

# **THE INDIAN CONSTITUTION**

THE  
INDIAN CONSTITUTION

AN INTRODUCTORY STUDY

BY

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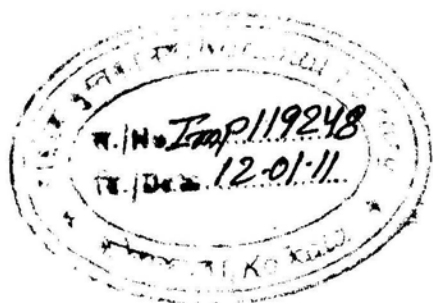
*Assistant Editor, "The Hindu"*

MADRAS : G. C. LOGANATHAM BROS.

MOUNT ROAD

1909

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**Madras : G. C. Loganadham Bros.  
The "Guardian Press" Mount Road**

TO  
THE MEMORY OF  
the late Dewan Bahadur  
S. Srinivasaraghava Iyengar, C.I.E.  
MY UNCLE  
WHOSE STUDY OF INDIAN PROBLEMS  
WAS AN INSPIRING AND INVALUABLE EXAMPLE  
TO ALL THOSE WHO 'KNEW HIM'



## PREFACE

This book is intended to meet a demand which is likely to be increasingly felt with the widening of the political life of the Indian people by the inauguration of the new Reform Scheme. Accessible information on the constitutional aspects of the Government and administration of British India is not found in recognised books treating of the laws and institutions of India. Official publications also hardly go beyond bare summaries of facts and events. A systematic treatment of the features of the Indian Constitution, studied from the point of view of the Indian citizen and of the Indian student of political science, has not so far been attempted. Students of Indian history, as it is taught in our schools and Colleges, hardly obtain an idea of the machinery whereby the Indian Constitution works and the lines on which it has been constructed and developed during more than a century of British rule. Such

standard books as Cowell's, "Courts and Legislative Authorities in India" and Sir Courtenay Ilbert's "Government of India," do, of course, treat of the Indian Constitutional Laws as they have been enacted, in all their details; but they deal only incidentally with the constitutional or political principles, understandings and conventions, on which so large a part of the working of British institutions all over the world depends.

It is to stimulate the study of the Indian Constitution in this direction that this introductory sketch is primarily placed by the author before the public. It is also attempted in the book to furnish the Indian citizen with a hand book of information to be of use to him in the discharge of his duties. The average Indian who cares to interest himself in politics, gains a knowledge of political problems in a haphazard way. Such knowledge as he obtains by his business contact with other men, the reading of newspapers and the hearing and reading of political speeches, can but give him a slender acquaintance with the subject.

Matters are not very much better even in regard to many who take an active, instead of a passive, part in public affairs. The author ventures to hope the present publication will give them some preliminary help in this direction.

The book lays no claim whatever to originality or research except in its method of presenting the leading facts and features of the Indian Constitution. Written, moreover, in the intervals of busy work, it is likely to contain many errors of style and of statement. For fuller information he would refer the readers to the authoritative works of Cowell, Ilbert and others, and to the many State Papers and Proceedings published by Government. A small collection of select constitutional documents is, however, published in the Appendix, which the author trusts will prove useful both to students and to politicians.

MADRAS,  
December, 1909. }

A. R.

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# THE INDIAN CONSTITUTION

## CHAPTER I

### BRITISH SOVEREIGNTY OVER INDIA

The Constitution of British India is, in a strict <sup>Introductory</sup> sense, "made"; yet it cannot be denied that it has also "grown." Unlike the British Constitution, it owes its origin to definite statutes of the Imperial Parliament of Great Britain and Ireland; but like the British Constitution, its progress and present character have not been due to any startling innovation or revolution, but to changes consciously made by British administrators to suit the varying needs of good government in the country and, latterly, to satisfy the growing aspirations of the people of the country for a share in the government of the land. The Indian Constitution, therefore, bears all the marks of British political and institutional peculiarities, so far as they could be found applicable to this country. It exhibits, for instance, that distaste for violent or radical change and that disposition to deal with the needs of the hour, as they arise, rather than with the requirements and possibilities of the future. It exhibits, again, that tendency towards "legal" forms of political institutions—i.e., institutions in respect of which legal remedies



and judicial control are provided, that regard for the maintenance of what Professor Dicey calls "The Rule of Law," which is a peculiarly British or Anglo-Saxon feature. At the same time, the requirements of the necessarily bureaucratic form of government in India, for more than a century, have also produced and perfected an administrative and constitutional system whose efficiency is its most conspicuous merit, but which possesses many drawbacks from the point of view of constitutional development.

