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JOINT COMMITTEE
ON INDIAN CONSTITUTIONAL REFORM

RECORDS

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REFORM**

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Memorandum by the Secretary of State for India describing the nature of the problem which arises directly and indirectly in connexion with the proposals in the White Paper relating to High Courts (paragraphs 168—175 of the White Paper).

THE JUDICIARY—HIGH COURTS.
(Paragraphs 168-175 White Paper.)

INTRODUCTORY.

The Machinery for the Administration of Justice.

An adequate appreciation of the authoritative position which the High Courts occupy in the administration of justice in India implies some acquaintance with the organisation of the subordinate civil and criminal judiciary, which is the machine over which they preside. The picture presented is not that of a judiciary composed of individual judges drawn from the Bar and severally responsible for the state of business in their respective Courts. It is nearer the truth to regard the Indian judiciary as an official corps organised under the High Court with the twin objects of securing their judicial independence and maintaining their professional efficiency.

By way of explanation it should be realised that the machinery for the administration of justice in a Province is an organic whole which may conveniently (neglecting local variations) be described by the following table:—

<i>Criminal side.</i>	<i>Civil side.</i>
Magistrates with third class powers.	Munsifs.
Magistrates with second class powers.	Subordinate Judges, second grade.
Magistrates with first class powers.	Subordinate Judges, first grade.
District Magistrate.	District Judge.*
Sessions Judge.*	High Court.†
High Court.†	

The High Court both on the criminal and civil side enjoys some original jurisdiction, but the bulk of its work is appellate. The other Courts indicated above are all Courts of first instance, but an appeal lies from the decisions of all third and second-class magistrates to the District Magistrate, from all first-class magistrates (including the District Magistrate) to the Sessions Judge, and from the Sessions Judge to the High Court. Similarly on the civil side an appeal from a Munsif's decision and from those of the lower grade of subordinate judge lies to the District Judge and from the higher grades of subordinate judge and the District Judge to the High Court.

It will be understood that while there is one High Court for each Province, the rest of judiciary as described above is grouped by Districts, each District having a District Magistrate and a District Judge, the former with subordinate magistrates and the latter with subordinate civil judicial officers under his control.

* The offices of District Judge and Sessions Judge are almost invariably held by one individual, who is commonly described as "District and Sessions Judge."

† For the meaning of the words "High Court" as used in this note, see paragraph 22 below.

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[Continued.]

The Subordinate Criminal Judiciary.

2. The criminal judiciary is constructed on a plan uniform for all British India by an Act of the Indian Legislature (the Code of Criminal Procedure). That Act in its Second Part deals with the Constitution and Powers of Criminal Courts, prescribing the classes of Criminal Courts which shall exist in the Provinces, and assigning powers to each class by specifying in a schedule the offences of which each class of Court may take cognizance. Further powers are assigned by particular Acts, Central and Provincial.

The Code of Criminal Procedure, however, leaves it to the Provincial Governments to provide the personnel required to man the subordinate criminal judiciary. At the stage of Sessions Judge a varying number of appointments are made direct from the Bar, though these have in most Provinces been few in number, but below that stage the personnel is provided (so far as honorary magistrates are not employed) by drawing upon the administrative cadres employed in the Provinces (the Provincial Civil Service). To varying degrees from Province to Province a distinction between officers of these cadres employed upon magisterial duties and those employed upon administrative duties has been drawn; but, generally speaking, the subordinate magistracy is employed also in administrative or revenue work as well as in strictly judicial duties.

The broad result, therefore, is that all magistrates are drawn from departmental cadres, which they enter at the outset of their official career, and through which they pass by rising in due course from grade to grade and within grades, by surmounting various "efficiency bars." Progress depends partly upon seniority and partly upon professional efficiency. The clerical establishment of Criminal Courts is provided by the Provincial Governments from their subordinate services.

The Subordinate Civil Judiciary.

3. The Subordinate Civil Judiciary is organised by provincial legislation. The plan is therefore not necessarily uniform from Province to Province. In fact, there is a good deal of uniformity in general arrangement, but there are differences of detail. Certain classes of court are required to be set up. The jurisdiction of each is determined according to the pecuniary value of suits, and that jurisdiction is supplemented by specific Acts which may assign jurisdiction according to other criteria. The provision of personnel to preside over these courts is generally left to the Provincial Government, but in some Provinces for certain courts has been entrusted entirely or in effect to the High Court. But whatever the method, the feature common to all systems is that the personnel compose official cadres into which normally a man enters at the outset of his career and through which he passes over efficiency bars and grade distinctions. The cases in which officers of these services are employed on work other than strictly judicial work are comparatively few.

Control of the Subordinate Judiciary.

4. These arrangements are part of a system which recognises that subordinate courts, civil and criminal, in India, while preserving their judicial independence, require a degree of administrative superintendence and control unknown in England. The judge or magistrate in charge of each court makes periodical returns of the state of business in his court, which are reviewed by the District and Sessions Judge and by the District Magistrate at shorter, and by the High Court at longer, intervals. All courts are

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[Continued.]

regularly inspected, and at least in some Provinces one or more judges of the High Court go on tours of inspection round the courts in the Province. In the course of all this, presiding officers are criticised, commended or reprimanded. There are efficiency bars to be passed and grade promotions awarded. Transfers must be arranged, leave granted and provided for, and there are also matters of discipline.

It will appear later how much of this administrative control, which is very considerable in amount, and very important in nature, is exercised by the High Court. Much of it has been devolved upon the Court by Statute; a great deal is exercised by less formal arrangement with the Provincial Government.

THE PROVINCIAL HIGH COURTS.

