THE INDIAN CONSTITUTION.

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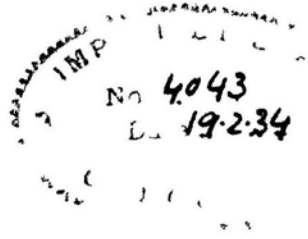

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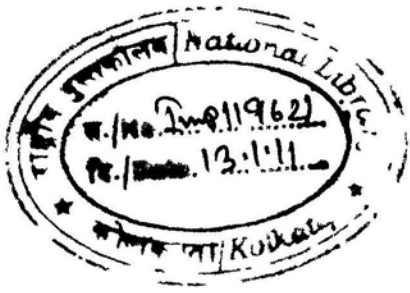

DEDICATION.

I dedicate this book

to

Mahommedali Jinnah

as a slight token of the respect

and regard I have for him.

CORRIGENDA.

On page 29. line 3. for valuable *read* votable.

On page 33, line 36 after Government *read* was.

On page 34, line 4, for test *read* rest.

On page 46. line 2, for lucid *read* lurid.

On page 48, last line for sold *read* solid.

CONTENTS.

FOREWORD.

(By Sir Chimanlal Setalvad, Kt. Vice-Chancellor of the University of Bombay).

I have great pleasure in writing this 'Foreword' for this little book on 'Indian Constitution.' It deals in a concise form with the present constitution of India under the Gvt. of India Act 1919, in a manner which will make it useful for popular reading. It also deals with the practical working of the Reforms Since 1921, thus supplying materials for thought regarding further Reforms that are immediately necessary. I think the publication has a peculiar value at a time when the public attention is so largly occupied in considering the future constitution of India.

C. H. SETALVAD.

PREFACE.

For the last two years I have been lecturing to the students of the Government Law College on the Government of India Act, 1919. This book has been mainly based on the notes I made use of in the course of those lectures. Several of my students requested me to give to these notes a more permanent form than the ephemeral and evanascent word of mouth could ever give them. Primarily, therefore, I owe the inspriation for this book to the students of the Law College who have ever listened to my exposition of the subject with invariable courtesy and unflagging attention.

But I do not intend the usefulness, such as it is, of this book to be restricted to the world of students, and therefore I have dealt with my subject critically. I am fully conscious that in doing so I have exhibited an unmistakable and a pronounced political bias. But which Indian is there who can study the constitution of his country without realising that the political institutions of his motherland bear upon them the stamp of a subject country, and that every section of the Government of India Act eloquently bears testimony to the servility and subjection of the people to which it has been applied? When Lord Birkenhead disputed the right of Indians to be on the Statutory Commission on the ground that they were all biassed men, he forgot that every Englishman, whether he belongs to the Liberal, Labour or Conservative party, is equally biassed, only the bias of an Englishman is towards the perpetuation of the British domination in India.

I have to thank Sir Chimanlal Setalvad for kindly consenting to write a foreword to this book. In his time he has played many parts in relation to the present constitution. As a member of the functions Committee he has been a builder; as a member of the Executive council of Bombay he has actually worked it; and since his retirement from that office, as a witness before the Muddiman Committee and in the Press, and on a hundred platfroms he has

been a trenchant critic. Like Vergil's hero he might well say of the present constitution, "Magna pars fui."

I have also to thank my friend Mahomed Yunus Haindaday, Advocate High Court, for the encouragement and advice I received from him throughout the preparation of this work; and my friend Assif Fyzee, B. A. (Cantab.), Barrister-at-Law, for willingly going through the drudgery of correcting the proofs.

The author of a book takes considerable risks in launching his work upon the turbulent waters of public criticism. The echoes of a speech delivered do not take long to grow mute; an article written for a daily paper is forgotten with the day; a case badly argued or mismanaged only lingers in the memory of the unfortunate client; but by publishing a book the author gives a permanence and an immutabitity to his ideas which they did not have before. I can only claim for myself, from the reading public, what a member in the House of Commons on rising to make his maiden speech expects and gets from his fellow members, the patience and courtesy which are due to his maiden effort.

High Court.
25th. Oct. 1928.

M. C. CHAGLA.

INTRODUCTION.

Events leading up to the passing of the Act of 1919.

The Minto-Morley Scheme was found very unsatisfactory in working. It did not satisfy any of the aspirations of politically-minded India to have a share in the Government of the country. This dissatisfaction was reflected all over the country in the persistent agitation that was carried on, and the numerous political organisations that came into existence advocating self-government for India.

There was a great deal of bitterness among the people due to the several reactionary measures that had been passed curtailing the liberty of the subject. The Press Act of 1910, the Seditious Meetings Act of 1911, the Criminal Law Amendment Act of 1913 were all measures of this character.

There was also a great deal of resentment at several measures which had found their way on the statute-book and which were based on the nefarious principle of racial discrimination. The Indian could not carry arms to defend his own person and property in his country, in the hour of need. It was difficult, if not impossible, for him to join any volunteer organisation, where he could receive any military training. With centuries of military traditions behind, he could not hold the King's Commission. He found it difficult to immigrate to foreign countries, or even to British colonies, for the fact of his nationality came in his way.

The outbreak of the war in 1914 gave an edge to these feelings of humiliation and resentment, and the principle of self-determination which was proclaimed far and wide gave an impetus to the national movement. In September 1916 the Home Rule League was established in Madras, and in the October of that year nineteen elected members of the Imperial Council issued a Joint manifesto, outlining the minimum demands which would satisfy India.

The unity between the Hindus and Musalmans had also been growing apace. In 1913 the All-India Muslim League

passed a resolution in terms similar to that of the Indian National Congress, demanding self-government for India. In 1915, for the first time in its history, the session of the League was held at the same place as the Congress, namely in Bombay, and Lord Sinha, (then Sir S. P. Sinha), presiding over the Congress at Bombay, urged upon the British Government to declare the goal of its policy in India. As Lord Chelmsford has recently confessed, the speech had a great effect upon him, and it was this which led him to bring pressure upon the Secretary of State to make an announcement of British policy.

In 1916, at Lucknow, Hindu and Muslim leaders, representing the Congress and the League, put their signatures to a Joint Scheme which embodied the demands of political India.

On August 20th 1917 Mr. Montague, Secretary of State for India, in reply to a question, announced the goal of British policy in terms practically identical with the Preamble of the Act of 1919. Very soon thereafter Mr. Montague visited India, and in conjunction with Lord Chelmsford, studied conditions in India first hand. They issued a joint report in May 1918, making their recommendations for a further constitutional advance.

A Bill was drafted on the basis of the report, and was referred to a Joint Select Committee of the House of Lords and Commons for report. The Committee heard several Indian and English witnesses and made a report making several alterations in the Bill. The Bill so altered was ultimately passed, and received the assent of the King, on 23rd December, 1919.

THE INDIAN CONSTITUTION.

CHAPTER I.

The Preamble.

The importance of the preamble of a statute cannot be minimised. "The preamble of a statute has been said to be a good means to find out its meaning, and, as it were, a key to the understanding of it."[1] Especially in the case of the Government of India Act of 1919 which constitutes the constitutional charter of our country it has a peculiar significance.

It practically reproduces in terms, the celebrated announcement that Mr. Montague made in the House of Commons on 20th August 1917 in answer to a question. That announcement was made in response to a persistent agitation in India for a clear definition of the goal of British policy in this country. Containing as it does a clear statement of British policy, it has a peculiar significance and considerable importance in assisting us to understand clearly the working of the constitution, the nature of the advance made under the Act and the direction in which the constitution will develop on the lines laid down in the Preamble.

As the Bill was originally drafted, the preamble contained only the first part of the Announcement, stopping at the words "substantial steps in the direction should now be taken".

As will be noticed this part merely laid down the policy, without emphasising or even indicating the agency which would be responsible for directing that policy in the future. Mr. Tilak in a brilliant analytical statement that he made

1. **Maxwell on Statutes, p. 77**

before the Joint Select Committee on 6th August 1919, clearly distinguished between these two parts. He said that he accepted the first part of the announcement namely the policy of Government, the gradual development of responsible government in India. The Joint Select Committee in making its report enlarged the preamble so as to include the whole of the Announcement of 20th August 1917. "Their reason for doing so", so the Report runs, "is that an attempt has been made to distinguish between the parts of this Announcement, and to attach a different value to each part according to opinion. It has been said, for instance, that whereas the first part is a binding pledge, the latter part is a mere expression of opinion of no importance. But the Committee thinks that it is of the utmost importance, from the very inauguration of these constitutional changes, that Parliament should make it quite plain that the responsibility for the successive stages of the development of self-government in India rests on itself and on itself alone, and that it cannot share this responsibility with, much less delegate it to, the newly elected legislatures of India."

It must be however clearly understood that the terms of the Preamble must not be looked at in order to construe a section where the language of the section itself is clear and definite. "It may legitimately be consulted for the purpose of solving any ambiguity or of fixing the meaning of words which may have more than one, or of keeping the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt."[1]

In the first place the Preamble lays down the ultimate goal of British policy as ***responsible*** Government. In other words it accepts the ***parliamentary*** system of Government as prevalent in England in contra-distinction to the ***Presidential*** type as is found in the United States of America. Under this system of Government the Executive holds office so long as it possesses the confidence of the Legislature, and can be

1. **Maxwell on Statutes, p. 69.**

turned out by a vote of the Legislature. It thus rejects the scheme that was prepared by the Congress and the League which provided for an irremoveable executive carrying out the mandates of the Legislature. "Self-government" must be clearly distinguished from "responsible government." (Self-government means the removal of alien influence and control from the government of a country.) It does not in any way connote a system of government. On the other hand, "responsible government", as has just been explained, indicates a form of government.

The responsible government contemplated to be given to India is not to be given all at once. It is to be a "progressive realisation"—the goal to be attained by successive stages of which the Government of India Act of 1919 is one,-and at that, a substantial one in the opinion of those who were responsible for the Act. As will be explained later in greater detail, it was the provision of the gradual development of responsible government in the Preamble of the Act that necessitated the introduction of dyarchy in the provinces.

The goal is to be attained in the first place by "the increasing association of Indians in every branch of Indian administration." This would mean the greater Indianisation-or to use Pandit Motilal Nehru's phrase-Non-Europeanisation, of the services, the increasing of the Indian element in the local and central Executives and the raising of the proportion of elected members in the various legislatures so that the Indian point of view may be brought to bear more and more upon the various branches of the administration.

Secondly, this is to be done by "the gradual development of self-governing institutions". This would refer to the local and district boards and municipalities. The official element in them would have to be eliminated and they would be more and more democratised. Of course this is not within the purview of the Act, but the policy having been enunciated, the carrying out of it would be in the hands of

the Indian minister in charge of the portfolios of Local Self-Government—that being a transferred subject.

The question of provincial autonomy in the sense of the independence of provincial Governments from the control and supervision of the Central Government is considered in the penultimate paragraph of the Preamble, and the policy of the British Government in this respect is to give the largest measure of independence to the Provinces in provincial matters of the Government of India, which is compatible with the due discharge by the latter of its own responsibilities.

In the third paragraph the responsibility of Parliament for the welfare and advancement of the Indian peoples is clearly enunciated, and the principle of self-determination is clearly and explicitly negatived by making Parliament the Judge of the time at which any advance upon the constitution is to be made, and the nature and character of such advance.

It might be noted in passing, that the Preamble talks of "Indian peoples". The plural is significant. It is an insolent denial of our proud claim to be a nation.

The fourth paragraph contains a very thinly veiled threat. The country is on its trial. New posts have been opened up for Indians. Indian ministers are appointed who are responsible to the Legislatures. The element of elected members has been largely increased in the various Legislatures. A much larger number of voters has been placed on the electoral rolls. How far are all these Indians on whom new opportunities of service have been conferred going to co-operate with the Government in order to make the experiment of 1919 a success? Will their action be such that Parliament will be able to say, when the time for the revision of the constitution arrives, that confidence can be reposed in their sense of responsibility?

CHAPTER II.

The Secretary of State and his Council.

The historical ancestors of the Secretary of State are the Court of Directors and the Board of Control, and the Secretary of State enjoys all the powers (subject to the inroads made upon them by rules framed under the Act) which these bodies originally enjoyed. Sec. 2 is quite explicit on the point. "The Secretary of State has and performs all such or the like powers...as might or should have been exercised by the East India Company or by the Court of Directors or Court of Proprietors of that Company either alone or by the direction or with the sanction or approbation of the Commissioners for the affairs of India"—the Commissioners referred to being more popularly known as the Board of Control.

"The Secretary of State is the constitutional adviser of the Crown in all matters relating to India." He is the officer who is responsible at the bar of Parliament for the government of His Majesty's subjects across the seas. He is the supreme authority presiding over the destinies of India. Even the Governor General is subservient to him. The Governor General is "required to pay due obedience to all such orders as he may receive from the Secretary of State" (Sec. 33).