History of  
British  
Sovereignty :  
Charters

British India, as the Statute of 1858 puts it, is governed by and in the name of His Majesty the King Emperor. How the British Crown came to acquire this vast and wonderful country is a matter of history which is common knowledge among educated people in India. But, in reference to constitutional growth, we may briefly indicate how the sovereignty of the British Crown came to be established as it is at present in India. The Charter issued to the East India Company in 1600 by Queen Elizabeth and the successive Charters renewing or amplifying the same, conferred on a trading corporation in England monopolies of trade in the East and for that purpose authorised the acquisition of territories, their fortification and defence by military levies. The Company pushed its fortunes vigorously in the midst of the political chaos in India in the 18th century. "At first the agent, it became

the master of princes. It fought and conquered with an army of its own and auxiliary forces hired from the Crown." On its behalf, Robert Clive in 1765 obtained from the Emperor at Delhi, the Dewani of the rich and fertile territories of Bengal, Bihar and Orissa. In the difficulties and troubles which arose over the administration of these provinces, arose the first Parliamentary assertion of rights of control and sovereignty over the Company's affairs in the East. The Regulating Act of 1773 contains the first Parliamentary restriction and definition of the Company's political powers and is the first important constitutional document of the Indian Government. It introduced the system of Parliamentary control over Indian affairs, and at each subsequent renewal of the Company's Charter, whenever necessary, the Parliament enacted laws for expanding and revising the constitution of the Indian Government and providing for just and impartial administration over its territories.

By the Regulating Act, the Governor of Bengal was raised to the rank of Governor-General and, in conjunction with his Council of four other members, was entrusted with the authority of supervising and controlling the Governments of Madras and Bombay in important matters. A Supreme Court of His Majesty's Judges was established at Calcutta—similar Courts were later established in Madras and Bombay—and the power of legislation was

conferred on the Governor-General in Council. The India Act of 1784, known before it became law as Pitt's Bill, established the Board of Commissioners for the Affairs of India—commonly known as the Board of Control—which virtually absorbed all real power from the Company's Court of Directors. The Act of 1813 did away with the Company's trade monopoly, except in China and that of 1833 took the latter also away and introduced various reforms in the constitution of the Indian Government—among others, the addition of a Law-Member to the Council of the Governor-General, the first appointment made to this office being that of Thomas Babington Macaulay. It also accorded the authority of Acts of Parliament to the laws and regulations passed by the Governor-General in Council. The Act of 1853 practically announced the forthcoming death of the Company and its rule as such, and laid down the principle that "the administration of India was too national a concern to be left to the chances of benevolent despotism." Finally, the Act of 1858 for the Better Government of India vested the executive administration of India in the Crown. The Indian Councils Act of 1861 defined and extended the constitutions and powers of the Executive and Legislative Councils in India; and the High Courts Act established the High Courts of Judicature in the Presidency towns under Charter from the Crown and by

The Act of  
1858

combining the old Supreme and Adalat Courts. The Acts of 1892 and 1909 have extended the principles embodied in the Act of 1861.

It will be seen from this necessarily brief outline that the powers and duties of the various legislative, executive and judicial bodies in India have to be gathered from the enactments of over a century and a half. The proposal to consolidate these has been allowed to drop and the Digest contained in the admirable book of Ilbert's 'Government of India' is the only authoritative exposition of the statutes: Parliamentary legislation, as is usual, has not attempted their consolidation and the latest enactment introducing very important changes in the constitutional system of India, *viz.* the Indian Councils Act, 1909—can only be understood and construed with reference to previous statutes.