5. It is convenient to examine the problem of the High Court from three separate standpoints:—

- (i) the establishment of the Court, including its composition;
- (ii) the "jurisdiction, powers and authority of the Court"; and
- (iii) its maintenance—i.e., the financial provision required for the salaries of the Judges, the pay of the Court's subordinate establishment and the provision and upkeep of its buildings.

The last of these heads will be discussed separately later. The first two broadly cover the field of the Letters Patent under which the High Courts are established, and are to be found stated as well in section 106 of the present Government of India Act.

Composition and Organisation.

6. The constitution of High Courts is to a certain extent determined by the specific provisions of the present Act, but is also governed by the provisions of Letters Patent. Provisions of the former nature, namely those which lay down the number of Judges and their qualifications, are, broadly, not alterable by any Legislature in India. But the Letters Patent as they stand are by their own terms subject to modification by the Indian Legislature (in the case of Burma by the Provincial Legislature). So far, therefore, as the constitution of a High Court depends upon its Letters Patent, the constitution is variable by Central (in the case of Burma by Provincial) legislation.

7. The effect of entry 28 in List II of Appendix VI of the White Paper is to exclude matters affecting the constitution and organisation of a High Court from the competence of Provincial Legislatures, and there is no entry in List I which puts these matters within the competence of the Federal Legislature, for, as will subsequently be shown, the terms used in item 69 of List I do not cover matters affecting the constitution and organisation of High Courts. Consequently, the proposals of the White Paper, paragraphs 168-175, contain the only provision for the establishment, constitution and organisation of High Courts. These provisions entrust matters of this nature solely to the Act itself or to Letters Patent by the Crown, and consequently give no power to any Indian Legislature to alter the composition or organisation of any High Court as they will be laid down in the new Constitution Act or Letters Patent.

8. The general assumption underlying the proposals in the paragraphs of the White Paper relating to the High Courts is that the existing provisions of the Government of India Act relating to the chartered High Courts (sections 101-113) will for the most part be repeated in substance in the

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(Paragraphs 168-175 White Paper.)

new Constitution Act without change, except to the extent that changes are indicated in paragraphs 168-175 of the White Paper. Briefly, these changes as proposed, nearly all of which except the last relate to the constitution of the Courts, are as follows:—

(i) That the tenure of Judges shall be during good behaviour instead of during pleasure (paragraph 169 and section 102 (1)).

(ii) That there shall be a fixed age limit of 62 for High Court Judges, instead of the present practice, whereby an undertaking to retire at the age of 60 is obtained from every Judge on appointment, no age limit being fixed by the Act (paragraph 169).

(iii) That every Puisne Judge, or every person qualified to be appointed a Puisne Judge, shall be eligible for the appointment of Chief Justice. The present Act (section 101 (4)) has been legally interpreted as rendering only barristers eligible for the office of Chief Justice (paragraph 170).

(iv) That the existing statutory requirement that at least one-third of the Judges of every High Court must be members of the Indian Civil Service and at least one-third must be barristers is to be abrogated (paragraph 170 and section 101 (4)).

(v) That the salaries, pensions, allowances, &c., of Judges shall in future be fixed by Order in Council instead of as at present by the Secretary of State in Council (paragraph 171 and section 104).

(vi) That Additional Judges* shall henceforth be appointed by the Governor-General in his discretion instead of by the Governor-General in Council (paragraph 172 and section 101 (2) (i)) and that the same authority shall henceforth have power to fill acting appointments, whether as Chief Justice or Judges, instead of the Local Government (paragraph 172 and section 105).

(vii) That the Governor-General, i.e., the Federal Government, shall take the place of the Governor-General in Council as the authority empowered to transfer areas from the jurisdiction of one High Court to another and to define their jurisdiction over British subjects situated in parts of India outside British India (paragraph 174 and section 109).

Jurisdiction, Powers and Authority.

9. The phrase "jurisdiction, powers and authority" has a long history reaching back to the Regulating Act of 1773, and it is employed in subsection (1) (a) of section 106 of the present Government of India Act to indicate, along with the power to establish a High Court, the whole scope of Letters Patent. The Letters Patent themselves indicate the distinction which is to be drawn at least between on the one hand "jurisdiction" and on the other "powers and authority": the broad distinction seems to be that "jurisdiction" indicates juridical competence and "powers and authority" administrative. The Letters Patent indicate, for instance, as regards civil jurisdiction, that that is a competence to try and determine, whether originally or on appeal, matters arising in issue between parties. The criminal jurisdiction is a competence to try all persons brought before the Court in due course of law and, of course, to hear appeals from the orders of Courts exercising a subordinate criminal jurisdiction. The Letters Patent, however, do not set out to describe or specify the content of the jurisdiction. The law to be administered by the High Court is left to the

* Additional Judges are Judges appointed for a period as distinct from permanent Judges of the Court.

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competent legislative authority in India, and the scope of the appellate power of the High Court is also left to the operation of existing legislative provision in India or to subsequent provision which in this respect, may hereafter be made by competent legislative authority in India.

Jurisdiction.

10. The present position is as follows:—

In spite of the existing concurrent jurisdiction of the Legislatures in India, it has been held that the provision in the Letters Patent enabling only the Legislature of the Governor-General in Council to amend Letters Patent excludes the competence of a Provincial Legislature in any matter affecting a High Court's jurisdiction. This, however, is not the position in Burma, where the Letters Patent differ from all others in granting power to the Provincial Legislature to amend the Letters Patent of the Burma Court.

Section 106 of the Government of India Act withdraws from the High Courts original jurisdiction in any matter concerning revenue, or the collection thereof, but even this provision of the Statute is, owing to the operation of the Fifth Schedule of the Act, amendable by the Central Legislature.

Powers and Authority.