Difference between the Secretary of State for India and the Colonial Secretary

There is hardly any analogy between the two. As far as the self-governing dominions are concerned the only constitutional rôle that the Secretary plays is the advice that he gives to the Crown with regard to the exercise of its prerogative in its application to the colonies. Broadly speaking, the royal prerogative with regard to the colonies is nothing more or less than the power of veto that the king has over colonial legislation. The colonial Secretary advises the King as to the occasions on which he should exercise this right. But the Colonial Secretary has no hand in the actual adminis-

tration of the self-governing dominion. He is in direct correspondence with the Governor or the Governor General of the Colony, but he has no control over the Prime Minister for the time being of any particular colony who is really the head of the administration. Responsible Government presupposes the giving up of all control and supervision from the mother country.

As India does not enjoy responsible government, or in other words as the Head of the State in India is not responsible to the Legislature, we have an extraneous agency in whom are vested all the powers and authority and we also have an extraneous Legislature to whom he is made responsible.

If we did not have a strong Secretary of State, and full power and control over the administration were vested in the Governor General, we would have an undiluted autocracy in India. For the Governor General, broadly speaking, is in no way controlled by the Legislature. The role then that the Secretary of State plays in the Indian constitution is that at one end of the Imperial chain we have an authority who is responsible and answerable for his actions to the Legislature of the ruling country and ultimately to the people of that country. Instead of the Government of the Country being carried on by an irresponsible autocrat, we have the government carried on by an alien ruler who is not an autocrat as he is responsible not indeed to the people of India, but to the people of his own country.

Under the colonial constitution the Executive Government is vested in the King to be exercised by the Governor-General as the King's representative.[1] As the Governor-General is a constitutional Governor-General (see post) the administration really vests in the Prime Minister. Under Sec. 33 of the Government of India Act the superintendence, direction and control of the civil and military Government of

1. See Sec. 9, British North America Act; Sec. 61, The Commonwealth of Australia Act; and Sec. 8, of the South Africa Act.

India is vested in the Governor-General in Council, but he is required to pay due obedience to all such orders as he may receive from the Secretary of State. The subservience of the Government of India is further emphasised by Sec. 2 (2) which lays down that "the Secretary of State may superintend direct and control all Acts, operations and concern which relate to the government or revenues of India."

The Powers of the Secretary of State.

Before the passing of the Act of 1919, the supervision and control exercised by the Secretary of State was extremely rigid and undoubtedly excessive. The Government of India was under the permanent tutelage of Whitehall. The Governor-General had to obtain the previous sanction of the Secretary of State for every measure he proposed to introduce in the Legislature and for almost every important administrative action he intended to take. The Government of India Act, by making provision for the framing of rules under various sections, has made deep encroachments upon the power and authority of the Secretary of the State. The subject of devolution has been dealt with in a separate chapter. But we might just mention here the various sections under which rules have been framed and which go to affect and modify the powers enjoyed by the Secretary of State. These Sections are 2 (2), (19-A), (33).

But notwithstanding these rules, the Secretary of State still continues to enjoy large powers and wield considerable authority over the Government of India. We might consider the powers of the Secretary of State under three separate heads: (1) The powers that he can exercise *without* consulting his Council; (2) the powers that he can exercise in council but *without necessarily* carrying the majority of his Council with him; and lastly (3) the powers that he can exercise *only* with the consent of the majority of his Council.

(i) ***The Powers that he can exercise without consulting his council.***

(*a*) He may revoke or suspend a Governor's Council for such period as he may direct [Sec. 46 (3).]

(*b*) He may enhance the period between the dissolution of the current and the commencement of the next session of either Chamber of the Legislature [63-D (c)].

(*c*) He has an identical power with regard to the Governor's Legislative Council.

(*d*) He must submit with concurrence of both Houses of Parliament the names of persons to act as the Statutory Commission (Sec. 84-A).

(ii) ***The powers that he can exercise in council but without necessarily carrying the majority of his Council with him.***

The powers exercisable by the Secretary of State in Council are immense and are scattered all over the Government of India Act. It would be impossible within a short compass to enumerate all of them, but we might briefly refer to the most important of them.

(*a*) The policy of devolution and the relaxing of the control of the Secretary of State is to be carried out by rules framed under Sec. 19—A. These rules are to be framed by the Secretary of State in Council (Sec. 19—A).

(*b*) The Secretary of State in Council must lay before both Houses of parliament the accounts relating to India accompanied by a statement exhibiting the moral and material progress and condition of India (Sec. 26).

(*c*) The Secretary of State in Council may sue and be sued in the name of the Secretary of State in Council as a body corporate and every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company [Sec. 32 (1), (2)].

The liability of the Secretary of State to be sued and his power to sue are reminiscent of the rule that the East India Company played as a trading corporation. In England the position is quite different. There no suit can be brought against the Officers of the Crown in their official capacity

either in contract or in tort. The same would be true of the various Secretaries of State. It is only when there is a specific statutory provision and the officials have been invested with the attributes of a corporation that they can be sued.[1]

But it is not in respect of all matters that the Secretary of State can be sued. The authorities distinguish between an Act of State and those matters for which an individual or a trading corporation could be legitimately held liable. Even the East India Company could not be held liable in respect of all matters. There were some acts which it performed as a Sovereign body in order to discharge its responsibility towards the State. There were others which fell in the category of acts of an individual or a trading corporation. It was only with respect to the latter that the East India Company could be held liable. Likewise the Secretary of State is immune from any liability accruing from acts of State. It is only when he acts as a Successor of the East India Company in its capacity as a trading corporation that the Secretary of State can be held liable.[2]

(d) The Governor General cannot declare war or commence hostilities without the express order of the Secretary of State in Council except in cases of emergency. Sec. 44 (1).

(e) The Secretary of State in Council can apply section 71 to any part of the British India whereby the Governor General can legislate for that part by means of regulations. These regulations are to have the same force as if they were an act of the Indian Legislature [Sec. 71 (4)].

(f) The Secretary of State and the Services.

Under the Government of India Act the Secretary of State is responsible for the organisation and control of the services. It is true that the establishment (Sec. 96 c) of a public service commission will divest the Secretary of State of many of his powers. But the Commission will derive its

1. Halsbury, Vol. 6, Article 633.
2. Mulla's C. P. C., 8 Edition p. 220 and the authorities cited there.

authority from the Secretary of State and shall dicharge in regard to recruitment and control only such functions as may be assigned to it by rules made by the Secretary of State in Council (96-C) (2).

Even now, notwithstanding the establishment of the public service commission, the Secretary of State in Council wields considerable powers of supervision and control over the services. The Secretary of State has the power of reinstating any person in the civil service of the crown who has been dismissed—thus virtually sitting in appeal on the decision of the authorities in India who were responsible for the dismissal [Sec. 96B (1)]. The Secretary of State in Council has also the power of making rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowance and discipline and conduct [sec. 96 B (2)]. Part VIII of the Act deals specifically with the Indian Civil Service and the power that the Secretary of State in Council has of making rules for the Indian Civil service examination [97 (1)], and for the admission of men into the Civil service who are not full blooded British Citizens (sec. 97 2-A). These powers are to be exercised with the advice and assistance of the civil service Commissioners.

The South Africa Act, 1907, also makes provision for the appointment of a public service Commission. But its appointment is to be in the hands of the Governor General in Council and its powers and duties are to be determined by the South African Parliament (see sec. 141 of that Act.)

The powers of the Secretary of State with regard to the services are a reminder of the days of the East India Campany when the administration of the country was practically carried on by men recruited in England. The task was first entrusted to the writers, factories and merchants of the East India Company, but they did not prove equal to the task, and it was Lord Cornwallis who put the matters on a more satisfactory

and a more logical basis. Nominations to the Covenanted Civil Service were made by the Directors of the Company, and the Secretary of State has inherited the powers originally enjoyed by these Directors.[1]

(iii) *Secretary of State acting with the majority of his Council.*

As a general rule if there is a difference of opinion in the Secretary of State's Council the determination of the Secretary of State is to be final. But the Act enumerates certain cases in which the Secretary of State can only act when he has the majority of the Council with him [see 9 (1)]. The most important of these cases is

The Financial Veto of the Council.

Under section 21 of the Act the expenditure of the revenues of India is placed under the control of the Secretary of State and no grant or appropriation of any part of these revenues can be made by the Secretary of State without the concurrence of a majority of votes at a meeting of the Council.

This important check which the council possesses over the Secretary of State has been called the financial veto of the council. In theory it is a very important power, as by the provisions of this section, the Council would be the keeper of the purse, and as such would be in a position to effectively control, if not dictate, the policy of the Secretary of State. In practice, however this power does not amount to much. For the Statute empowers the Secretary of State to issue orders to the Governor General without consulting his council or at least, without being under the necessity of having the support of the majority of his Council. Several of these orders when carried out would result in heavy expenditure. Thus the Secretary of State, in issuing the orders, is tacitly sanctioning the expenditure incidental to the execution of those

1. Imperial Gazetteer, Vol. IV, p. 40.

orders. It is true that the Secretary of State has to go to his council to get the expenditure sanctioned. But in practice the council is rarely found to be recalcitrant. One might profitably compare the financial veto of the Council with the similar power that Parliament has over the actions of the cabinet. Theoretically Parliament can always refuse to vote grants for the carrying out of the policy that the cabinet has laid down. But in practice, so long as a particular cabinet is in power and its policy is acceptable to Parliament, the financial veto of Parliament is never exercised.

The Secretary of State's Council

The Council of the Secretary of State was established in 1858 when the Indian administration was placed in the hands of the Secretary of State. The reasons for its establishment are obvious. In 1858 there was placed at the helm of Indian affairs a man who had neither acquaintance with, nor experience of, the affairs in India. The convention was established that the Secretary of State for India should be a man who enjoyed a high reputation in English politics but whose outlook should not be in any way hampered by any knowledge of India on things Indian. Once a convention like this was established, the necessity immediately arose for the creation of a body which possessed expert knowledge and which could guide the Secretary of State and place him in possession of the necessary data on which his policy could be based. Therefore we find that an important element in the personnel of the Council is reserved for those who have served in India. In order that their knowledge of Indian affairs should not be out of date we also find the provision that there should not be the lapse of a long period between the retirement of a person from India and his appointment as member of the Council.

The Commission and the powers of the Council have practically remained the same since its first establishment although several statutes have from time to time modified the provisions with regard to the number of members and the qualifications for membership.

Under our present constitution the Council is to consist of not less than 8 and not more than 12 members (sec. 3). One half of the members are required to have service qualifications [Sec. 3 (3)]. The tenure of office is to be five years [Sec. (4)] but the Secretary of State may then continue the services of a member for a further period of 5 years for special reasons to be assigned by him. [Sec. 3 (5)]. The Secretary of State is the president of the Council (Sec. 7) and at least one meeting in the course of a month must be held (Sec. 8). We have already referred to the powers of the Secretary of State to over-ride his Council, and have also referred to the cases in which the concurrence of the majority of the Council is necessary.

Should the Council be abolished ?

There has always been a strong public opinion in this country pressing for the abolition of the Council of the Secretary of State. It is urged that the Council is a very reactionary body, and it must be so from the very nature of its constitution. Men who have become "fossilised" in the services in this country cannot possibly be expected to bring to bear upon Indian problems a progressive and an advanced outlook. It is suggested that however democratic the Secretary of State may be his vision is bound to be clouded by the advice that he would receive from his councillors, and the result is that any advantage that India might gain by having men fresh from English public life at the helm of Indian affairs is lost by giving to him a body of advisors who have been brought up in the traditions of the old school.

It seems, however, difficult to understand how so long as the Secretary of State is possessed of the powers that he at present enjoys, he can possibly carry on his work without expert advice of some sort. The problems that he has to tackle are so vast and so different in their nature and complexity from those he is accustomed to deal with, that, able and experienced as he may be, he is sure to blunder without

the aid and assistance from men who have studied them at close quarters. The problem really is not the Secretary of State's Council, it is the tremendous powers that the Secretary of State possesses. And the solution seems to lie not in the way of the abolition of the Council, but in divesting the Secretary of State more and more of his powers.

The Secretary of State's Salary.

An important change that has been effected in the Act of 1919 is that the salary of the Secretary of State has been made a charge upon the British revenue [Sec. 2 (3)].

Apart from the monetary aspect of the question it has an important constitutional aspect. It stands to reason that Parliament being ultimately responsible for the Government of India should have proper opportunities and facilities for discussing the problems affecting the Indian subjects of His Majesty. Now it is well known that the Budget discussions in Parliament afford the best opportunity to members to scrutinise the various departments, and if dissatisfied with the working of any of them, then moving for the reduction of the salary of the minister in charge of the respective departments. The Colonial Secretary's salary always used to be voted by Parliament could closely inquire and investigate into the working of the Colonial department. Under the old constitution the only time when Parliament could ordinary discuss Indian affairs was when the Secretary of State presented the Indian Budget along with a report showing the moral and material progress of the country. This, as a rule used to be at the fag end of the session and as this discussion used to be divorced from the Budget discussion proper, it was, as a rule, a thin and listless house that listened to the harangue of the Secretary of the State. Nor did there seem to be any valid reason why when the British exchequer paid the salary of the Colonial Secretary, the Indian Secretary should have been placed on a different footing in this matter.