We may begin with what is indeed a truism of the British constitutional system, that the legal sovereignty of the British Empire in India, as elsewhere, vests in the British Parliament—Parliament, in legal phraseology including King, Lords and Commons. It is the British Parliament that possesses the unrestricted power of legislating on Indian affairs, affecting the interests and welfare of all the Indian subjects of His Majesty. To those laws every body or authority in India, is bound to pay unquestioned obedience. In a legal, as well as in a moral sense, therefore, the destinies of this

Legal  
Sovereignty  
vested in  
Parliament

country are committed to the care of Parliament. But the political sovereignty over the Indian Empire is a different thing. "That body is *politically* sovereign or supreme in a state" writes Professor Dicey in his 'Law of the Constitution' "whose will is ultimately obeyed by the citizens of that state. In this sense of the word, the electors of Great Britain, may be said to be, together with the Crown and the Lords, or perhaps in strict accuracy, independently of the King and the Peers, the body in which the sovereign power is vested. The matter, may, indeed be carried a little further and we may assert that the arrangements of the Constitution are now such as to ensure that the will of the electors shall, by regular and constitutional means, always in the end assert itself as the predominant influence in the country. But this is political and not a legal fact." So far as England is concerned, the electors constitute the bulk of the people of the land and the will of the people, therefore, can rightly be stated to be supreme in the government of their country. In respect of the government of India, however, it cannot be said that the will of the people of India is supreme, and though it is in a sense true that the electors of Great Britain are the political sovereigns of India, it cannot be said that the will of the British electors has regularly and constitutionally, or ever, asserted itself on questions of Indian administration. As a

matter of fact, at the present time, the conduct of the Indian Government depends on the policy and measures taken from time to time by the ministers of the Crown commanding the confidence of the House of Commons in the first instance and thus of the electors indirectly. The time at which the electors of Great Britain assert their political sovereignty with regard to questions concerning themselves is at General Elections. But the time seems yet to be far distant when a purely Indian question will be fought out at a General Election, the prevailing policy of both the great political parties in England being to treat Indian affairs as non-party matter\*

Subject, therefore, to the legal sovereignty of the British Parliament and the political sovereignty of the ministers of the King, for the

A three-fold  
origin of  
powers

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\* [The intention, however, of the framers of the Act of 1858, which transferred the rule of India from the Company to the Crown, appears to have been that the House of Commons should exercise a direct and regular supervision over the Government of India. The history of that measure is from a constitutional point of view interesting, and an admirable summary of it by the late Mr. George Yule in his Presidential Address as the President of the 4th Indian National Congress, appears in a note at the end of this chapter. From the stand-point of a political institution, India has been usually deemed a dependency of Great Britain and it is only on the material authority and moral responsibility of the people of England that the good government of this Country ultimately rests—whatever might be the changes which the new reforms might hereafter effect in the way of constitutional government for this country.]

time being chosen by the electors of Great Britain, the superintendence, direction and control of the civil and military Government of India itself is vested in the Secretary of State for India assisted by a Council in England and the Governor-General of India in Council in India. The Governor-General in Council exercises in India the delegated authority of the Crown and the Parliament over Indian affairs but the actual powers exercised by all these authorities have been inherited from different sources. Though there could be no limit to the authority of Parliament from a constitutional point of view, it is still useful in obtaining a proper idea of the usual course of Britain's administration of India, to bear in mind the three-fold origin of the powers of the Government in India, *viz.*, those arising from the authority of Parliament, those inherited from the East India Company and those derived from the Mughal Emperor and other territorial rulers whose powers the Company succeeded to by cession or conquest. The Government of India Act, 1858, refers to these when it recites in section 3:—

“ One of his Majesty's principal Secretaries of State shall have and perform all such or the like powers and duties in anywise relating to the government or revenues of India, and all such or the like powers over all officers appointed or continued under the Government of India, Act, 1858, as if that Act 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 direc-

tion 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."

His Majesty's Secretary of State with his Council thus exercises on behalf of the Crown, all the powers of control over the authorities in India previously exercised by the East India Company through its Court of Proprietors and Court of Directors. He also represents, as a member of the Cabinet responsible to Parliament, the supreme and ultimate authority of Parliament, formerly exercised through the Board of Control. The powers, rights, and duties inherited from the previous rulers of the land are in practice exercised by the Viceroy and Governor-General of India. This may seem a valueless distinction in the face of the omnipotence of Parliament to deal with Indian affairs as it chooses. But it assumes importance with reference to the actual means and methods of administration in India. We may say, for instance, that the Secretary of State by himself, in a sense, succeeded to the powers of the Board of Control, but with a more direct authority over the affairs of India and a more direct responsibility to Parliament. The Council of India established by the Act of 1858 to advise and assist the Secretary of State in the transaction of Indian business is also, in a similar sense, the successor to the old Courts of Directors and Proprietors of the Company. To the