11. The distinction made explicitly or implicitly in Letters Patent between "jurisdiction" on the one hand and "powers and authority" on the other is clear from the nature of the "powers" there given. They include, for instance, powers to appoint officers of the Court itself; powers to admit advocates, vakils and attorneys, and to make rules for their qualification, removal and suspension; powers to regulate their own proceedings; and powers to delegate duties of a judicial, quasi-judicial or non-judicial nature to any Registrar, Prothonotary or Master, or other official of the Court.

But the powers and authority of the High Courts of this nature are much wider than those described in the Letters Patent, and may conveniently be displayed under the following four heads, namely:—

- (i) Powers conferred by the Government of India Act.
- (ii) Powers conferred by Letters Patent.
- (iii) Powers conferred by enactments of the Central Legislature.
- (iv) Powers conferred by enactments of Provincial Legislatures.

(i) The powers conferred by the Government of India Act include those described in its 107th section, "Powers of the High Court with respect to Subordinate Courts." This power has usually been understood to be of a purely administrative nature, but certain High Courts have recently held that it confers upon them a wide juridical competence, and have further pointed out that it is not a power amendable by the Indian Legislature, as it is not included in Schedule V of the Government of India Act. It is the intention on the present occasion to enact the substance of this section, but in such a form as to leave no doubt that it does not confer juridical jurisdiction, but administrative powers.

In Proposal 175, it has been suggested that this authority should be subject to regulation by the Federal Legislature. But the suggestion made in the preceding sentence that the nature and scope of this authority should be laid down once for all in the Constitution Act itself would render a provision of the nature of paragraph 175 unnecessary.

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[Continued.]

(ii) *Powers and authority conferred by Letters Patent.*—The details of these powers have been indicated above. The White Paper itself contains no provision for amendment of Letters Patent by any authority in India and to this extent withdraws the powers at present enjoyed, in virtue of Schedule V to the Act and the Letters Patent themselves, by the Central Legislature (and in Burma, the Provincial Legislature). Nevertheless, the individual powers and authority enjoyed in virtue of their Letters Patent by the High Courts would be subject to an extent not yet explored to the jurisdiction of Legislatures in India according as they are covered by one entry or another in Lists I, II and III of Appendix VI. For instance, the powers of the High Court under Letters Patent in regard to the admission of advocates, vakils and attorneys would be subject to any competence which might be placed in India to legislate for the constitution and control of the Bar or Bars. Another instance is the High Court's power to delegate functions to Registrars and other officers of its own.

(iii) *Powers conferred by Central legislation.*—Instances of powers of this nature are to be found in the Criminal Procedure Code and particularly, in a very wide form, in the second part of the Civil Procedure Code, and it is presumed for the moment that these powers, as at present, will be subject to the competence of the Federal Legislature or, to the extent to which they fall in List III of Appendix VI, to the concurrent competence of the Federal and Provincial Legislatures.

(iv) *Powers conferred by Provincial Legislatures.*—The most prominent of these powers are those conferred in relation to the subordinate civil judiciary by Provincial Civil Courts Acts in certain Provinces: thus in Madras the civil subordinate judiciary of the Munsif class are appointed and controlled entirely by the High Court; in the Punjab the High Court is given the power to nominate persons for recruitment as Subordinate Judge, which nomination must be accepted by the Local Government. In other Provinces the position with regard to Munsifs is the same as that just indicated with reference to Subordinate Judges in the Punjab. But although, except to the extent just stated, the actual appointment of the civil judiciary rests with the Provincial Government, in nearly every case the opinion of the High Court as to appointment, transfer, promotion, etc., is taken and acted upon by the Local Government.

12. The importance of powers derived from provincial legislation and from the Provincial Governments will be apparent in their relation to the provincial judiciary as an administrative machine to which attention has been drawn in the opening paragraphs of this note. It may be added that by convention also the High Courts are almost invariably consulted in regard to the conferment of certain magisterial powers, such as those under section 80 of the Criminal Procedure Code. In effect, the whole of the civil judiciary and, to the extent indicated in the introductory portion of this note, the criminal judiciary, form an administrative department under the High Courts; they carry out a regular inspection of the Superior District Courts and, in some cases, of the Magistrates' Courts; they prepare the budget and control the contingent expenditure of the Civil Courts; they make recommendations to the Local Government regarding the promotion of the civil judiciary on an examination of their work; they issue a large body of rules prescribing the action of the civil judiciary in a variety of matters such as questions relating to judicial deposits and payment of witnesses. Indeed, the judiciary in India is regarded as constituting a piece of machinery the efficiency of which is maintained by day-to-day control and supervision by the High Court.

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[Continued.]

13. The maintenance of this control unimpaired is regarded by many as a matter of essential importance. If that view is endorsed by the Select Committee, it will be necessary, in drawing up the Constitution Act and the schedules thereunder, to ensure that the legislative powers to be entrusted in this respect to the Provincial Legislatures are so defined as to safeguard this position.

Maintenance.

14. The most important aspects of the problem of maintenance of the High Courts are financial. The salaries and other allowances of the judges themselves (proposal 171) will be regulated by Order in Council and will be met by non-voted provision (proposal 98). They, therefore, do not fall within the scope of entry 28 in List II. The more important matters which fall within the scope of that entry are the provision of buildings required for the Court, of the necessary clerical establishment and of the numerous miscellaneous matters classed as "contingencies." The effect of the White Paper proposals would be to leave all these matters to be regulated by the Provincial Legislature and Government, but to enable the Governor (proposal 98, sub-section (3)) to certify, after consultation with his Ministers, the sums required for these expenses of the Courts and thereby to remove them from the vote, but not from the criticism, of the Provincial Legislature.

FEDERALISATION OR PROVINCIALISATION.