The High Commissioner for India.

The Act of 1919 establishes a High Commissioner for India (Sec. 29—A).

We have already pointed out that the Secretary of State has inherited his powers both from the Board of Control and the Court of Directors and under the act he discharges all the functions which the East India Company would have discharged. Hence the functions of the Secretary of State are not purely or altogether political. Under the act he has to discharge important what are known as "agency" functions. He has for instance, the power to enter into contracts for the purposes of the act (Sec. 29). The colonies entrust this "agency" work to a special representative of theirs who is termed the High Commissioner and who resides in London. Apart from doing this "agency" work for his respective colony, he also represents it on all formal occasions in England. He is in a sense the ambassador sent by the colony to the mother country.

By the establishment of the High Commissioner for India it will now be possible to demarcate between the political and the agency function of the Secretary of State. Section 28 (1) provides for the delegation to the High Commissioner of powers previously exercised by the Secretary of State.

CHAPTER III.

The Governor.

Distinction between Governors of Provinces and Presidencies :—

The Government of India Act draws a distinction between the Governor of a Province and the Governor of a Presidency. Section 46 (1) defines the various Provinces and Presidencies of India and Sec. 42 (2) lays down the different method of appointment of the Governors of the former and of the latter respectively. Whereas the former are appointed after consultation with the Governor General, in the case of the latter no such consultation is necessary. The underlying reason seems to be that the Governors of the Presidencies should be recruited from the front rank of English public men and the Provincial Governorships should be reserved for men who have served in India. It is natural that the Governor-General would be in the best position of knowing which man from the services should be selected for this high post. There is also some distinction with regard to the pay that a Governor of a Province and a Governor of a Presidency respectively draws, the latter being in a more advantageous position in this respect. Sec. 90 further reserves to a Governor of a Presidency the right of acting as Governor-General in a case of a temporary vacancy in the case of the latter.

Is the Indian Governor a constitutional Governor ? :—

The Governor of a British Self-Governing Colony is known in constitutional parlance as a constitutional Governor. The Governor is the link in the imperial bond, between the colonies and the mother country. But it is really the Prime Minister, for the time being, of the colony that is the ruler and the head of the administration. The Governor's relations vis-a-vis the colonial executive are the same as the relations of

the King towards the cabinet. In short the powers that the King enjoys of dissolution, of dismissing his ministry, etc., are equally enjoyed by the Governor. One might note one important exception to the analogy that we have just drawn. In England the veto of the King has become obsolete. Although constitutionally the King can veto any measure passed by Parliament, the convention of the constitution has practically deprived him of this power. In the case of a Colonial Governor however he has been given the power of the veto by specific statutory provision (See the various colonial constitutions) and this right is meant to be and has been frequently exercised.

There is no analogy whatsoever between an Indian and a Colonial Governor. The former forms the most important "limb" of the constitution. As we shall presently see, he forms part of the Executive and presides over his Council. He is possessed of very wide powers and the smooth working of the machinery of the state largely depends upon his skill, ability and an acute sense of statecraft. It is only when the provinces become completely self-governing that the Governor can be divested of the important powers that he now possesses. One might say epigrammatically that self-government is identical with the making of a provincial Governor a constitutional Governor.

The Governor's Powers:—

Leaving the smaller details aside, we might group these powers under different heads corresponding to the subjects with which they deal.

A. The Executive Council.

Generally the Governor presides over the meetings of his Council, and as such has a casting vote [Sec. 50 (1)]. In the generality of cases he is bound by the decision of the majority of his Council, but under exceptional circumstances he has the power of over-riding his Council [Sec. 50 (2)]. The provision is more or less identical with a similar

provision in the case of the Governor General and the reader is referred to the notes under that section.

B. The Ministers.

Under Section 52 (1) the appointment of Ministers is left with the Governor and the Ministers are to hold office during his pleasure. In England the King enjoys a similar right "Ministers are the King's servants, appointed by him to superintend the various departments of Government, holding office during pleasure."[1] No executive can be satisfactory which is elected by a large body of men. Election almost invariably brings in its train the vices of jobbery, nepotism and corruption, and as far as possible the appointment of the Executive should be kept free from these evil influences. Election of the Executive (at least a part of it) was the vitiating defect of the Congress-League Scheme and in the Report on Indian Constitutional Reforms the learned authors placed their finger on it with unerring Judgment; it will however be noticed that the Governor's choice in the appointment of ministers would be largely circumscribed for the ministers that he appoints must be such as are acceptable to the Legislature. For ministers being responsible to the Legislature, can only hold office while they retain its confidence.

In England, too, "the King also appoints the Prime Minister, but the Prime Minister is practically chosen for him by the opinion of the party which a general election has placed in a majority in the House of Commons."

In relation to transferred subjects, the Governor is to be guided by the advice of his Ministers [Sec. 52 (3)]. In England the King, and in the colonies the Governor, also act only on the advice of their respective ministers. If the advice so proffered is not acceptable either to the King or the Governor as the case may be, it is open to either to dismiss his respective ministers. But in no event can the

1. Anson, Law and Custom, Vol. I, p. 5.

King or the Governor act otherwise than in accordance with the advice of such ministers as are in power where the particular advice is given. The Government of India Act gives in this respect, exceptional powers to the Governor. If the Governor "sees sufficient cause to dissent from the opinion of the ministers, he may require action to be taken otherwise than in accordance with that advice." [Sec. 52 (3)]. This seems to be an unfortunate and a highly retrograde provision which seriously undermines the responsibility of the ministers to the Legislature for the subject over which they are placed in charge. So long as the Governor continues to keep them in office, it should be constitutionally possible for them to have their advice carried out.

C. The Governor's Position in Dyarchy.

Under the constitution of 1919, with the introduction of dyarchy the position of the Governor has become even more difficult and more responsible. Upon him has fallen the onerous functions unavoidable in a dualistic form of Government. The Joint Select Committee recommended that there should be joint deliberations between the two halves of Government and the Committee hoped that the Governor would preside over them. "In such cases it will be inevitable for the Governor to occupy the position of informal arbitrator between the two halves of his administration.....The position of the Governor will thus be one of great responsibility and difficulty, and also of great opportunity and however he may have to hold the balance between divergent policies and different ideals and to prevent discord and friction."

D. The Legislature.

The Act of 1919 marks an advance upon the old constitution in that the Governor no longer forms part of the Legislature. He is no longer its president as he was under the old Act (See Sec. 75-5 & 6 Geo. 5 Ch. 61). He has however been given the right of addressing the Council [Sec. 72 A (1)]. The English constitution also provides a similar mode of communication between Crown and Parliament. The King

at the opening of the Session of Parliament reads his speech from the House of Lords informing Parliament of the business to be laid before it.

The Governor enjoys the right of dissolving the Legislature before the termination of its statutory period [Sec. 72 B (1) (a)]. This right of dissolution enjoyed by the Head of the State is a statutory provision almost invariably found in every constitution. The ministry may lose touch with the electors and may cease to reflect its views. But for this provision, the country would be saddled with the domination of a party, which, although in the majority in the Legislature, no longer commands the confidence of the majority of the people.[1]

The ministry itself may require the Head of the State to resort to this constitutional weapon in order to strengthen its hands by an appeal to the country in order to elicit the opinion of the electors on a question on which it received no mandate at the last election.

The Governor in India has the power of extending the period during which the legislative Council is to continue under special circumstances to be determined by him—such extension not to exceed the period of one year [Sec. 72 B (b).] This is a unique provision without precedent in the constitution of any country of importance. Non-Sovereign legislatures like that of America or France are circumscribed by the provisions of the Fundamental Law by which they are governed and there is no provision known to constitutional law by which the period of these legislatures can be extended. The British Parliament being a sovereign law making body, has the right of extending its own life by passing an ordinary law as it has done in several cases.[2] But the point to note is that it is the Legislature itself that can extend its own period, and no outside agency. Under the Indian constitution

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1. See the elaborate discussion on this question in Dicey.
2. See e. g. the famous Septennial

the Legislature has no power to do so, the power being reserved to the Head of the State.

Under section 72 C (1), the Governor has the power of appointing the President of the Council for the first four years. With the expiry of that period the section has ceased to have any practical interest. Now the president of the Legislative Council is elected by the Council itself. It may be noted that the election is subject to the approval of the Governor. This proviso does not find its place in any of the colonial constitutions. In England the King formally through the Lord Chancellor approves of the election of the Speaker by His Majesty's faithful commons,[1] in practice the approval is never withheld. It seems that in India, too, that convention is well in its way to being established. When the Legislative Assembly elected Mr. V. J. Patel, a redoubtable Swarajist, as its President, the action of the Victory was awaited with keen interest. Mr. Patel, however, received the formal benediction of the Head of the Indian Administration. In all the Local Legislatures the election of the President has been so far approved of by the Heads of the respective Provinces.

E. Emergency or Extra-Ordinary Power.

Every constitution makes provision for emergencies. But the extraordinary powers that it vests in the Executive are not meant to be exercised in the generality of cases. They are kept in the lumber room of the State to be taken out and refurbished only on extremely rare occasions. The extra-ordinary powers that the Governor in India possesses are of quite a different nature. As the Joint Select Committee said the powers are real and their exercise should not be regarded as unusual or arbitrary.

(i) Certification of Expenditure.

The proposal of the local Government for the appropriation of provincial revenues and other moneys are submitted

1. Redlich, Procedure of the House of Commons, Vol. II. P. 57.

to the vote of the Council in the form of demand or grants [(72 D (2)]. It is open to the Council either to assent or reject the grant or modify it. If however the Governor certifies that the expenditure provided for a particular demand, which has either been rejected or modified by the Council, is essential to the discharge of his responsibility for the subject, then the demand is restored and the Local Government acts as if the demand had been actually assented to by the Council. It must be borne in mind that this power of certification only applies to reserved subjects. The reason underlying this provision seems to be that the Governor being responsible to Parliament for the reserved half of his government, the Council should not be in a position to create an impasse by refusing the necessary supplies for the due discharge of his responsibility [Sec. 72 D (2) (a)].

The power given to the Governor in the following subsection (b) is even wider. Under it the Governor has the power of authorising such expenditure as may be necessary in his opinion and the expenditure may even be with regard to a transferred subject. But before the Governor can exercise this power he must be satisfied that an emergency has arisen and that the expenditure is required either for the safety or tranquillity of the province or for the carrying on of any department.

The section seems to contemplate the possibility of the Councils refusing essential expenditure for transferred departments and creating a complete deadlock.

(ii) Certification of Bill.

Sec.[(72 D (5)] enables the Governor to shut out all discussion on any Bill or Amendment to a Bill which in his opinion affects the safety or tranquillity of the province or any other province. The reader will be easily able to distinguish this power vested in the Governor from the power of the ordinary veto which we shall discuss later. The ordinary veto only comes into operation after a Bill has gone through

all the stages and full and free discussion has taken place thereon. This provision is more in the nature of the House of Commons guillotine which on the certificate of the Governor stops all further proceedings with regard to the Bill or the amendment. This is a provision which is not to be found in any of the well-known constitutions. It seems to have been inserted in ours because it was feared that mere discussion on certain subjects might seriously endanger the safety or tranquillity of the province. It undoubtedly is a very unsatisfactory provision as it prevents the Governor from knowing the reasons in support of a particular measure or the opinions held on it by his legislative Council.

(iii) Provision for case of failure to pass Legislation.

Sec. 72 E enables the Governor to pass legislation over the head of the legislature. The measure proposed to be passed must relate to a reserved subject and the Governor must certify that the passing of the Bill is essential for the discharge of his responsibility for the subject.

The ordinary veto, at least, is merely a negative right. The Governor can *prevent* the legislature from passing certain laws. This is definitely a *positive* and much more extensive right. Neither the English nor any of the Colonial constitutions provide for the possibility of a law being passed without the legislature being a party to it. The Head of the State may stultify the action of the legislature by vetoing any measure passed by it; he cannot coerce the legislature into helping him to place on the statute book any measure which he thinks necessary in the interests of the country, nor can be seek the assistance of the constitution for this purpose. If the Head of the State has his veto, so has the legislature and the Legislature's "nay" is a complete check to the legislative ambition of the British or the colonial executive.

Subsection (2) provides for a safeguard, in that the Governor General has to reserve the Act for the signification

of His Majesty's pleasure, and it is only on such signification that the Act becomes law. Subsection (3) provides a further safeguard by requiring a copy of the Act to be laid before each House of Parliament.

(v) **The Veto** (Sec. 81, 81A, 82).

In the first place the Governor has the power of withholding his assent from a Bill passed by the Legislature. In the event of his doing so the Bill lapses and the matter ends there. He may however give his assent to the Bill in which case the Bill has to go through a further stage before it can become law. The assent of the Governor General is required before it can have validity [Sec. 81 (3)]. Instead of the Governor General giving his assent or withholding it he may reserve it for the consideration of the King, in which case it would have validity only on the King giving his assent [81A (3)].