extent to which this Council assists and interposes in the Secretary of State's action or policy in regard to the affairs of India, the position of the Indian Secretary of State in fact differs in some respects from that of other Secretaries of State of His Majesty. Similarly, though his office is the creature of a British statute, the Governor-General has and exercises rights, powers and privileges which do not come within those enumerated in the statutes of Parliament, but which have accrued to the Government of India as the successors of the previous native rulers in the land and as the representative of the Crown and the accredited agent for its prerogatives in India. The important rights of the State to the land revenue in India arise, for example, from what is claimed to be the customary and ancient Indian right to the *Rajabhagam* or the King's share of the produce of the land in India.

Indifference  
of Parliament  
in practice

It may, therefore, be inferred from the above that Parliamentary control over Indian affairs, even from the constitutional point of view, must needs be imperfect owing to the complicated origin of British authority in India and the difficulty of exercising direct supervision. In actual fact, moreover, the indifference of Parliament and the British electors to the government of India—the brightest Jewel in the British Crown—is astounding and their ignorance of Indian affairs is 'abyssmal.' The extent and the limits of the authority ordinarily

exercised by Parliament over Indian administration, as fixed by statute, are comprised in the following provisions :—(1) that, “ although the whole of the Indian revenues are at the disposal of the Secretary of State and the Council, to be by them drawn upon for all expenditure required for the service of India, they must make known to Parliament, all expenditure incurred and may not increase the debt of India without the sanction of the House of Commons ; (2) that, on the other hand, although the Indian Budget is annually laid before that House to enable its members to offer suggestions, ask for information, and generally criticise the policy of the Government in relation to India, the financial statement is followed by no application for any vote to control or influence the taxation of India but merely by certain formal resolutions setting forth the actual revenue and expenditure in India for the current year” ; (3) that, except for preventing or repelling actual invasion of His Majesty’s Indian possessions, or under other sudden and urgent necessity, the revenues of India are not, without the consent of both Houses of Parliament, applicable to defraying the expenses of any military operation carried on beyond the external frontiers of those possessions by His Majesty’s forces charged upon those revenues and (4) that all proclamations, regulations and rules made under the India Councils Act, 1909, other than rules made by a Lieutenant-Governor for the more convenient

transaction of business in his Council, shall be laid before both Houses of Parliament as soon as may be after they are made.

While it is true that Parliamentary control over Indian affairs has thus tended to become unreal, because of its difficulty, it has been maintained by no less an authority than Mr. Leonard (now Lord) Courtney in his book on the *Working Constitution of the United Kingdom*, "that it has been part of the overruling mind which has shaped the organisation of Indian Government to make it not too responsive to the varying temper of the House of Commons, though in the end, the national will must have its way." How both these could be secured by placing the Indian Secretary of State's salary on the British Estimates, is explained by Mr. (Lord) Courtney as follows :—

"The Secretary of State is a member of the Cabinet which must possess the confidence of the House of Commons. It has nevertheless been part of the overruling mind which has shaped the organisation of Indian Government to make it not too responsive to the varying temper to the House of Commons. In the end the national will must have its way here as elsewhere ; but checks and obstacles are interposed which, perhaps insensibly, moderate its force. No part of the expense involved in the Government of India comes before the House of Commons in Committee of Supply. The salary of the Colonial Secretary is voted by Parliament and there is thus a possibility of annually reviewing his policy in the full activity of the Parliamentary session. The salary of the Indian Secretary of State is paid by India and never comes before the House of Commons. At the end of the Session, generally after the Appropriation Bill has been

read a second time, the Indian Budget is submitted ; and this consists of the review of the financial situation in India followed, after a desultory discussion, by a resolution simply affirming that the Indian Accounts show certain totals of income and expenditure. It may be doubted whether this does not betray too great a jealousy of the House of Commons. If the salary of the Indian Secretary of State were submitted like the Colonial Secretary's to a vote, the opportunity for a real debate would be given which, experience suggests, would be used rather than abused."