15. If the question be asked whether the White Paper federalises or provincialises the High Courts, the answer must be given separately under each of the preceding heads under which the incidents of the problem have been described. So far as composition and organisation of High Courts is concerned, the White Paper neither federalises nor provincialises. It removes questions of this nature from the competence of either the Federal or the Provincial Legislature and entrusts them to Parliament by amendment of the Constitution Act, or to the Crown by issue of Letters Patent or Orders in Council.

16. As regards jurisdiction in the sense of juridical competence, the proposal is that the power to regulate juridical jurisdiction should follow the power to regulate the substantive law to be interpreted. This proposal has been accepted by the Governments in India as natural and logical and, indeed, seems to find support in section 5 of the Colonial Laws Validity Act and in general principles* accepted by the Privy Council.

17. As regards powers and authority, it is proposed to make the general administrative authority of the kind now conferred by section 107 of the Government of India Act neither Federal nor Provincial, but to lay down its nature and scope and to confer it upon the Courts once and for all in the Constitution Act itself. Particular powers and authority will be conferred upon the Court and regulated by the legislative authority which has competence in the matter to which they refer. For instance, all powers and authority which the High Courts may exercise under Provincial Civil Courts Acts will be Provincial; those which they exercise under the Code of Civil Procedure or the Code of Criminal Procedure, both of which fall in List III, will be Provincial or Federal according as the legislation undertaken is that of the Provincial or the Federal Legislature. The powers at present enjoyed by courtesy are, of course, not regulated by the proposals of the White Paper.

* *Valin v Langlois*, 5 App. Cas. 115; 49 L.J.P.C. 37.

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[Continued.]

18. As regards maintenance, the proposal is that this should be entirely a Provincial matter, but it is proposed, as already stated, to give the Governor a personal authority to certify, after consultation with his Ministers, the amounts which he thinks are required for the expenses of these Courts.

19. These proposals as regards powers and maintenance take account not only of the necessities of administration, but also of the conditions which the new Constitution is likely to set up. In the light of past experience it is suggested that the Federal Government will lack the requisite local knowledge to enable them to discharge the functions now assigned to the Provincial Governments in the case of all High Courts other than the Calcutta High Court. (The relations which have hitherto existed between the Government of India and the Calcutta High Court are due partly to historical reasons and partly to the fact that that Court serves two Provinces.) To restrict the competence to confer power and authority upon High Courts to the Federal Government might well involve a risk of conflict of administrative authority over subordinate Courts between (a) the Provincial Government, which would continue to possess such authority in virtue of its responsibility for the Provincial subject, and of the fact that in the majority of Provinces the Provincial Courts Act vests power of appointment of subordinate judicial officers in the Local Government, and (b) the High Court, which would also continue to possess such authority, but which, with the High Court centralised and with the statutory Letters Patent powers transferred to the Government of India, would cease to have any administrative relations with the Local Government. The present system of provincialisation has worked well in the past and has proved itself appropriate to the varying constitutional conditions. Finally, it might reasonably be held that since the administration of justice is essentially a Provincial subject, the Courts which administer it should be in relation with the Provincial executive authority.

20. It is further for consideration whether, if the High Courts were to be federalised, the Provincial Governments of the future would be content to allow them to remain in possession of the power and authority over the subordinate judiciary of the Province at present conferred by Provincial legislation or as the result of arrangements with Provincial executives. This is a consideration which cannot be ignored, for if the administration of the subordinate judiciary were removed from the High Court it would necessarily fall to the charge of a Minister directly responsible to the Legislature.

21. On the point of maintenance it is sometimes assumed that the federalisation of civil and criminal justice would not involve additional expenditure on the Centre, since the receipts on this head balance expenditure. Enquiries made from time to time, however, show that this is not correct when all expenditure of every kind on this head is taken into account, and in any case this measure would involve complicated financial adjustments ranging not only over Court fees, but stamps and Public Works expenditure. The administrative functions of the High Court involve control over a considerable range of expenditure in regard to subordinate establishments, Court buildings, and the like, and it has been represented with much force that these arrangements can best be effected in relation to the Local Government, instead of bringing them within the purview of the Central Government, which would not have the necessary knowledge, or could, in turn, only acquire that knowledge through reference to the Local Government itself.

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(Paragraphs 168-175 White Paper.)

[Continued.]

“HIGH COURTS,” OTHER THAN CHARTERED HIGH COURTS.

22. The foregoing paragraphs of this note have reference primarily to the High Courts referred to in the Government of India Act (section 101 (1)), that is, to High Courts of Judicature established by Letters Patent, commonly known as the Chartered High Courts. But such Courts do not exist in every Province; in a few Provinces the highest Court of criminal or civil appeal, though not a Chartered High Court, exercises the appellate and revisional powers of such a Court. These include the Courts of the various Judicial Commissioners and the Chief Courts. The observations in this note are to some extent applicable also to “High Courts” of this description, but not those which refer to constitution and organisation, to the general administrative power derived from section 107 of the Government of India Act, nor, of course, those relating to the powers conferred by Letters Patent. The position of non-chartered “High Courts” in relation to these matters will require consideration when the exact scope of the provision to take the place of paragraph 175 of the White Paper, and the precise extent of item 28 in List II of Appendix VI, come under examination. For the present the nature of the problems which arise in connection with the Judiciary are most conveniently presented from the angle of the Chartered High Courts.

Proposals for the Future Administration of Indian Railways.

MEMORANDUM BY THE SECRETARY OF STATE FOR INDIA.

In paragraph 74 of the Introduction to the White Paper it was stated that His Majesty's Government considered it essential that while the Federal Government will necessarily exercise a general control over railway policy, the actual control of the administration of the State Railways in India (including those worked by Companies) should be placed by the Constitution Act in the hands of a Statutory Body so composed and with such powers as will ensure that it is in a position to perform its duties upon business principles, and without being subject to political interference.