In the same way the Governor may reserve a Bill for the consideration of the Governor General instead of exercising his right of assenting or withholding his assent to it. In order that such a Bill can become law the Governor General's assent must be received within six months else the Bill lapses. [81A (2) (c)]. Over and above all these provisions is the right of the veto vested in His Majesty the King. Even when a Bill has been placed on the Statute Book and has validity and has become operative, the King may disallow it and the Act becomes void from the date of the notification of such disallowance (Sec. 82).

Similar provisions with regard to the veto are to be found in the colonial constitutions.[1]

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1. The British North America Act 1867, Sec. 55, 56, 57. The Commonwealth of Australia Constitution Act 1900, Sec. 58, 59, 60. The South Africa Act 1909, Sec. 64, 65, 66.

CHAPTER IV.

The Provincial Legislature.

A Historical Preface:—We can trace back the legislative power of the Provincial Councils to the Charter of George I, dated 1726. That Charter gave the power to the Governors in Council of the three Presidencies of Bombay, Madras and Bengal to make, constitute and ordain bye-laws and ordinances for the good government and regulation of the territories under their respective jurisdictions.

This independent power of legislation given to the three Presidencies led to legislative chaos and anarchy. There was no co-ordination between the various laws passed in the country and although the Regulating Act of 1773 had subordinated Bombay and Madras to the Supreme Government at Bengal, the legislative autonomy of the Provinces remained unaffected. Under that Act the Councils of Bombay and Madras had to submit copies of the Acts they passed to the supreme Government. But the Bengal Government had no authority either to veto or even to modify the local legislation. It must be borne in mind that as yet there was no distinction between the Legislative and Executive Council of the Governor. The same Council along with the Governor was the Legislative and Executive authority.

The Act of 1833 introduced far-reaching reforms in the legislative machinery. The Provinces were deprived of their legislative power and the Supreme Government was constituted the sole legislative authority. All that the Provinces could do was to submit drafts of Bills, which they required to be passed to the Supreme Government and it was the latter, if it approved of them, that placed them on the Statute Book.

The working of the Act of 1833 disclosed one serious defect and the subsequent Act of 1853 made an attempt to remedy it. It was found that the provincial point of view was not properly represented in the Supreme Legislative Council and the Act of 1853 made provisions for the

representation of the various provinces in the Council of the Governor General. The Governor or the Lieutenant Governor was to nominate one representative from Civil Servants in his province who had served for at least 10 years.[1]

In 1861 the legislative power that was taken away from them in 1833 was restored to the provinces. Distinction was made between the Governor's Council as an Executive and a Legislative body, and the Council was enlarged by the addition of new members for the purposes of legislation. Such new members were the Advocate General and not less than 4 and not more than 8 members to be nominated by the Governor—half of such members to be non—officials. The subsequent assent of the Governor-General was requisite for the validity of any law passed by the Governor's Council.

The Act of 1892 further enlarged the Governor's Councils. The number of additional members was increased to 20 maximum and 8 minimum—not less than half to be non-officials as under the previous Act. But a clause was inserted in the Act which though not in theory still in practice introduced the principle of election in the Councils. This was known as the "Kimberley Clause" from the name of the Secretary of State for India—Lord Kimberley who piloted the Bill in Parliament. This was Sec. (1) sub-clause (4) of the Act, which provided that the Governor-General was to make regulations under which nominations to the Councils were to be made. The effect of these regulations was that the Governor in practice accepted the recommendations of the various representative local bodies (e. g. municipalities) as to who should represent them in the Council. Thus in practice these local bodies elected a section of the members who sat in the Governor's Councils. Although the principle of election was accepted, it was still indirect and not direct election.

The Act of 1892 is notable for another important innovation that it introduced in the history of Local Legislatures.

1. 16 and 17 Vic. C. 95 Sec. 22.

So far these Legislatures were confined to the work of legislation. The right of controlling the administration by means of resolution, questions, etc., which is so important a function of every Legislature was denied them. The Act of 1891 took tentative steps in that direction. It gave the new councils the power to discuss the annual financial statement. This must not be confused with the modern Budget discussion. For, barring the right of a general discussion, the members had no right to move resolutions, much less to move "cuts." It also empowered members to ask questions, although as yet they had not the right of asking supplementary questions.

The Act of 1909, popularly known as the Minto-Morley Scheme, brings us to the state of things that prevailed on the eve of the passing of the Act of 1919.

In the first place it considerably increased the size of the Provincial Councils. The number of members was now to be somewhere about 50. The Act of 1909 also specifically recognised the principle of election which had only been indirectly accepted under the prior Act. The official majority which had been so far maintained was now abandoned, although, except in the case of Bengal, Government could always muster up a majority with the help of nominated members. In the Bengal Council there was a clear elected majority.

With regard to the functions of the Legislature, its powers were still further enlarged. Members were now given the right of putting supplementary questions. They could now move resolutions not only on questions of general public interest but also on the budget and to call for a division, although it was clearly understood that their resolutions were to be no more than mere recommendations to the Executive. The right which the present Councils have of voting supplies was still very distant.

B. The Present Position:—In this Chapter it is proposed to deal with only one class of local legislatures, *viz.*,

the legislative Councils of the Governor's provinces, covered by sections 72-A to 72-E. The provisions (Sec. 73 to Sec. 80) with regard to the Legislative Councils of Leiutenant Governors and Chief Commissioners have merely an academic interest.

Unicameral System.—Unlike the Indian legislature, the Provincial Legislature does not possess two chambers. It was after some deliberation that it was ultimately decided not to try the experiment of the bicameral system in the Provinces. It was found that it would be extremely difficult if not impossible, to prepare two separate rolls for voters to elect members to the two respective chambers. The difficulty of finding sufficient number of suitable members to man the two houses was also considered. The Act of 1919 does not finally determine the question. It is to be specifically referred to the Statutory Commission which is to be appointed under Section 84-A.

Membership term of office, duration of the Council, etc.—The size of the Councils is enlarged so as to include roughly from 100 to 125 members in the major provinces. Another important change is the provision for a large elected majority. [Sec. 72-A.] (2) providing for at least 70 per cent. elected members. The Official element is still maintained but is considerably reduced in numbers the maximum possible under the Act being only 20 per cent. The duration of the Council is 3 years, subject to the power of the Governor to extend the period by one year under section 72-B (b).

The powers of the Councils might be considered under two separate heads:—Financial and Legislative.

Financial Powers.—The Government have to present the budget to the Council every year. The Budget is the estimated expenditure and revenue of the province for the year. Government cannot " appropriate " any portion of the provincial revenue or in other words spend any sum of

money on the administration of the Province without receiving the sanction of the Council. Sub-clause (3) of Sec. 72-D, deals with what is known as the non-valuable heads. These heads of expenditure are not submitted to the Council for their vote. They deal mostly with what we might call the permanent charges on the Provincial Revenue.

All proposals for the appropriation of provincial revenue must emanate from Government. Government being in charge of the administration of the province are in the best position to know how best and how most economically the provincial revenue should be applied for the various purposes of the State. To permit private members unconnected with Government to propose different methods by which the provincial finances could be expended, and to place the provincial exchequer at the disposal of the whole legislative body, would lead to financial chaos and ultimately to bankruptcy.

It is further to be noted that the power of the legislature is confined to either refusing the proposal of Government or reducing the sum that Government demand for a particular department. It cannot *increase* the amount. The principle upon which this particular provision is based is identical with the principle discussed in the previous paragraph viz. that the Government alone should formulate the plans for the expenditure of provincial revenue. As coming within the same principle we might mention that any measure proposing fresh taxation or recommending increase of any tax already imposed can also proceed only from Government.

The financial powers of the Legislature must be read subject to the power of the Governor to certify expenditure when it relates to a reserved subject as already seen in the chapter on the Governor.

Legislative power:—The powers of the Local Legislatures are defined under Sec. 80-A.

Generally speaking the Legislative Council can make laws for the peace and good government of the territories that go to constitute the province of which it is the legislature.

The first important disability from which it suffers is that it cannot in any way alter or modify any Act of the sovereign Legislature the British Parliament [(Sec. 80A (4)].

The second disability is the necessity of obtaining the sanction of the Governor General before it can make or take into consideration any law relating to subjects enumerated in Sub-clause (3) of Sec. 80 A. These are mostly central subjects which have not been delegated to the Provincial Governments and have been retained by the Government of India under their own supervision and control.

Thirdly, we have the power of the Governor (1) to veto a bill passed by the Council ; (2) to closure any further proceedings on a measure which he deems to be opposed to the safety or tranquillity of his province ; and (3) to ensure the passage of a bill in face of opposition of the Council when the measure relates to a reserved subject. These extraordinary and emergency powers vested in the Governor have already been dealt with.

Thus we find that both in its composition and in its functions, the Provincial Councils register an advance upon the state of things existing under the Minto-Morley Scheme. But while the Act of 1919 concedes to the local Legislature a large elected majority, it hedges round this concession with several novel and extraordinary powers conferred upon the Governor which he did not enjoy under the old dispensation. The power of the certificate whereby a Bill can be placed on the Statute Book, notwithstanding the opposition of the Council, and the power to stop all further proceedings on a Bill are innovations which seek to restore the official equipoise, slightly disturbed by the presence of an elected majority in the Council.

CHAPTER V.

Dyarchy, its working and its defects.

Its meaning and the reasons why it was introduced :—This word was first used to denote the dual character of the *imperium* which Augustus acquired over the Roman world. He held sway over the whole Empire, but the authority that he exercised was different in the imperial provinces from what it was in the case of Senatorial provinces. Hence the early Roman Empire was in reality a dyarchy.[1]

The same idea has been borrowed to apply to a very different set of circumstances obtaining in the Governor's provinces under the Government of India Act.

The word 'Dyarchy' is used to indicate the dual character of the Provincial Executive—a portion of it forming his Executive Council appointed by the Crown, not responsible to the Legislature and holding office for a fixed statutory period, the other portion, the Ministers appointed by the Governor from among the elected members of the Legislature, responsible to the Legislature and theoretically holding office only so long as they retain the confidence of the Provincial Council. Besides the dualism in the executive, there is of necessity a dualism in the subjects administered by the Provincial Government, those of which the members of the Executive Council are in charge being known as 'reserved' subjects, and those administered by the ministers being known as 'transferred' [Sec. 46 (1)].

We have to go to the Preamble of the Act of 1919, in order to understand why the dyarchical system of Government was the only one possible, if the framers of the constitution of 1919 were to comply with the provision of the Preamble. Those provisions contemplated the progressive realisation of responsible Government. They also laid down as a condition that its achievement must be by successive stages, and they also necessitated the taking of substantial

1. See Enc. Britt. Vol. 9, p. 348.

steps in that direction. The net result of all these terms and conditions seems to be, that while an element of responsibility was to be introduced in the Provincial Executive, that responsibility was not to be of such a character as to make the entire Executive responsible to the Legislature and removable by it. This desideratum could only be obtained by some form of dual Government. In para 215 (p. 140) of the Montague-Chelmsford report, the learned authors observe, "We start with the two postulates that complete responsibility for the Government cannot be given immediately without inviting a breakdown and that some responsibility must be given at once if our scheme is to have any value." Therefore those critics of the constitution who hold that it was a gross error to have tried the experiment of dyarchy at all, misjudge the situation and take up an entirely wrong position from which to assail the enemy. The real vitiating defect in the Act of 1919 was the Preamble, which compelled those who were responsible for the provisions of the Act to accept a situation that was constitutionally hopeless. It was not realised that there can be no half way house between bureaucracy and Responsible Government, nor can a country attain to that form of Government by the crude method of instalments or successive stages. See Sec. 45 (A).

Division of Subjects:—What has been said above about dualism of subjects to be administered by the Provincial Government needs a little elaboration.

The Committee that was appointed under the chairmanship of Mr. Richard Feetham, known as the Functions Committee, was entrusted with the task of advising as to the functions which should be discharged by the Provincial Governments, and which of the functions to be discharged by Provincial Governments could be transferred at the outset in each province to the charge of Ministers. The Committee in the first place divided all the subjects of administration into All-India and Provincial subjects thus accepting the model of Federal Governments where such a division is to

be invariably found and it further sub-divided the Provincial subjects into transferred and reserved. The recommendations of the Committee were in the main accepted and were made an integral part of the Constitution by rules framed under the Act. In relation to the All-India subjects, a further distinction was drawn :—there were subjects which were to be directly administered by the Central Government, and there were other subjects for which the ultimate responsibility rested with the Central Government but which were to be administered by the Provincial Governments as the agents of the Government of India. The Committee also sought to give effect to that part of the Preamble which says that "it is expedient to give to those Provinces in provincial matters the largest measure of independence of the Government of India which is compatible with the due discharge by the latter of its own responsibilities." The supervision and control exercised by the Central Government under the old constitution was almost completely relaxed in the case of transferred subjects, it being made less strict in the case of reserved subjects, as the Government of India were still responsible to the Secretary of State for the administration of these subjects. In this connection the reader must be warned against the confusion that is often created by the phrase "Provincial Autonomy". In modern political parlance, it means full responsible Government for a Province. In the strict constitutional sense, it means the independence of a Province from the control and supervision of the Government of India.

