement backwards." But the despatch of the Government of India cannot but have the effect of strengthening the hands of the Indo-British Association and of others, the guiding principle of whose attitude towards the question of Indian reform seems to be that, since reforms cannot now be altogether pre-

vented, the Montagu-Chelmsford Scheme should be watered to such an extent that it will transfer as little power to the people as possible. While our efforts will be in the direction of so improving the Scheme as to make it conform at least to the proposals of the Moderates' Conference, they will leave no stone unturned to see that the Scheme is whittled down and brought in line with the proposals of the Government of India. Our task has thus been rendered more difficult by the despatch of the Government of India. We have (1) to prevent the original Scheme from being whittled down, to see that the Parliament does not give its preference to the proposals embodied in the despatch as against those in Joint Report, and (2) we must try to obtain those improvements in the original Scheme about which the Moderates' Conference and the Special Congress, the Delhi Congress and the Moslem League agree. I know there are differences of opinion as regards the improvements that should be urged in the Montagu-Chelmsford Scheme, but it would be sheer folly not to realize that we must, at least now, concentrate all our efforts on those improvements about which Indian public opinion is unanimous. I cannot too strongly urge that the several deputations that have left for England ought to sink their differences and adopt a common line of action. This has now become all the more necessary in view of the accession of strength to the cause of reaction due to the proposals of the Government of India. The policy of the Moderates affords now the only basis for action. Mrs. Besant has already avowed her intention to work in co-operation with the Moderates' Deputation, and let us hope the deputations of the Congress and the All-India Home Rule League will realize the wisdom of the same policy. In such united action alone lies the hope of obtaining such reforms as can satisfy our sense of national self-respect.

I conclude with a suggestion. We have one single supreme duty to discharge at the present moment, and it is absolutely clear. In every town and as many villages as possible we must hold public meetings and express our utter and unqualified disapproval of the proposals embodied in the despatch of the Government of India. And we must give the British Parliament and people clearly to understand that not only we shall not brook any whittling down of the original Scheme, but that nothing short of the improvements about which Indian opinion is agreed shall satisfy us. We must now shake off the mood of depression that has come over us and put forth every effort not only to save the Montagu-Chelmsford Scheme, but to get it improved on the lines on which we are all agreed. The British Parliament and Cabinet must be literally flooded with telegrams and representations (a) condemning the despatch of the Government of India, (b) supporting the original Scheme, and (c) urging those improvements therein which are agreed to by the Moderates' Conference, the Special Congress, the Delhi Congress and the Moslem League. Let not our efforts be now distracted or our resources frittered away by any other movement, Satyagraha or any other, and let our sole endeavour for the present be to obtain such constitutional and administrative reforms as can truly lay the foundations of a self-governing India and her future greatness as a member of the British Commonwealth of Nations. The Secretary of State has announced that the Reform Bill will be introduced during the next week, and for the next few months we should have no thought but that of carrying on our struggle for constitutional reform to a successful issue.—Yours, etc.

R. G. PRADHAN.

Nasik, 31st May.

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