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#### NOTE

*(Extract from the Presidential Address of Mr. George Yule, as President of the Fourth Indian National Congress held in Allahabad in December 1888.)*

"When the sole Government of this country was taken over by the Crown in 1858, it fell to the lot of Lord Palmerston who was then Prime Minister, to introduce into the House of Commons, a bill which was afterwards known as India Bill No. 1. The main provisions of this bill were, that the Government of India was to vest in a Viceroy and Council in India and a Council of eight retired Indian officials presided over by a Secretary of State in London. The proceedings of these two separate bodies, each of whom had certain independent responsibilities, were to be subject to the review and final decision of the House of Commons. The chief objection to this Bill was that no provision was made for the representation of the people of the country. Mr. Disraeli, who was leader of the Opposition, objected to it on the ground of the insufficient check which it provided ; and he said that with such Councils as those proposed, ' you could not be sure that the inhabitants of India would be able to obtain redress from the grievances under which they suffered, that English protection ought to insure.' Almost immediately after the introduction of the Bill, Lord Palmerston was defeated upon a side question and Lord Derby became Prime Minister with Mr. Disraeli as Leader of the House of Commons. No time was lost by

the new Ministry in introducing India Bill No. 2. Mr. Disraeli dwelt upon the desirability of having the representative principle applied to the Government of the country and his scheme was to increase the Council in London, which was proposed by Lord Palmerston, from eight to eighteen members, half of whom were to be elected and were in all other respects to be entirely independent of Government. He regretted that the unsettled state of the country did not admit of a representation of the people in India itself, and all that could be done in the meantime was to approach as near to that form of government as the circumstances would permit. The provisions of his Bill to effect that purpose were briefly these. Four of the elected half of the Council were to be members of the Indian Civil and Military services of ten years' standing and the remaining five must have been engaged in trading with India for at least five years. The constituency electing the four members connected with the services was to consist of all officers of both branches of the India Service and also of all residents in India owning £2,000 of an Indian Railway or £1,000 of Government Stock. The five mercantile members were to be elected by the Parliamentary constituencies of London, Belfast, Liverpool, Manchester and Glasgow. So deeply ingrained is this notion of government by representation in the minds of Englishmen that, rather than leave it out of sight altogether in dealing with the affairs of India, the Government of that day made the proposal I have stated. Although the intention underlying these proposals was applauded, the scheme itself was felt to be, from the imperfect character of the constituencies, wholly inadequate to secure the check that was desired. It was clear, or rather it soon became clear, that the interest of one set of voters were adverse to the interests of the mass of the people and that the other set knew absolutely nothing of the country or its wants. Received with favour at first, the Bill soon became the object of jest and derision on the part of the Opposition and even its more impartial critics said of it that it was useless offering to the people of India under the name of bread, what would certainly turn

out to be a stone. At the suggestion of Lord John Russell, the Bill was withdrawn and the House proceeded by way of resolutions to construct the frame work of another Bill. The plan finally adopted was this—the legislative and administrative powers were to be entrusted to a Viceroy and a Council in India and the check upon them was to be a Council of fifteen members sitting in London. This Council was to be responsible to the Cabinet through a Secretary of State, who was to be responsible in turn to the House of Commons. This arrangement was regarded merely as a provisional one and the policy to be pursued was to work up to the constitutional standard. Education was to be largely extended and improved and the natives of the country were to be drafted into the service of Government as they became qualified with the view, among other reasons, to fit them for the anticipated enlargement of their political powers. The provisions made and the prospects held out in the debates in Parliaments derived a lustre from the famous Proclamation of the Queen—that half-fulfilled Charter of Indian rights—which was first read and published to the people of India in this very city of Allahabad thirty years ago.