Allocation of Revenues :—Under the new constitution, radical alterations were made in the method of financing the provincial Government, for carrying on the administration of the territories placed under them. Under the old dispensation there was the system known as "divided heads." The various sources of revenue were shared between the Central and Provincial Governments. One of the results of this system was that the Government left no incentive to

develop these sources of revenue as every increase had to be shared with the Government of India. The new constitution did away with this and broadly speaking allocated certain subjects to the Provinces and the test to the Central Government. Thus every increase of revenue brought about by the energy and initiative of the Provincial Government was retained by itself. Thus it was thought that this would give a greater incentive to the Provincial Governments to develop those sources of revenue which were allocated to them. It was found that if the Central Government were to rely only on the revenue which it was to derive under the new arrangement, it would not be in a position to meet its obligations. Thus a settlement was arrived at whereby each province was to contribute a certain sum every year towards the Imperial exchequer. The settlement is known as the Meston Settlement. It was to continue till such time as the Government of India[1] finds itself in a position to balance in own budget.

Defects of Dyarchy.

All impartial observers after having watched the experiment of dyarchy being tried for the last 8 years have come to the conclusion that dyarchy has proved a failure whether it be due to defects inherent to the system itself, or because the experiment was not worked in the spirit in which it was intended it should be, by those who were responsible for its introduction.

(1) Government being a single unit you cannot divide its functions into water-tight compartments.

Its very dualism is the most vital and vitiating defect of dyarchy. You cannot draw an imaginary line dividing the functions of Government into two categories, the transferred and reserved subjects. Questions are bound to arise which may be difficult to allocate to one or the other category. There may also be questions which may be of a mixed character and may possess attributes of a reserved as well as

1. See Sec. 72-D (3) (i).

a transferred department. The question of starting a Muslim school in a locality mainly inhabited by Hindus may at first blush appear to be a matter properly belonging to the department of education. But if the Hindus are agitated over the question, if they threaten civil resistance, it is difficult to see why the member in charge of Law and Order should not claim to have a voice in the determination of that question. The result must be a constant friction between the two halves of Government. The strength and solidarity that should be the distinguishing feature of a unitary Executive must be lacking in an executive dual in character.

(2) Impossibility of achieving joint responsibility of ministers.

One of the most important and vital factors of the British Parliamentary system is Joint Ministerial Responsibility. In the first place the whole executive not being responsible to the Legislature, the two halves have to function independently of each other, and this to such an extent that the Act insists that all acts and proceedings of the Government should state in definite terms on whom the responsibility for the decision of a particular question rests, whether it emanated from the reserved or the transferred half [See Sec. 49 (1)]. Apart from this fundamental cleavage, it has been found difficult, if not impossible, to achieve Joint responsibility even among the Indian Ministers themselves.

In England the King sends for the leader of the Party who has a majority in the Commons, and asks him to form the ministry. He never forms the ministry himself by electing various individual ministers from different groups. Here, except in the Provinces of Bengal and Madras, the Government, in flagrant violation of all constitutional precedents, have appointed ministers to represent various groups in the Council. Thus there is no bond uniting these different ministers. They do not belong to the same party, nor do they share a common political past, with memories of having appeared on the same platform, and advocated and fought

for the same policy The Minister does not find himself called upon to pursue a policy which receives the approval and support of his colleagues. He feels he is only responsible to the group whom he represents, and so long as he can make sure of the votes of those members, he has done all that the constitution requires of him.

The unfortune result is largely brought about by the non-existence of the Party system in the majority of councils, and the presence of nominated and official members. It is the opinion of all those who have seen and studied the history of political institutions in Europe, that the British Parliamentary system can only be worked successfully where you have well formed parties in the Legislatures. And it might be said in fairness to some of the Provincial Governors that they find it difficult to transplant the English institutions to this Eastern soil, where there is no group or section in the legislature which has behind it the majority of the Legislature and which can place in power a majority which will command the confidence of that Legislature.

The nominated and official members form a most disturbing and demoralising element in the Council.

The majority that a minister obtains in the Council in support of a particular policy of his is often inflated by these members, and even a minority of elected members is converted into a majority by their plunging solidly into the Government lobby.

No individual minister having an absolute majority of members behind him, he has to depend for his very existence upon these official hordes. And instead of the Indian ministers liberalising the Government, the ministers have been completely officialised. Government can always bring to book any recalcitrant minister by threatening to withdraw from him the support of the Official and nominated block.

The various and varying groups in the Legislature have supplied the Provincial Government with another important

and almost deadly weapon. Not only is the unfortunate minister officialised but along with him his whole group runs the danger of being tainted with the same disease. The group appreciates the importance of having one of its representatives as a minister. It also knows that there are rival groups which are clamouring and competing for similar favours. The only way to retain its importance and to thwart the odious rival is by voting with the minister right or wrong. Thus in practice, dyarchy has substituted in place of the old powerful official block, the nominated and official members plus the ministerial block.

Thus the only justification of dyarchy viz. that it introduces an element of responsibility disappears. In no sense of the term is the minister responsible to the Legislature. He need not, and in practice, he rarely has, the confidence of the majority of the representative of the people of the Province. Instead of his presence in the Executive tending to jeopardise the Government, he drags with him into the official lobby the members of his group who otherwise might have voted on the merits of the question rather than from a consideration of saving his official existence. In this connection it must be remembered that under the Minto-Morley Scheme with an irremoveable Executive, the elected members voted more freely against Government because their action was not fraught with the serious consequence of the downfall of their protegé, and finally the provision under the Act, whereby the Governor can act otherwise than in accordance with the advice of his minister, as we have seen above,[1] gives the coup de grace to the idea that under the Act of 1919 any real responsibility has been conferred upon the Provincial Legislature.

(3) Joint deliberations.

Although a dual Executive was provided under the Act, it was thought necessary that in the actual working there should be as little friction as possible, and it was contemplated

1 See p. 19.

that the two wings of the Cabinet should meet as often as possible, although the responsibility for the ultimate decision should be clearly fixed upon one section or the other. "There will be many matters of administrative business" say the Joint Committee, "as in all countries, which can be disposed of departmentally, but there will remain a large category of business of the character which would naturally be the subject of cabinet consultation. In regard to this category the Committee conceive that the habit should be carefully fostered of joint deliberation between the members of the Executive Council and the Ministers, sitting under the chairmanship of the Governor." In practice, far from these joint deliberations being encouraged, they were held on very rare occasions as was testified to by several ex-ministers who gave evidence before the Muddiman Committee.

Apart from lessening the friction between the two halves of Government, it was also felt that at these joint meetings Ministers would be in a position to put forward the popular point of view even with regard to matters which primarily affected a reserved subject and thus, however unconsciously, affect the decision that would be ultimately taken by a member of the Executive Council on that question.

Both on the question of Joint responsibility and joint deliberations, the point was clinched by Mr. Chintamani's well-known epigram. In India, we have ministers, we have no ministries.

(4) The Finance Department.

The fact that the finance department is a reserved subject also prejudicially affects the working of transferred departments. The Finance Member exercises general control over all departments. It is for him to prepare the statement of estimated revenue and expenditure which is to be laid before the Legislative Council every year, and as such he can critically examine any proposals of ministers of suggested expenditure on matters connected with his department. Any

proposal for increased taxation has also to pass the test of his scrutiny. The Minister therefore very largely finds himself at the mercy of the Finance Member, and the orientation of new policy, the development of existing institutions, being all questions of funds, he has to satisfy the Finance Member that the revenues of the Province can bear his increased demands.

Further the system of a Joint purse has worked to the great detriment of popular institutions. And the irony of the situation lies in this, that before the Joint Select Committee all the accredited representatives of the country eloquently pleaded in favour of it. Joint purse means that all the revenues of the Province are thrown into the common pool, and then various sums are appropriated to meet the needs of different departments. In practice it has been found that the Reserved subjects have always come in for the lion's share of these moneys, and the nation-building departments like education, etc., have been starved at the expense of subjects like Police, etc. If Ministers insist upon spending more upon their departments the onus has always been thrown upon them to go to the Council for fresh taxation, and even the most stalwart of ministers would shrink at the idea of trying to induce the representatives of the people to bear a greater burden of taxation than is already being borne by the Province. A separate purse, as was recommended by Government of India in their despatch to the Secretary of State on Reforms, would have handed over to the ministers certain heads of Provincial Revenue which would have rendered them comparatively independent of the Finance Department, and would have inspired them and given them an incentive to develop those sources in order to be able to spend more on departments under their control.

(5) Ministers and the Services.

The Minister's role vis-a-vis the members of the Indian Civil Service is a very anomalous one. He does not have

the same rights and privileges that a Cabinet minister has over the members of the Permanent services in England. There the Minister is the Master, and the members of the service, as the very term connotes, loyal and devoted servants. Here the services being an all-India subject, the subordinates have rights and powers which are entirely inconsistent with the relationship of Master and Servant.

Sec. 96 B lays down that no member of the Civil Services can be dismissed by any authority subordinate to that by which he was appointed, and it further gives him the right to complain to the Governor if he thinks himself wronged by an order of an official superior in a Governor's province. Discipline and a sense of loyalty to one's superior would be impossible to expect when you find the services protected by such extraordinary provisions under the Act.

(6) Elevation of Ministers to high offices.

The consistent policy that certain Provincial Governments, especially our own Bombay Government, have adopted, to elevate men who hold the portfolios of ministers to more lucrative offices under Government is most reprehensible. Dyarchy was introduced in the Provincial Governments, and Indian Ministers were appointed, in order that there should be a popular element in the Executive, and that the popular ideals should be translated into practice by their representatives presiding over the transferred departments. Speaking generally, without reference to personalities, how can a Minister be expected to fight for popular rights when he has the glittering prize of a seat on the Executive Council dangling before him? Very often, a Minister has this choice before him, to submit to official pressure and be ensured a safe official position for a fairly long period, or to be true to his constituents and the party whom he represents in the Council and be driven into wilderness at the first opportunity Government have of reshuffling portfolios.

CHAPTER VI.

The Governor General in Council.

The direction and control of the civil and military Government of India is vested in the Governor General in Council, but constitutionally be occupies a position which is completely subservient to that of the Secretary of State for India. Sec. 33 is as explicit and clear on the point as any section can be. "He is required to pay due obedience to all such orders as he may receive from the Secretary of State". It will be noted that this Section is the counterpart of section 2 which defines the powers of the Secretary of State and gives him the direction and control of Indian policy.

There has been a school of thought in India which was pressing for the relaxation of the control of the Secretary of State. But it is often forgotten, that so long as the Government of India is not responsible to the Indian Legislature, to remove the controlling hand of the Secretary of State, would be to place at the helm of Indian affairs an autocrat with tremendous powers and unlimited authority. As Lord Morley once said, "It will place the Government of India in a position of absolute irresponsibility to the Governed." For, it must be remembered, that theoretically speaking, with all his powers, the Secretary of State is not an autocrat. He is responsible to the British Parliament and through Parliament to the people of Great Britain for the administration of India. Parliament can call him to book any moment, and if his policy runs counter to the expressed desire of Parliament, he can be immediately turned out of office. On the other hand the Government of India can pursue its own course quite impervious to the wishes of the Indian Legislature. It forms an irremoveable executive, which continues safe and secure in its entrenched position, unperturbed by any want of confidence in its policy on the part of the Legislature to which it is in no way responsible. Therefore, the relaxation of the control of the Secretary of State can only come, pari passu with the introduction of responsibility in the Government of India.

The Governor General's Council.

The Executive Council of the Governor General at present consists of seven members, but the statute does not lay down any fixed number. Sec. 36 only provides for the qualifications of four members of the Council. Three of them have to be men who have been in the service of the Crown in India for at least 10 years. This is to ensure a civilian element in the council. The fourth member has to be a barrister or a pleader of ten years standing. He is known as the Law member and is looked upon as the expert in the council on questions of drafting of bills and other legal subtleties that might require attention by the Government of India. It will be noted that there is no racial qualification laid down as to the members of the council; nor is there any statutory provision for Indian members. In fact there is nothing to prevent His Majesty the King from appointing all members of the Council from among Indians provided they satisfy the other qualifications.

Under Sec. 37 the Commander-in-Chief is a member of the Council. Thus our constitution does not accept the healthy principle of the British constitution whereby a civilian alone can be in charge of the military portfolio. In England the Commander-in-Chief has nothing whatever to do with the laying down of policy or with the decision of the financial aspect of the military question. It is the Secretary of State for war—who is invariably a civilian—who is responsible to Parliament for the military policy of the British Government.