The paper entitled "Sketch Proposals for the Future Administration of Indian Railways," which I now circulate, is the outcome of the deliberations of a Committee which I recently appointed to consider a scheme which I had prepared in consultation with the Government of India to give effect to these principles. The Committee was very representative, containing as it did seven members of the Indian Legislature who came to England specially for this purpose; five of the delegates to the Joint Select Committee, of whom two were representatives of the Indian States; four eminent railway experts, two with special knowledge of Indian railways; while the remaining six members were possessed of wide administrative, financial or commercial experience.

2. I venture to think that the proposals set out in this paper are, broadly speaking, conceived on sound lines, and it is gratifying that so large a measure of agreement has been reached. In regard, however, to the vital question of the method of appointing the Railway Authority (paragraph 2 of the Proposals) a distinct cleavage of opinion emerged.

One section of the Committee recommended that all the members of the Authority should be appointed by the Federal Government; the rest of the Committee, while agreeing that four out of the seven members should be appointed by the Federal Government, considered it necessary that the other three should be appointed by the Governor-General in his discretion. I do not favour the former view as I consider that such an arrangement might conflict with the fundamental principle that the Authority should be entirely free from political influence, and I would be unwilling to go further than to allow four out of the seven members of the Railway Authority to be appointed by the Federal Government. As for the proposal that the Authority should be established on a communal basis laid down by Statute, while I sympathise with the anxieties which have prompted this proposal I regret that I cannot support it. If such a precedent were set in this case it would be difficult to refuse to follow it in other cases; and apart from the probability that no Federal Government could afford to disregard the claims of the minority communities if qualified persons be available, the reservation of three appointments in the hands of the Governor-General himself would serve to ensure that the Authority was representative, subject always to the governing consideration that no person should be appointed who did not possess the qualifications laid down in paragraph 2 of the Proposals.

3. I invite special attention to the foot-notes to paragraphs 11 and 12 regarding the position of railways in the Indian States. These notes raise an important constitutional issue which the representatives of the Indian States will no doubt explain to the Joint Select Committee.

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PROPOSALS FOR THE FUTURE
ADMINISTRATION OF INDIAN RAILWAYS.

[Continued.]

4. The Sketch Proposals refer specifically in paragraph 8 to the special responsibilities of the Governor-General in so far as they may extend to the recruitment and service conditions of railway personnel. It will be understood, however, that this does not exhaust the scope of his responsibilities in the matter of railway administration, particularly with regard to defence requirements. The governing principle laid down in paragraph 1 of the Proposals is that railway policy is to be controlled by the Federal Government and the Legislature; and where defence requirements may be concerned the authority of the Federal Government will reside in the Governor-General by virtue of his special responsibility in respect of any matter affecting the administration of the Reserved Department of Defence. In this regard, therefore, he will be in a position to give directions to the Railway Authority as to the exercise of their functions.

5. There remains to consider the important question whether a Statutory Railway Authority should be set up by British or by Indian legislation. As I see the position there appear to be four courses open:—

(1) An Act might be passed in the present Indian Legislature and the necessary adaptation to the new Constitution made in the Constitution Act itself.

(2) The Constitution Act itself might contain provisions, complete in all details.

(3) The Constitution Act might lay down the general principles on which legislation should be based, it being left to the new Indian Legislature to legislate in detail in conformity with those principles.

(4) The matter might be left entirely to the new Indian Legislature with a reservation that the approval of the Governor-General in his discretion would be required to the introduction of the original Bill, or of any amending Bill.

In any event it will be necessary to ensure that a Statutory Railway Authority shall be set up on right lines.

In any case it would be necessary to preserve in the Constitution Act the existing rights which the Indian Railway Companies possess under contracts entered into with the Secretary of State in Council.

27^o Julii, 1933.] SKETCH PROPOSALS FOR THE FUTURE ADMINISTRATION OF INDIAN RAILWAYS. [Continued.]

Sketch Proposals for the Future Administration of Indian Railways.

1. Subject to the control of policy by the Federal Government and the Legislature, a Railway Authority will be established and will be entrusted with the administration of railways in India (as described in paragraph 4) and will exercise its powers through an executive constituted as described in paragraph 3.

2. The Railway Authority will consist of seven members. The Committee is divided on the question whether (a) three will be appointed by the Governor-General in his discretion and four by the Governor-General on the advice of the Federal Government or (b) all will be appointed by the Governor-General on the advice of the Federal Government. Those members of the Committee who are members of the Central Legislature, with the exception of Mr. Anklesaria, support the latter alternative. All the Hindu and Muslim members of the Central Legislature on the Committee agree that out of the seven seats on the Railway Authority two should be reserved for the Muslim community and one for the European community. Sir Phiroze Sethna, Mr. Anklesaria, Sir Manubhai Mehta and the European members of the Committee, while they would welcome an authority representative of all interests and all communities so far as is compatible with efficiency, do not consider that any special provision should be made in the statute for the establishment of the Railway Authority on a communal basis. The seven members so appointed must be possessed of special knowledge* of commerce, industry, agriculture or finance, or have had extensive administrative experience. The President† of the Authority, who shall have the right of access to the Governor-General, will be appointed from the members by the Governor-General in his discretion.

The Federal Minister responsible for Transport and Communications may at any time convene a special meeting of the Railway Authority for the purpose of discussing matters of policy or questions of public interest. At such meetings the Federal Minister will preside. The Federal Minister may by order require or authorise the Railway Authority to give effect to decisions of the Federal Government and the Legislature on matters of policy, and it shall be obligatory on the Railway Authority to give effect to such decisions.

No Minister or member of the Federal Legislature or any other Legislature in India will be eligible to hold office as a member of the Authority till one year has elapsed since he surrendered his office or seat, nor will

* Mr. Joshi would add "knowledge of public affairs."