Now, what I wish to impress upon your mind by this brief narrative, is the great importance that was attached at that time to some sort of constitutional check. Failing to have it in the form that the English people themselves approved and followed in the management of their own affairs, they devised the substitute with its three-fold check that I have mentioned. Parliament itself was full of gushing enthusiasm as to the part it would take in the business. In the absence of a representative body in India, the House of Commons was to play the role of one on our behalf. It was to regard the work as a great and solemn trust committed to it by an all-wise and inscrutable Providence, the duties of which it would faithfully and fully discharge. Such was the style of language employed both in and out of Parliament at the time I allude to. And now what is the actual state of the case? It is summed up in a single sentence: there is no check. The Bill under which our affairs are administered

appears like many other Bills to be open to more than one interpretation. The interpretation put upon it at the time, and what was probably the intention of Parliament, was ; the Government of India was to have the right of initiative ; the Council in London the right of revision and the Secretary of State, subject to the ultimate judgment of the House of Commons, the right of veto. And this was practically the relation of the parties until 1870. In that year, the Duke of Argyll was Secretary of State ; and in a controversy on this subject with Lord Mayo who was then Viceroy, he laid down quite another doctrine. He held that the Government in India had no independent power at all and that the prerogative of the Secretary of State was not limited to a veto of the measures passed in India 'The Government in India,' he maintained, 'were merely executive officers of the Home Government, who hold the ultimate power of requiring the Governor-General to introduce a measure and of requiring also all the official members of the Council to vote for it.' This power-absorbing despatch is dated 24th November 1870. The supposed powers and privileges of the Council in London have been similarly dealt with and the Council is now regarded merely as an adjunct of the office of the Secretary of State, to furnish him with information or advice when he chooses to ask for it. The present position is this : the Government of India has no power ; the Council in London has no power ; the House of Commons has the power, but it refuses or neglects to exercise it. The 650 odd members who were to be the palladium of India's rights and liberties have thrown 'the great and solemn trust of an inscrutable Providence' back upon the hand of Providence to be looked after as Providence *itself thinks best.*"

## CHAPTER II

### THE CROWN AND THE INDIA OFFICE

The executive authority of the Crown over India is not a thing which arose with the Act of 1858. As has been pointed out in the introductory chapter, it has existed all along and been exercised through various bodies from time to time. What the Act of 1858 did was to vest that authority in a Secretary of State, assisted by a Council, newly created. It is in this respect that the framers of the Act made a departure from the methods followed as regards the Colonies. The reasons therefor were then indicated to consist in a desire to have expert advice and guidance on, and to some extent control over, the affairs of India entrusted to the Secretary of State. In respect of the Colonies, the constitutional theory has been that the authority of the Crown, both in regard to legislation and administration, is exercised by the King in Council (*i.e.*, the Privy Council). Parliament, of course, is supreme and might intervene and make provision for the Government of any Colony—for, in the words of Lord Mansfield, "there cannot exist any power in the Crown exclusive of Parliament." But, ordinarily, it has been deemed to be specially

The Colonies  
and India : a  
distinction



within the province of the 'King in Council to deal with the good government of the overseas Empire. This theory, to a large extent, held good in respect of India, too, and vestiges of it still remain in the matter of issuing military commissions. With the passing, however, of the Regulating Act, in 1773, the Parliament came upon the scene and the authority of the King in Council receded and was practically thereafter confined to the "settled prerogative of the Crown to receive appeals in all colonial causes"—a power which is now statutorily vested in the Judicial Committee.

Thus, while the authority of the Crown over Colonial affairs continued to be exercised by the King in Council, that over India came to be exercised through special bodies, such as the Board of Control and the Secret Committee of the Court of Directors, the main reason being, it may be presumed, to keep a zealous watch over the Company and to provide well-informed and expert guidance in the administration of such a vast and varied territory as the Indian Empire. The evolution of the Colonial Secretary, therefore, became associated with the King in Council, while that of the Indian Secretary became associated with a special and new body known as the Council of India. In his book on "The Law and Custom of the Constitution," Sir William Anson has laid down this distinction in the following terms :—"Apart from the legislative supremacy

of Parliament, which is the same for all parts of the King's dominions, the Colonies are governed by the King in Council, or by the King acting on the advice of the Secretary of State for the Colonies. But India is governed by the Emperor of India acting on the advice of the Secretary of State for India in Council. The Secretary of State, no doubt, represents the King-Emperor of India in the exercise of the royal prerogative, but his *Council* is not the Privy Council, but the *Council* of India."