There are obvious reasons why it is undesirable that the Commander-in-Chief should be a member of the council, and the person to lay down the military policy of the Government of India. He is an expert and as such has all the defects that experts unfortunately suffer from. He has lived all his life in military surroundings and has imbibed military traditions, and it would be difficult if not impossible for him to act as a statesman, and to take a statesmanlike view of the military problem.

Difference of opinion in the Governor-General's Council.

Sec. (41) (1) lays down that normally the Governor-General is bound by the decision of the majority of the council. Sub-clause (2) however gives him the power to act otherwise than in accordance with the decision of the majority, provided in his judgment, the safety, tranquility or interests of British India are essentially affected. Under the Regulating Act of 1773, Warren Hastings had only a casting vote, but had to bow before the majority of his council. The constant friction between the Governor-General and a hostile majority, which this state of the law produced, led Parliament in 1786 to confer on the Governor-General the power of over-riding his council.

The important respects in which the relations between the Governor-General and his council differ from the Secretary of State and his council must be noted.

Except under Sec. 43 (when the Governor-General visits any part of India unaccompanied by his council, and that too with the leave of the council) there are no powers which the Governor-General alone can exercise. On the other hand there are a large number of functions, as we have seen, which the Secretary of State can discharge, without even consulting his council. In the second place, in the generality of cases, the Governor-General has to act in accordance with the views taken by the majority of his council; the Secretary of State can act on many occasions without necessarily carrying the majority of the council with him. Thirdly, the Governor-General has been given the power of over-riding his council in all cases where he is satisfied that the interests of British India demand his taking such a course; on the other hand, the Secretary of State, in certain matters, can only act when he has the majority of his council with him.

The Indian Executive compared with other executives.

The Indian Executive is unitary in character. It has not the dualistic character which provincial executives have, nor

is there any section of it which owes responsibility to the Legislature. The experiment of dyarchy was advisedly confined to Provincial Governments. So we witnessed at the same time the working of a dualistic executive in the Provinces, and that of a unitary one in the Government of India.

Our Executive, being an irremoveable executive, differs fundamentally from the British Executive, which is responsible to the British Parliament, and can hold office only so long as it has the confidence of the Legislature.

It resembles in certain respects the American executive which is also an irremoveable executive. But while in America, there is a division of functions between the Executive and the Legislature, and the Executive has to carry out the orders of the Legislature in those matters which are the province of the American Congress, the Indian Executive is all powerful, and can almost in all cases over-ride the Legislature. In Switzerland too, there is a permanent Executive appointed for a statutory period. But it has hardly any powers, and merely acts as a committee of the Swiss Legislature to put into execution the policy from time to time laid down by it.

The results of the irresponsibility of our Executive have been very apparent in the last so many years. There is a tendency on the part of the members of our Legislature to indulge in reckless and irresponsible talk, when they know full well that they can never be called upon to form a Government themselves, and carry out the policy they have been advocating. In England, the opposition have to be careful as to what expressions they use, and what opinions they proclaim, for at any moment His Majesty's Government may be overthrown, and they may have to take up the reins of office, when they might be confronted with their own declamations in black and white. Happy in the thought that such a contingency can never arise in their case, our opposition can give expression to the most impossible and utopian ideas.

Further, our opposition is not in the minority, but almost invariably in the majority. Taking the Legislative assembly as the prototype of the House of Commons, we find that the popular party can always command sufficient number of votes to defeat Government on any measure it chooses to bring before the assembly. Thus the Government is carried on, not with the assistance of the majority party, but with that of a minority, backed by the extra-ordinary and emergency powers of the Governor-General, which he has to requisition to his aid from time to time. Thus there is a constant friction between Government which is in a minority, and the majority which are prevented from taking office, and can only play the rôle of irresponsible critics.

CHAPTER VII.

The Indian Legislature.

Historical Preface :—The dawn of the Indian Legislature was a very lucid one. At the outset, the laws in India were only the fiats or decrees of the Executive. The Executive used to issue regulations and ordinances which had to be registered with the supreme court. These regulations and ordinances had to receive the sanction of the Court of Directors. The only constitutional right that the subject had, against the arbitrary and autocratic exercise of its rights by the Executive, was a right to appeal to the King in Council. The earliest of such regulations in existence is one dated 17th April 1780.

The Charter Act of 1833 added a fourth extra-ordinary member to the Governor-General's Council. He was appointed especially for the purpose of making laws, and he is the historical ancester of our present Law Member. It is hardly necessary to state that the first member so to be appointed was the illustrious Macaulay. Under the Act of 1833, the Governor-General's council could make laws for the whole of India, and they were to have the same force as Acts of Parliament. They need no longer be registered with the Supreme Court, but had to be laid before Parliament. The Court of Directors was given the power to disallow any of these laws and regulations.

The Act of 1853 for the first time made provision for a legislative council to make laws for the whole of India. Our first Indian Legislature consisted of twelve members. There were six representatives from the six different provinces, the Chief Judge of the Supreme Court, and one more Judge from some provincial court. Added to these eight members were the four members of the Governor-General's Council who sat with the other member, for the purpose of legislation. It will therefore be noted that as yet there was no clear line of demarcation between the Executive and the Legislature.

The Executive, as it were, co-opted a few members when it wanted to make laws. Further, the sole concern of the Legislative Council was to make laws. It had no part or share in the actual administration of the country. The fourth member of the Governor-General's Council was made an ordinary member and was present at all the meetings of the Council. The meetings of the Legislative Council were to be open to the public, and its proceedings were officially published.

The Act of 1861, for the first time, introduced the non-official element in the Indian Legislature. The Legislative Council was to consist of the five ordinary members of the Governor-General, the Commander-in-Chief, and the Governor of the Province in which the Council met. The Act further provided for the nomination of between 6 to 12 members by the Governor-General, half of whom had to be non-officials. The Council established under this Act has been described as the committee for the purpose of making laws. In view of the introduction of the non-official element, the Act armed the Governor-General with emergency and extraordinary powers. The Governor-General could make laws and ordinances for the peace and good Government of India, on his own initiative, without having resort to the Legislature. These ordinances were to hold good for a period of six months. Since 1861 this provision has been reproduced in every subsequent Act dealing with the constitution. Sec. 72 of the present Act contains similar provision.

The Act of 1892 slightly increased the size of the Legislative council, the number of nominated members to be not less than ten and not more than sixteen. As we have already seen in the historical preface to the Provincial Legislatures, in practice although not in theory, thanks to the "Kimberley clause", the principle of election was introduced. As we have already seen, the Act gave the council the right to discuss the annual financial statement and also to ask questions.

The Reforms of 1909 considerably increased the size of the Indian Legislature. The number of additional members was increased to sixty, of which twenty-eight may be officials, and twenty-seven were elected members. The seven members of the Governor-General's Council were the ordinary members of the council. Thus Government had a clear *official* majority in the council, and with the assistance of the official. *block* it could carry any Government measure or defeat any bill introduced by an elected member. As we have seen, the functions of the Council were also enlarged. The members could move resolutions of general public interest, and also on the annual financial statement, and the right of asking supplementary questions were granted to them. The principle of election was formally recognised.

Defects of the Minto-Morley Reforms.

In chapter IV (page 53) of their Report on Indian Constitution Reforms, Mr. Montague and Lord Chelmsford have submitted the Reforms to merciless criticism.

In the first place, although the principle of election was recognised, the election to the Indian Legislative Council was indirect, and the Reforms left the masses absolutely unaffected.

The presence of the official block in the council gave an air of unreality to the debates, and constantly irritated the elected members who found themselves helpless in the presence of this official steam-roller. Government viewed with disfavour any attempt on the part of non-official members to legislate, and constantly emphasised the fact that law-making was primarily the prerogative of the Executive. The Council also tended to accentuate racial feelings, because Indian members saw their national aspirations being turned down by the organised officials most of whom were Europeans. The atmosphere of the Council Hall was that of a glorified debating society, for the elected members knew full well that their speeches would have no effect, and their resolutions or bills would be mercilessly defeated by the sold phalanx of the

officials marching into the government lobby. To put it briefly, the Reforms gave to the elected members "the power of challenge and obstruction, influence without responsibility."

The Legislative Assembly and the Council of State.

The Indian Legislature consists of two chambers—the Legislative Assembly and the Council of State—the former being elected on a much wider franchise than the latter. The Legislative Assembly has been given a large elected majority, section 63 B (2) laying down, that whatever the number of members of the Assembly, five-sevenths shall be elected members. The Council of State, being the second chamber, is a much smaller body with a membership of not more than 60. The maximum number of official members that it can contain is 20. Thus, under the statute, even the Council of State has a non-official majority, and in practice the elected members have a majority over the official and nominated members combined. While the President of the assembly is a member of the Assembly, elected by the assembly and approved by the Governor-General, the President of the Council of State is appointed by the Governor General from among the members of the council of state. The duration of the council of state is five years and that of the Legislative assembly three years. As far as the duration of the two chambers is concerned, our constitution is more democratic than that of England or of any of the colonies—there being a more frequent appeal to the voters, the Legislature does not get out of touch with the sentiment prevailing in the country. The statutory duration of the House of Commons is five years, that of the Lower chamber of Canada five, and of Australia, three years. The members of the Senate in Canada are appointed for life. The duration of the Australian Senate is six years, and that of South Africa ten years. Both in the South African and the Australian constitution there is a provision that money bills must originate from the lower chamber, and the senate has not been given the power to amend such bills, or to introduce any such

legislation which would increase the burden of taxation which the people have to bear. We do not find any such provision in our constitution.

The Bi-Cameral System.

At first the intention of both Lord Chelmsford and Mr. Montague was not to introduce a true bi-cameral system in India. The real object that the second chamber was to serve was to register, as it were, the decrees of Government. The Legislative assembly having a large elected majority, it was quite probable that Government might fail to get passed by that body legislation which they might deem essential. Thus the Council of State was to be a set-off against the democratic and popular chamber, or in other words, the Second Chamber was to be the substitute for the old official block, which Government had, in the old Imperial Council, under the Minto-Morley reforms. "We do not propose to institute a complete bi-cameral system, but to create a second chamber, known as the Council of State, which shall take its part in ordinary legislative business, and shall be the final Legislative authority in matters which the Government regard as essential.[1]

But the joint Select Committee did not accept this proposal. In its opinion, the Council of State should be, not an organ for Government legislation, but a true Second Chamber.

A great deal of talent and ingenuity has been exercised by political thinkers in considering the desirability or otherwise of a bi-cameral system. But it seems on the whole true to say, that most modern constitutions have accepted the system, and those countries which tried the experiment of legislating with one chamber, have after a very brief interlude gone back to the more orthodox system. The Long Parliament in 1649 did away with the House of Lords. France, both in 1791 and 1648, tried the unicameral system. But both the countries reverted to the institution of two chambers after a brief and disastrous attempt to strike out on a new path.

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1 Report on Indian Constitutional Reforms, p. 178.

The modern German constitution, seems to be trying the experiment of a unicameral system. "The German constitution, however, consists now of a single chamber, though with it is associated a *Reichsrat*, which serves to represent the Governments of the federal states, and this *Reichsrat* has a certain right of veto."[1]

Lecky in a well-known sentence in his "Democracy and Liberty", draws attention to the dangers of the unicameral system,—"Of all forms of government that are possible among mankind, I do not know any which is likely to be worse than the government of a single, omnipotent, democratic chamber."[2] His warning must have been ringing in the ears of those who were in a minority in the House of Commons during the war, when Mr. Lloyd George constituted himself the dictator of the country, assisted by a large, overwhelming and triumphant majority, when England was practically governed by one chamber, the House of Lords having been shorn of all its powers under the Parliament Act of 1911.

Thus Lecky goes on to state what he considers to be an axiom. "The necessity of a second chamber to exercise a controlling, modifying, retarding and steadying influence has acquired almost the position of an axiom"[3]

The second chamber has a controlling and steadying influence, because the more popular chamber is often the victim of gusts of passion and prejudice, and the elders can always apply the brake to the headlong tendencies of the Lower House.

Very often the lower chamber is guilty of undue haste, and accepts amendments to bills which are the result of very little consideration and bad draftsmanship. In these circumstances the existence of a revising chamber is of very great value, to modify and alter the decision arrived at by the other chamber.

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1 See The Journal of Comparative Legislation and International Law. Vol X, Part I, p. 59.

2 P. 361.

3 Lecky, Democracy and Liberty, Vol. I, p. 363.

One of the most important functions of the Second Chamber is to retard legislation. By allowing time to pass after the Lower House has registered its decision, it allows public opinion to crystalise, and often on second thoughts the popular chamber might desire to retract its steps. Under the Parliament Act of 1911, although the House of Lords has ceased to be a Second Chamber in any real sense of the term, in that it is possible under certain circumstances for the House of Commons to legislate alone, the Lords have still left to them what one might term the suspensory veto. They can hold up legislation for a period of two years.[1] Thus, the House of Commons, although it can pass any legislation it likes without necessarily carrying the upper chamber with it, it cannot pass such legislation *when* it likes. The intervening period might be made use of by the Lords in working up public opinion, and forcing the hands of the Commons to alter their decision.