Mr. Joshi considers that two seats on the Railway Authority should be specially reserved for representatives of Labour and the travelling public.

Mr. Joshi and Dr. Ahmad consider that if the Authority is to consist of a whole-time Chairman and part-time members, the number should be increased.

Mr. Joshi and Mr. Anklesaria consider that special representation should be given to agriculturalists on the Railway Authority.

† Mr. Joshi and Mr. Ranga Iyer consider that the appointment of President should be made on the advice of the Federal Government.

‡ Mr. Joshi and Mr. Yamin Khan hold the view that in regard to the membership of a Legislature the year's disqualification should not apply, but that any member of a Legislature appointed to the Railway Authority will *ipso facto* vacate his seat.

27^o Julii, 1933.] SKETCH PROPOSALS FOR THE FUTURE [Continued.
ADMINISTRATION OF INDIAN RAILWAYS.

any person be appointed as a member of the Authority who has been a servant of the Crown in India, a railway official in India, or has personally held railway contracts, or has been concerned in the management of companies holding such contracts, within one year of his relinquishment of office or of the termination of the contract as the case may be. The Federal Minister responsible for Transport and Communications may, if he sees fit, attend the ordinary meetings of the Authority or be represented thereat, but in neither case will there be the right to vote. The members of the Authority will hold office for five years, but will be eligible for reappointment for a further term of the same length or for a shorter term. (In the case of the first appointments, three will be for three years only, but these members will be eligible for re-appointment for a further term of three or five years.)

Any member of the Authority may be removed from office by the Governor-General in his discretion if, in his opinion, after consultation with the Federal Government, there is sufficient cause for such action.

Members shall be appointed to the Railway Authority who are prepared to give their services to such an extent as may be required for the proper performance of their duties as laid down in the Statute.* Their emoluments shall be such as to secure suitable men who will be prepared to devote sufficient time for the proper discharge of their duties and responsibilities and will be fixed by the Governor-General in his discretion after consultation† with the Federal Government, the emoluments of the members of the first Railway Authority being fixed in the Statute.

3. At the head of the railway executive there will be a Chief Commissioner, who must possess expert knowledge of railway working and will be appointed by the Railway Authority subject to the confirmation of the Governor-General.‡ A Financial Commissioner will be appointed by the Governor-General on the advice of the Federal Government. He must possess extensive financial experience and have served for not less than 10 years under the Crown or have shown outstanding capacity in the conduct of the financial affairs of commercial or railway undertakings. The Railway Authority, on the recommendation of the Chief Commissioner, may appoint additional Commissioners, who must be chosen for their knowledge of railway working. Except in matters relating to Finance the Chief Commissioner shall have power to overrule his colleagues. The Chief Commissioner will carry out the duties from time to time delegated to him by the Railway Authority and may delegate such powers to his subordinate officers as may be approved by the Railway Authority.

4. The Railway Authority will be responsible for the proper maintenance and efficient operation of the railways vested in the Crown for the purposes of administration (including those worked by Companies), all of which will remain vested in the Crown for the purposes of the Federal Government. The Railway Authority will also exercise the control over other railways in British India at present exercised by or on behalf of Government.

* Mr. Ranga Iyer, Mr. Padshah, Mr. Joshi, Dr. Ahmad and Mr. Yamin Khan are of opinion that the members should be "whole time" while the other members of the Committee consider that the Committee's recommendation does not exclude the appointment of whole-time members, should experience prove this to be necessary.

† Mr. Joshi and Mr. Ranga Iyer hold that "in his discretion after consultation with" should read "on the advice of."

‡ Mr. Joshi would add "and the Federal Government."

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ADMINISTRATION OF INDIAN RAILWAYS.

Provision will be made for safeguarding the existing rights of Companies working under contracts with the Secretary of State in Council, and it will be the duty of the Railway Authority to refer to the Secretary of State any matters in dispute with the Companies which, under the terms of those contracts, are subject to the decision of the Secretary of State in Council or which may be referred to arbitration. It will be obligatory on the Railway Authority and the Federal Government to give effect to the decision of the Secretary of State or the award of an arbitrator.

5. In exercising the control vested in it, the Railway Authority will be guided by business principles, due regard being paid to the interests of agriculture, industry and the general public and to Defence requirements. 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 apportionment running for a period of not less than five years. In the event of a dispute as to the adequacy or otherwise of the allowance to be made in respect of renewals and depreciations the Auditor-General shall be the deciding authority. Pending any new scheme of apportionment the disposal of any surplus will be governed by the arrangements in force at the time the Authority is established.

6. The Railway depreciation, reserve and other funds should be utilised solely for railway purposes, and be treated as far as possible as the property of the Railway Authority. The investment of such funds and the realisation of such investments by the Railway Authority shall be subject to such conditions as the Federal Government may prescribe. A Committee might be convened in India to advise what those conditions should be.

7. Revenue estimates will be submitted annually to the Federal Government, which will in turn submit them to the Federal Legislature, but these estimates will not be subject to vote. If the revenue estimates disclose the need for a contribution from general revenues, a vote of the Legislature will, of course, be required. The programme of capital expenditure will be submitted to the Federal Government for approval by the Federal Legislature. The Federal Government may, however, empower the Railway Authority to incur capital expenditure subject to conditions to be prescribed.