Ironically enough, although most foreign constitutions have accepted the model of England, and have established Second Chambers, England herself, as we have seen, due to the passing of the Parliament Act 1911, has dealt a severe blow to the authority and prestige of her own Second Chamber. But, it must be remembered, that whereas the House of Lords, based as it is on the hereditary principle, is a relic of the Middle Ages, the Second Chambers in foreign countries are almost all elective in character, and have been given considerable powers and an influential position under the constitution.

We might note in passing the classic instance of the Roman Senate which existed for a period of thirteen hundred years. For a considerable part of this period it enjoyed great power and prestige, and its principal function was to sanction laws which had been voted upon by the people. In Switzerland the Second Chamber occupies a co-ordinate position with the Lower. In France the President cannot dissolve Parliament without the consent of the Senate. But

1. Sec. 2 Parliament Act, 1911.

the most celebrated instance of modern times is the American Senate. It has a preponderating voice in the foreign policy of America, and the readers will recall to their minds the recent instance when it negatived the League of Nations policy of President Widrow Wilson. The President has also to receive its sanction for the distribution of offices, on his coming into power.

It might also be noted in passing that some second chambers combine judicial with legislative powers. The best example is the House of Lords. It is the highest Judicial tribunal in Great Britain. In America, too, the Senate is the judicial tribunal for the trial of high officials, impeached for corruption, mal-practices etc. Under our constitution, the Council of State has not been given any judicial powers.

Conflict between two chambers

A constitution that provides for a bicameral system must also provide for cases where there is a conflict between the two chambers. One chamber might take quite a different view of any particular questions from the other chamber, and each might stand firmly by its own decision. This would result in a complete dead-lock unless the constitution provides for some solution. The British constitution failed to provide any such, except the very arbitrary one of the right of the King to create additional peers. Ultimately, to avoid constant friction between the two chambers, the Parliament Act of 1911 had to be passed. But this was more a solution after the manner of cutting the Gordian knot, than the providing of a real constitutional device. The colonial constitutions are more practical in this respect, having taken the lesson of England to heart. The Australian constitution provides for the dissolution of Parliament, and then the holding of a Joint Sitting of the House of Representatives and the Senate, and it requires an absolute majority of the total number of the members of both the Houses before the Bill or amendment upon which the two Houses have disagreed can become law.[1]

1. Sec. 57 of the Commonwealth of Australia Constitution Act.

The South African constitution provides for the passing of the bill in two successive sessions by the House of Assembly, and then being accepted at a Joint Sitting of both the Houses by a majority of the total number of the members of the two Houses present at the meeting.[1]

The British North America Act being the earliest of the colonial constitutional charters, makes no statutory provision for a conflict between the two Houses. As is well known, Canada followed the English model more closely than any other colony did.

Sec. 67 (3) of our Act deals with the same subject. It provides for a Joint Sitting of both the chambers, in the event of a bill not being passed by the other chamber within a period of six months after its passage by one chamber. Our constitution differs in this respect from colonial constitutions, in that it is left to the discretion of the Governor-General to convene a Joint Sitting. Armed as our Governor-General is with extraordinary powers, he can get over the dead-lock brought over by a conflict between the two chambers by more summary and drastic methods than the elaborate constitutional device provided for under the Act.

Powers of Indian Legislature.

The Legislative powers of the Legislature are defined under Sec. 65. And the most important thing to note is, that unlike federal constitutions, it has powers concurrent with the provincial legislatures: Sec. 65 (1) (a) gives the legislature power to make laws "for all persons, for all courts, and for all places and things within British India." Although provision is made to prevent undue encroachment by the Indian Legislature upon the field intended for provisional legislatures by making the previous sanction of the Governor-General necessary, before any measure can be introduced regulating any provincial subject [Sec. 67 (2) (i)].

Section 65 sub-clauses (2) and (3) enumerate the various limitations upon the powers of the Legislature. The

1. Sec. 63 South Africa Act, 1909.

Indian Legislature being a non-sovereign legislature (1) it cannot repeal or effect certain laws; and (2) there are certain matters on which it cannot legislate.

(1) It cannot pass any law repealing or affecting a statute passed by the British Parliament after the year 1860. Such an Act must have been made specially applicable to India. There is nothing to prevent our Legislature from making laws which are contrary to the spirit of the English common law.[1] It will be noted that under this general restriction is also included the present Act. Thus the constitutional charter of India is beyond the reach of the Legislature, and the British Parliament alone can alter or modify it.

2. The principal matters upon which the Legislature has no power to legislate are the authority of Parliament, and unwritten laws or constitution of Great Britain whereon may depend, in any degree, the allegiance of any person to the Crown.

The interpretation of the latter provision has given great deal of difficulty. The allegiance that a subject owes to the Crown is in return for the protection that the Crown gives to the person and property of the subject. Therefore, it would seem that the Indian Legislature cannot pass any law which would in any matter take away the protection of the Crown from the person or property of the subject.

The point was argued at great length in the well-known case of "*In the matter of Ameer Khan.*[2]" It was there contended that the Bengal Regulation of 1818 under which a person could be interned without a trial was *ultra vires* of the Government of India Act, then in force, and which also contained a similar provision. It was argued that a subject was no longer bound to pay allegiance to the Crown, if he was deprived of his personal liberty without a proper trial. The court held that the Regulation was *intra vires*. It held that the Governor-General in Council, who had to examine every

1 See the Colonial Laws Validity Act.

2 6 Bengal Law Reports. p. 459.

case before the warrant was issued, was a proper court; and that to argue that because of this regulation the loyalty of the Indian subjects to the Crown would be affected was "to convert a political sentiment into a principle of law."

As these words are being written, Pundit Motilal Nehru has raised a similar point with regard to the Public Safety Bill. The ruling of Mr. Patel, which he has promised to give after the third reading (if the Bill does reach that consummation devoutly wished by Government), will be awaited with interest.

The legislative powers of the Leglslature are further circumscribed by the extraordinary or emergency powers conferred upon the Governor-General under the constitution, and which are practically identical with the similar powers which the Governor has in relation to his own legislature.

(1) Certification of Bill. [Sec. 67(2-a)] enables the Governor-General to shut out all discussion on any Bill or Amendment to a Bill which in his opinion affects the safety or tranquillity of British India.

(2) Provision for case of failure to pass legislation. The Governor-General has in this respect wider powers than the Governor. Whereas the Governor can only make use of this provision when the Bill relates to a reserved subject, there being no dyarchy in the central government, the Governor-General can place any measure on the statute book, notwithstanding the opposition of the Legislature. [Sec, 67 B (1) sub-section (2) provides for safeguards similar to those found in sub-section (2) and (3) of section 72 E. Copies of the Act have to be laid before Parliament, and the Act is not to come into operation till it has received the assent of the King. In cases of emergency, however, the Governor-General may direct that the Act shall come into operation forthwith.

(3) The Veto.

Secs. 68 and 69 deal with the power of the Governor-General to withhold his assent to a Bill, or to reserve it fo

His Majesty's pleasure, and the power of the king to disallow any Bill to which the Governor-General has given his assent, and which has come into operation.

Financial Powers of the Legislature.

The provisions with regard to the Indian budget to be found in Section 67 A are identical with those of the provincial budgets in Sec. 72 D and which we have already dealt with.

The estimated annual expenditure and revenue is to be presented to each chamber. While the right of discussing the annual statement is given to both the chambers, the right to vote on the various proposals of Government for the appropriation of revenues is confined to the Legislative Assembly. There are several heads of expenditure which connot be voted upon by the Legislative Assembly, nor can be discussed by either chamber unless the Governor-General otherwise directs [Sec. 67 A (3).]

Certification of expenditure.

The power conferred upon the Governor to certify expenditure on matters relating to reserved subjects is also conferred upon the Governor-General, with this difference, that it is much wider in terms as it relates to all the items that might be voted upon by the Assembly. [Sec. 67-A (7).] And the Governor-General has also the power to authorise such expenditure as may in his opinion be necessary in cases of emergency. [Sec. 67 A (8).]

Indian Laws and Courts of Law.

It was held in *Queen* vs. *Burah*[1] that the High Courts in India have the power to test the validity of Indian laws, and to decide whether they are within or without the scope of authority conferred upon the various legislatures by the Paliamentary statute dealing with the constitution of India. Another important function discharged by Courts of Law in Federal countries is rigidly to maintain the separation of

1 Indian Law Reports. Calcutta, p. 363.

powers between Central and Provincial Legislatures. This has been expressly excluded from the ambit of the High Court's powers by Sec. 84 (2).

The Present Legislature compared with the Legislative Council under the Minto-Morley Reforms.

Instead of the single chamber constituted by indirect election, the present Act has set up two chambers, both constituted by direct election. The *official bloc* has disappeared, and there is a majority of elected members in both the chambers. But the only majority that counts is the one that is to be found in Legislative Assembly. For the Council of State being a highly oligarchic chamber, more often than not, plays the same role as the *official bloc* under the old regime did.

The functions of the Legislative have been enlarged, and theoretically, the Legislative Assembly has been given the power of the purse—that is, the power of voting supplies. But the power is more illusory than real. In the first place the non-votable head covers such important heads of expenditure as defence, which accounts for the bulk of Indian revenues. Further, the important and wide powers given to the Governor-General to certify expenditure clearly indicate that the "cuts" made by the Assembly in the Indian Budget are more in the nature of pious resolutions than the exercise of power by a sovereign legislature.

Further, the value and importance of elected majorities in both the chambers has been rendered nugatory by the extraordinary and emergency powers that the Governor-General enjoys under the constitution. In this respect the present constitution is definitely more reactionary than the one it supplanted. The provisions in case of failure to pass legislation, the power to closure a Bill or an amendment to a Bill before it has been discussed in the Legislature, are all provisions which did not find a place in the Act of 1909.

Further the present Act in no way remedies the most vital defect of the Minto-Morley Council, viz., the irresponsibility of the Legislature. If anything, the position has become much worse owing to the large elected majority in the Legislative Assembly. It is an anomaly, which is perhaps to be witnessed nowhere else in the world, that the Government of the country is in a perpetual minority, and the opposition, although in a majority, is helpless before a statutory and irremovable Executive. Even the inadequate and half-hearted measures adopted in the provincial governments to make a section of the Executive responsible to the legislature, have not been availed of in the Central Government. If it be true of the Minto-Morley Reforms to say, that they gave to the Legislature the power of challenge and obstruction-influence without responsibility, it is true a hundredfold of the Act of 1919. For while the means of challenge and obstruction have been increased considerably, the responsibility remains where it was. And it is a modern constitutational miracle that the machinery set up by the Act has not given way under the constant friction between Government and the elected members, the frequent attacks delivered by the Opposition, and the growing dissatisfaction of the people outside.

CHAPTER VIII.

The Indian High Courts

The sections dealing with the High Courts do not strictly form part of the constitution. They relate to a different province of Law. We shall, however, briefly deal with those provisions which have a bearing upon constitutional law.

Tenure, etc. of the Judges.

Under [Sec. 101 (2) (ii)] the maximum number of judges of a high court including the chief justice and additional judges is fixed at twenty.

Sub-clause (3) lays down the qualifications of a high court Judge. He must be, either (1) a barrister or an advocate of Scotland of not less than five years' standing ; (2) a member of the Indian Civil Service of not less than ten years standing. (3) a person who has held judicial office for not less than five years, and (4) a pleader of not less than ten years' standing.

Under section 102, every judge of a high court shall hold his office during His Majesty's pleasure. This means that a judge can be removed from the Bench at any time, without any cause being assigned by the king, on the advice of the Secretary of State. This is a provision which is not likely to lead to the integrity and impartiality of the judiciary. The most important feature of the English Bench is the fact that it is absolutely independent of the Executive, and that it can never be suspected of being controlled or influenced in any manner whatsoever by Government. If the judges are to hold office during the pleasure of the king, then it is but natural that Government can, if it were so minded, influence the decisions of the judges. In England no Judge of the High Court can be removed unless both Houses of Parliament move an address to the king to have him removed. Thus, however fearless a champion the judge may be of the liberties of the people, the Government can in no way bring pressure to bear upon him.

In America, too, the Judges of the Supreme Court can only be removed after an impeachment before the Senate on grave charges of corruption or bribery.

Sec. 101 (4) provides for the personnel of the Bench, not less than one-third have to be barristers, and not less than one-third members of the Indian Civil Service. The chief Justice has to be a barrister.

The Civilian element in the Judiciary is an innovation in our constitution which is repugnant to all modern principles of statecraft, and is also opposed to the most sacred principle of British policy, namely, the complete separation of the judiciary from the executive. Every student of the constitutional history of England knows that some of the most glorious fights fought by the English Judges were against the attempted encroachments of the Executive. How, then, could it be possible for one who throughout his career has been the main prop of government, its very steel-frame, to use the Lloyd Georgian phrase, to be called upon to dispense justice, often against that very government itself? The more so, when the Civilian Judge might, after a few years on the Bench, become once again an important member of government. Traditions of loyalty and service to Government on which he has been brought up, make the Civilian throughly unfit to be a member of the judiciary, the most important qualification for which must be absolute independence and unquestioned impartiality. One does not wish to overlook the fact that the Civil Service has given to the High Court some very eminent Judges, but no number of individual cases can make this obnoxious practice defensible.