8. The Railway Authority will be empowered, subject to the powers of the Governor-General in the exercise of his special responsibilities, and subject to the safeguarding of the rights of all officers in the service at the time of the establishment of the Railway Authority, to regulate by rules or by general or special order the classification of posts in the railway services on State-worked lines in British India, and the methods of recruitment, qualifications for appointment to the service, conditions of service, pay and allowances, Provident Fund benefits, gratuities, discipline and conduct of those services; to make such delegations as it thinks fit, in regard to appointments and promotions, to authorities subordinate to it; and to create such new appointments in the State Railway Services in British India as it may deem necessary or to make to authorities subordinate to it such delegations as it thinks fit in regard to the creation of new appointments. In its recruitment to the railway services the Railway Authority shall be required to give effect to any instructions that may be laid down to secure the representation of the various communities in

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India. In regard to the framing of rules to regulate the recruitment of the Superior Railway Services the Public Service Commission* shall be consulted. Any powers in regard to matters dealt with in this paragraph at present exercised by the Government of India over Company-managed railways shall in future be exercised by the Railway Authority.

9. The Railway Authority will at all times furnish the Federal Government with such information as that Government may desire, and will publish an Annual Report and Annual Accounts. The Accounts of the State-owned lines in British India will be certified by or on behalf of the Auditor-General.

10. Should any question arise involving a conflict of interest between the various authorities in British India responsible for railways, waterways and roads as competitive means of transport, a Commission will be appointed by the Governor-General to ascertain the views of all the interests concerned and to report, with recommendations, to the Federal Government, whose decision shall be final. The Commission shall consist of one independent expert of the highest standing and experience in transport matters, with whom will be associated, at the discretion of the Governor-General, two or more assessors.

11. The Federal Government shall lay down regulations for safety on all the Indian railways and one of the Departments of the Federal Government, other than that responsible for Transport and Communications, shall be responsible for the enforcement of such regulations, subject, in the case of the Indian States, to the provisions of their respective Instruments of Accession.

In regard to the railways referred to in paragraph 4,† maxima and minima rates and fares shall be fixed by the Railway Authority subject to the control of the Federal Government. Any individual or organisation having a complaint against a railway administration under the control of the Railway Authority in respect of any of the matters which may, at present, be referred by the Railway Department to the Railway Rates Advisory Committee, may have the matter referred, under such conditions as the Federal Government may prescribe, to an Advisory Committee to be appointed by the Federal Government. Before the Federal Government passes any order on a recommendation of the Advisory Committee it shall consult the Railway Authority.

* Mr. Joshi and Mr. Padshah consider that the Public Service Commission should be consulted in regard to the recruitment of both the Superior and Subordinate Services to the extent practicable.

Sir Muhammad Yakub considers that the Public Service Commission should be utilised in making appointments as far as practicable.

† Mr. Mudaliar and Mr. Joshi hold that the restriction under this clause to railways in British India conflicts with the provisions contained in the White Paper on the subject.

Mr. Ranga Iyer considers that the present powers exercised by the Government of India over all railways in Indian States should be exercised by the Railway Authority under the Federal Government.

It was represented on behalf of the Indian States that separate arrangements would be required for railways owned by Indian States, and accordingly no provision has been made for such railways in the scheme except to some extent under safety (paragraph 11, sub-paragraph 1) and again under arbitration (paragraph 12).

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ADMINISTRATION OF INDIAN RAILWAYS.

12.† Provision should be made for the reference, at the request of either the Railway Authority or the Administration of a railway owned by an Indian States, of disputes in certain matters such as the construction of new lines, the routing and interchange of traffic and the fixation of rates, to arbitration by a tribunal consisting of one nominee of each party and a chairman approved by both parties. The decision of the committee should be final and binding on both parties. Should the parties be unable to agree on the nomination of a chairman, he shall be nominated by the Governor-General in his discretion.

The arrangements should be such as not to prejudice the position of the Federal Court as the interpreter of the Constitution and Constitutional documents.

CAMPBELL RHODES,
Deputy Chairman.

N. N. ANKLESARIA.

E. A. S. BELL.

H. P. BURT.

HUBERT M. CARR.

F. D. HAMMOND.

A. HYDARI.

N. M. JOSHI.

L. J. KERSHAW.

R. A. MANT.

MANUBHAI N. MEHTA.

J. MILNE.

ROBT. MOWBRAY.

S. M. PADSHAH.

A. A. L. PARSONS.

A. RAMASWAMI MUDALIAR.

C. S. RANGA IYER.

PHIROZE SETHNA.

T. SMITH.

MOHAMMAD YAKUB.

MOHD. YAMIN KHAN.

ZIA UDDIN AHMAD.

A. T. WILLIAMS,
Secretary.

Sir Cecil Kisch, who was appointed to the Committee, was not able to take part in its discussions owing to his preoccupations in connection with the World Economic Conference. He has, therefore, not signed the proposals.

India Office,
21st July, 1933.

† Mr. Mudaliar and Mr. Joshi dissent from the proposals in this clause as antagonistic to the proposals in the White Paper.

Memorandum by the Secretary of State for India in regard to the Instrument of Instructions of the Governor-General or Governors.

1. There seems to have been some misapprehension as to our intentions with regard to the Instrument of Instructions of the Governor-General or Governors and I should like to describe briefly what I conceive to be the purpose and function of that Instrument in relation to the Constitution Act.

2. In the United Kingdom executive power and authority is, broadly speaking, vested in the Monarch. This is almost as true to-day as it was 200 years ago; but constitutional usage and practice has in process of time materially affected the *manner* of its exercise, without altering the strictly legal position. Thus the Crown could remit to-morrow the sentence of every person imprisoned at this moment in a United Kingdom gaol, and the remissions would all be legally valid; but a sentence is not in fact remitted save on the advice of a responsible Minister, who would be accountable to Parliament for the action taken on his advice.

3. In the British Dominions beyond the seas the relations between the Governor-General or Governor, as the King's representative, and his Council of Ministers in respect of the exercise of the executive powers vested in him by law are governed by his Instrument of Instructions, which in this respect takes the place of the unwritten usage and practice in the government of the United Kingdom. Such Instructions are susceptible of infinite variation, according to the stage of constitutional development with which they are intended to deal. They may, for example, direct the Crown's representative either to exercise his powers entirely at his own discretion, consult a body of Councillors but not necessarily to follow their advice, or to be guided by the advice of Ministers in certain matters though not in others, or to act in all matters on Ministers' advice.