Additional and Acting Judges.

Section 105 (1) provides for the appointment of an acting Chief Justice from among the Judges of the High Court. Sub-Section (2) provides for the appointment of acting Judges during the absence of any permanent Judge. These acting appointments are to be made by the Governor-General in Council in the case of the high court at Calcutta, and by the local governments in the case of other high courts. Sec. 101 (2) (i) provides for the appointment of additional Judges by

the Governor-General in Council for a period not exceeding two years. The qualifications of additional and acting Judges are to be the same as those of permanent ones.

The appointment of acting and additional Judges is an unhealthy practice. Once a man is raised to the Bench he should say good-bye to the Bar and his ambitions and prospects thereat. One of the main reasons for the independence and integrity of the English Bench is its aloofness from the heat and dust of the Bar. But once it is possible for a man to go up to the Bench and then again to come down and resume practice, it is undermining the very foundation on which the Judicial System in England has been based. It is true that a man in so high a position does not consciously allow his mind to be biased by the knowledge that he has to go back to the Bar. But one knows what important part the subconscious plays in a man's life, and these constant peregrinations from the Bar to the Bench and back, create a most unfortunate impression upon the mind of the public.

The Advocate General.

Section 114 provides for the appointment of an advocate-general in the presidencies of Bombay, Bengal and Madras. The appointment is made by the King. His office is similar to that of the Attorney-General in England, except in this that he has no political functions to discharge. He is not a member of Government as the Attorney-General is. "The Attorney-General is the head of the Bar, and has precedence over all King's council. He represents the Crown in the courts in all matters in which rights of a public character come into question, and is, therefore, the representative and legal adviser of all public departments which have capacity to sue and be sued, as well as of departments which have no such capacity. He is a necessary party to the assertion of public rights even where the moving party is a private individual".[1] On the whole the same would be true of our Advocate-General.

1. Halsbury Vol. 7 p. 72-73.

CHAPTER IX.

The Statutory Commission.

In a staid and dispassionate text-book, one does not wish to import the passion and emotion which have swayed most of the speakers who have inveighed against the Simon Commission on the public platform. It is considered here purely as a question of some interest and importance to students of constitutional law.

The first point it is necessary to emphasise is that there is no difference of substance between the Commission appointed under the Government of India Act of 1919, and the several other Royal Commissions that have been appointed in the past to deal with matters of peculiar importance to India. Section 84 A of the Act is merely procedural in its effect. It does not take away from His Majesty the King the prerogative right of appointing the Royal Commission. It merely lays down, that instead of the names of the Commissioners being recommended by the Prime Minister, as they usually are, they should be recommended by both the Houses of Parliament. Nor did the section in any way fetter the power of Parliament, and this is on the authority of some of the best legal minds both in England and here, to appoint a commission earlier than at the expiration of ten years, although *pro majore cautela*, Parliament did pass an amending Act in order to accellerate the appointment of the Commission.

The only reason for inserting this section in the Act seems to have been to give the experiment of dyarchy a full and satisfactory trial. People in England were apprehensive, that but for a clear and definite statutory provision, the "agitators" in India would start on their work, immediately after the passing of the Act, for a further revision of the constitution, and a proper atmosphere would be wanting in which the Reforms could be worked. One might note in passing that the Joint Select Committee declared in their report in no unemphatic terms :—"The Committee are of opinion that the

Statutory Commission should not be appointed until the expiration of ten years, and that no change of substance in the constitution, whether in the franchise or in the lists of reserved and transferred subjects or otherwise, should be made in the interval."

It is necessary to labour this point in order to make it clear, that as far as the constitution and the personnel of the Commission are concerned, there is no distinction whatsoever between the Royal Commissions appointed in the past, and the Commission to be appointed under Section 84 A of the Act of 1919.

For a very large number of years the British Government have accepted the policy, and invariably given effect to it, of appointing one or more Indians on every Royal Commission appointed to deal with Indian affairs. The exclusion of Indians from this Commission makes a sudden and startling departure from the accepted and avowed policy of Government. Whatever the reasons for the adoption of this new policy might be—be it the weakness of our unfortunate country which was hopelessly divided, or be it the impudence and insolence of an aggressively "white" Secretary of State—it surely connot be on the ground that the present commission is a Statutory Commission.

A great deal of emphasis has been laid on these words of the preamble of the Act: "And whereas the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian people." No man who has accepted the Government of India Act of 1919 has ever challenged the authority of Parliament to legislate for India, or to be the final and ultimate arbiter of the nature and character of every constitutional advance, ultimately culminating in responsible Government. But there is no warrant for the statement of Lord Birkenhead in the House of Lords, that the responsibility of Parliament is both primary and ultimate, and that at no stage of constitution-making can Indians be associated as equals with Britishers in the task of investigation and inquiry preliminary to the passing of a statute by Parliament.

In this connection, attention might be drawn of the readers to the Report on Indian Constitutional Reform under the distinguished signature of Mr. Montague and Lord Chelmsford at p. 169 para 262. "It is our desire to revive the process by which the affairs of India were periodically subjected to searching review by *investigating bodies* appointed with the approval of Parliament itself."

Therefore the much vaunted Statutory Commission is nothing more than an investigating body upon the report of which Parliament would base its decisions. Is there even a soupçon of authority or warrant for saying that under the Government of India Act Indians cannot be appointed on this investigating body? Nor is there any warrant or authority for the statement that Section 84 A of the Act contemplated a purely Parliamentary Commission.

This Commission will submit its report to the King as much as other Royal Commissions have done in the past. After that, on the command of His Majesty, the report will be laid on the table of both Houses of Parliament, and will then become, in the legal sense, a parliamentary paper (see 98 L. T. page 640). There will be no more sanctity attached to the report of the Commission under the Government of India Act than there was to the reports submitted by Royal Commissions on which Indians have sat.

The argument of Lord Birkenhead that Section 84 A—clear and unambiguous as its terms are—should be interpreted in the light of the intention of those who were responsible for the Act of 1919 is too puerile to need any serious refutation. It is a certain indication of the weakness of the case of the British Government that an eminent ex-Lord Chancellor of England should be compelled to have resort to arguments which, to use a phrase of Lord Birkenhead himself, used with such effect against Lord Carson, in the debate in the Lords on the Irish Treaty Bill, would sound hysterical even on the lips of a school girl.

APPENDIX I.

PREAMBLE TO THE GOVERNMENT OF INDIA ACT, 1919.

(9 and 10 Geo. 5, Ch. 101.)

Whereas it is the declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian Administration, and for the gradual development of Self-Governing institutions, with a view to the progressive realisation of responsible government in British India as an integral part of the empire :

And whereas progress in giving effect to this policy can only be achieved by successive stages, and it is expedient that substantial steps in this direction should now be taken ·

And whereas the time and manner of each advance can be determined only by Parliament, upon whom responsibility lies for the welfare and advancement of the Indian peoples :

And whereas the action of Parliament in such matters must be guided by the co-operation received from those on whom new opportunities of service will be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility:

And whereas concurrently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those Provinces in provincial matters the largest measure of independence of the Government of India, which is compatible with the due discharge by the latter of its own responsibilities :

Be it therefore enacted by the King's most Excellent Majesty by and with advice and consent of the Lord's Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

APPENDIX II.

THE GOVERNMENT OF INDIA ACT.

(AS AMENDED UPTO DATE).

ARRANGEMENT OF SECTIONS.

PART I.

HOME GOVERNMENT.

The Crown.

PART II.

THE REVENUES OF INDIA.

PART III.

PROPERTY, CONTRACTS AND LIABILITIES.

PART IV.

THE GOVERNOR-GENERAL IN COUNCIL.

General Powers and Duties of Governor-General in Council.

The Governor-General.

The Governor-General's Executive Council.

War and Treaties.

PART V.

LOCAL GOVERNMENTS.

General.

Governorships.

Lieutenant-Governorship and other Provinces.

Boundaries.

PART VI.

INDIAN LEGISLATION.

The Indian Legislature.

PART IX.

THE INDIAN HIGH COURTS.

Constitution.

Jurisdiction.

Law to be administered.

Additional High Courts.

Advocate-General.

PART X.

ECCLESIASTICAL ESTABLISHMENT.

PART XI.

OFFENCES, PROCEDURE AND PENALTIES.

THE GOVERNMENT OF INDIA ACT.

(5 & 6 Geo. 5, Ch. 61 ; 6 & 7 Geo 5, Ch. 37 ; and 9 & 10 Geo. 5, Ch. 101).

An Act to consolidate enactments relating to the government of India.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

PART I.

HOME GOVERNMENT.

The Crown.

Government of India by the Crown.

21 & 22 Vict., c. 106.

1. The territories for the time being vested in His Majesty in India are governed by and in the name of His Majesty the King, Emperor of India, and all rights which, if the Government of India Act, 1858, had not been passed, might have been exercised by the East India Company in relation to any territories, may be exercised by and in the name of His Majesty as rights incidental to the government of India.

The Secretary of State.

The Secretary of State.

2. (*1*) Subject to the provisions of this Act, the Secretary of State has and performs all such or the like powers and duties relating to the government or revenues of India, and has all such or the like powers over all officers appointed or continued under this Act, as, if the Government of India Act, 1858, had not been passed, might or should have been exercised or performed by the East India Company, or by the Court of Directors or Court of Proprietors of that Company, either alone or by the direction or with the sanction or approbation of the Commissioners for the Affairs of India, in relation to that government or those revenues and the officers and servants of that Company, and also all such powers as might have been exercised by the said Commissioners alone.

21 & 22, Vict., c. 106.

(*2*) In particular, the Secretary of State may, subject to the provisions of this Act[1] [or rules made thereunder], superintend, direct and control all acts, operations and concerns which relate to the government or revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India.

[2][(*3*) The salary of the Secretary of State shall be paid out of moneys provided by Parliament, and the salaries of his under-secretaries and any other expenses of his department may be paid out of the revenues of India or out of moneys provided by Parliament.]

The Council of India.

The Council of India.

3. (*1*) The Council of India shall consist of such number of members, not less than [3][eight] and not more than [3][twelve], as the Secretary of State may determine:

[4][Provided that the Council as constituted at the time of the passing of the Government of India Act, 1919, shall not be affected by this provision, but no fresh appointment or re-appointment thereto shall be made in excess of the maximum prescribed by this provision.]

9 and 10 Geo. 5, c. 101.

(*2*) The right of filling any vacancy in the Council shall be vested in the Secretary of State.

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[1] These words were inserted by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

[2] This sub-section was substituted by *ibid.*

[3] The words "eight" and "twelve" were substituted for the words "ten" and "fourteen" respectively by *ibid.*

[4] This proviso was added by *ibid.*

(3) Unless at the time of an appointment to fill a vacancy in the Council [1][one-half] of the then existing members of the Council are persons who have served or resided in [*][2] India for at least ten years, and have not last left [*][3] India more than five years before the date of their appointment, the person appointed to fill the vacancy must be so qualified.

(4) Every member of the Council shall hold office except as by this section provided, for a term of [4][five] years:

[5][Provided that the tenure of office of any person who is a member of the Council at the time of the passing of the Government of India Act, 1919, shall be the same as though that Act had not been passed.]

(5) The Secretary of State may, for special reasons of public advantage, re-appoint for a further term of five years any member of the Council whose term of office has expired. In any such case the reasons for the re-appointment shall be set forth in a minute signed by the Secretary of State and laid before both Houses of Parliament. Save as aforesaid, a member of the Council shall not be capable of re-appointment.

(6) Any member of the Council may, by writing signed by him, resign his office. The instrument of resignation shall be recorded in the minutes of the Council.

(7) Any member of the Council may be removed by His Majesty from his office on an address of both Houses of Parliament.

[6][(8) There shall be paid to each member of the Council of India the annual salary of twelve hundred pounds:

Provided that any member of the Council who was at the time of his appointment domiciled in India shall receive, in addition to the salary hereby provided, an annual subsistence allowance of six hundred pounds.

Such salaries and allowances may be paid out of the revenues of India or out of moneys provided by Parliament.

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[1] The word "one-half" was substituted for the word "nine" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

[2] The word "British" was omitted by *Ibid.*

[3] The word "British" was omitted by Sch. I of the Government of India (Amendment) Act, 1916 (6 & 7 Geo. 5, Ch. 27).

[4] The word "five" was substituted for the word "seven" by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).

[5] This proviso was inserted by *ibid.*

[6] Sub-sections (8) and (9) of section 3 were substituted for old sub-section (8) by Part II of Sch. II of the Government of India Act, 1919 (9 & 10 Geo. 5, Ch. 101).