4. The Instrument of Instructions thus does not itself confer any powers. It neither defines nor creates *legal* rights and obligations. It lays down the *manner* in which the Crown's representative is to exercise the powers vested in him by law. And it is to the Crown and to Parliament alone, and not to the Courts, that the Governor-General or Governor is accountable for any breach of his Instructions—an accountability which in the last resort could be enforced by his removal from office.

5. In the White Paper we have adopted this well-known constitutional device. Executive power and authority will be vested by the Constitution Act in the Governor-General in the case of the Federation, and in the case of the Provinces in the Governor; and the Governor-General and Governor will each be given an Instrument of Instructions directing him as to the manner in which he is to exercise those powers. The Instrument will direct him to be guided by the advice of his Ministers in all matters with regard to which they are competent under the Act to advise, unless to be so guided would in his opinion (and his opinion must necessarily be conclusive on this point) be inconsistent with the fulfilment of any of the "special responsibilities" which we propose should be imposed upon him by the Act itself. The Instrument of Instructions will deal with other matters as well, but at the moment I confine myself to the basic matter I have just mentioned.

6. In one respect the White Paper breaks new ground. We propose that Parliament should be associated both with the original Instruments and with any subsequent amendments to them. Parliament is entitled in our view

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GOVERNOR-GENERAL OR GOVERNORS.

to satisfy itself, first, that the original Instruments of Instructions are consistent with the intentions of Parliament when it enacted the new Constitution; and, secondly, that any constitutional change made hereafter by means of an amendment of the Instruments can only be made with its knowledge and approval. In our opinion provisions for this purpose are essential if the responsibility of Parliament for the future constitutional development of India is to be maintained unimpaired.

7. It will be remembered that the Instructions are those of the Crown to its representatives, and I have been thinking over what was said the other day by Lord Randeillour as to the manner in which the approval of Parliament should be secured. On further consideration I am disposed to think that the method which I understand him to propose, viz., an Address to the Crown, is the best and the most appropriate. I would accordingly suggest to the Committee that provision should be made whereby the Crown would communicate a draft of the proposed Instructions to Parliament and Parliament would subsequently present an Address praying that the Instrument may be issued either in the terms of the draft or with such omissions, additions or alterations as may be suggested; and the Crown would not take action until the Address had been received. A similar procedure would be followed in the case of any amending Instructions which might be issued hereafter.

8. I have only to add this. Paragraphs 20 and 72 of the White Paper speak of the Governor-General and Governor acting "in accordance with such directions, if any, as may be given to him" by the Secretary of State. This, of course, refers to *ad hoc* directions which may be given by the Secretary of State from time to time to meet particular contingencies. The Instrument of Instructions itself can only lay down general principles; but we make it clear in the same paragraphs that any *ad hoc* directions must not be inconsistent with those principles. A member of the Committee inquired a few days ago what would happen if the Secretary of State gave directions which were in fact inconsistent with the principles laid down in the Instrument of Instructions. I can only reply that Parliament could, and I have no doubt would, hold him strictly to account if he thus presumed to disregard the provisions of the Act.

Memorandum by Secretary of State for India being an Estimate of increased expenditure on fresh "overhead charges" necessitated by the White Paper Constitution (viz., increased cost of legislatures, elections, etc.).

CENTRE.

	<i>Lakhs</i> <i>per annum.</i>
Annual additional cost of elections (assuming a general election every three years)*	4.0
Annual additional cost of enlarged Legislature	39.0
Annual cost of Federal Court	4.6
Annual addition on account of salaries of Counsellors, Financial Adviser and staff	5.0
Contingencies (including possible reconstruction of New Delhi for summer session of Legislature)	25.0

* The maximum statutory life of the Provincial and Federal Lower Chambers is five years. It is impossible to say what will be the actual average life, but three years has been arbitrarily assumed for the purpose of these estimates.

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"OVERHEAD CHARGES" NECESSITATED BY THE WHITE PAPER CONSTITUTION.

PROVINCES.					
Province.	Number of elected members of Legislature.		Increased cost of Legislature. Lakhs.	Ministers' salaries P.S.C.'s, etc. Lakhs.	Extra cost of each general election. Lakhs.
	Present	Proposed.			
Madras	98	215	1.25	.50	10.00
Bombay	86	175	0.50	1.70	10.00
Bengal*	114	250	1.75	1.25	11.00
United Provinces*	100	228	3.0	5.00	8.00
Punjab	71	175	2.0	.89	6.25
Bihar*	76	152	2.65	.87	4.00
Central Provinces	55	112	0.62	1.02	2.60
Assam	89	108	0.50	.60	1.50
N.W.F.P.	34	50	0.25	.80	.50
Total			12.52	12.33	53.85
				24.85	
Estimated annual cost of separation of Orissa†				15.0	
Estimated annual cost of separation of Sind†				10.26	
Annual cost of provincial elections, assuming three years as average life of legislatures‡				17.95	
Interest on capital cost of new buildings, etc.				2.25	
<i>Total annual recurring cost:</i>					
Provinces				70.31	
Centre				77.60	
TOTAL				147.91 = £1,109,000 per annum.	

* Includes cost of a second chamber. *Separate* estimate for the second chamber is available only in the case of Bihar (30 members) where it is estimated to be .88 lakhs per annum.

† Fresh overhead charges only. This does not include the amount necessary to cover the estimated deficits in these new provinces.

‡ The maximum statutory life of the Provincial and Federal Lower Chambers is five years. It is impossible to say what will be the actual average life, but three years has been arbitrarily assumed for the purpose of these estimates.