The Act of 1858 which inaugurated the direct Government of India by the Crown, recites that all rights which, if the Act 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 British India. In virtue of his position, the Indian Secretary is always a member of the Cabinet—the body in whom the ultimate executive authority of the Crown over the whole of the British Empire is by constitutional convention vested. The Secretary of State for India advises the Sovereign, according to legal theory, in his capacity of Privy Councillor, having been 'sworn of the Privy Council' as a matter of course. The Cabinet, therefore, in its solidarity, joins in his counsels and shares in his responsibilities. The Act of 1858, however, as we have seen, has associa-

The Indian  
Secretary of  
State

ted with the Indian Secretary, a Council whose function it is "to conduct, under his direction, the business transacted in the United Kingdom in relation to the Government of India and the correspondence with India." Its concurrence, moreover, in respect of some important matters relating to Indian affairs, has been made essential to the Secretary of State taking any action in respect thereto.

His position :  
In theory

The constitutional position of the Indian Secretary of State has thus been made to differ somewhat markedly from that of other Ministers. According to constitutional usage, he is the person responsible to Parliament for the administration of India. But in regard to certain specified questions—one of them being the appropriation of the revenues of India—the determination thereof is reserved by statute to the Secretary *and* a majority of the India Council—a body which is unrepresented in Parliament and is statutorily disqualified from direct representation in Parliament. The only exception to this rule is that no appropriation of Indian revenues for any military operations beyond the Indian frontiers can be made without the sanction of Parliament. This, of course, is of very rare occurrence. It would therefore seem as if the principle of ministerial responsibility to Parliament could not be enforced against the Indian Secretary in such cases—which would virtually mean that Parliament could not exercise effective control over

the finances and expenditure of India. A discussion arose on this question in the House of Commons some time after the Act of 1858 was passed, in 1869, and the matter has been virtually settled by the statement of a late Secretary of State for India. "The proper mode of regarding the India Council would appear to be as a body deputed by Parliament to exercise a species of *quasi*-Parliamentary control in certain matters over the Secretary of State, and the authority so delegated is, in this view, liable to be revoked. "The House of Commons is so overwhelmed with business nearer home," he said, "that it has no opportunity of making itself acquainted with all those vast fields of knowledge that will enable it to exercise an efficient influence over the Secretary of State for India. Therefore, it has instituted this Council to be its deputy, as it were, to watch him and see that the powers placed in his hands are not abused. It ought, however, to be clearly understood that the moment the House steps in and expresses an opinion on a subject connected with India, that moment the jurisdiction of the Council ought to cease. It is not to be endured in this constitutional country for a moment that the Council should set itself against the express opinion of the House."

The student of Indian constitutional history In practice has yet to look for the development and subsequent use of a constitutional convention such

as is indicated in the above words. The consciousness that the will of the House of Commons is ultimately bound to prevail has not acted so much to prevent the Council of India from assuming a factious or obstructive attitude in the exercise of its powers, as in strengthening the hands of the British Cabinet, which could rely on the support of the House to subordinate and even to sacrifice the interests of India—which is unrepresented in the House—to British or Imperial exigencies or interests. “While the object, and to some extent, the effect of the Act was,” writes Mr. Ilbert, “to impose a constitutional restraint on the powers of the Secretary of State with respect to the expenditure of money, yet this restraint could not be effectively asserted in all cases, especially where Imperial interests are involved. For instance, the power to make war necessarily involves the expenditure of revenues, but it is a power for the exercise of which the concurrence of a majority of votes at a meeting of the Council cannot be made a necessary condition. The Secretary of State is a member of the Cabinet and in Cabinet questions, the decision of the Cabinet must prevail.” The belief that the Act of 1858 had vested in the India Council the power to veto absolutely any expenditure which they considered India should not be charged with, was soon discovered to be unfounded. In practice, the Council has often been overborne and sometimes not

even consulted. The Secretary of State has had to bow to the decision of the Cabinet in these matters irrespective of the interests of India.

This fact was clearly brought out in the examination of the Marquis of Salisbury, when Secretary of State for India, by the Parliamentary Committee on Indian Finance of 1871—74. "If, with the support of the Council, the Secretary of State should oppose a demand from the Treasury," said Lord Salisbury, "the result would be 'to stop the machine'." He was thereupon asked: "You must either stop the machine or resign or go on tacitly submitting to injustice." "I should accept that statement", he replied, "barring the word, 'tacitly.' I should go on submitting with loud remonstrances." "Remonstrances, however loud," remarks an authority,\* "might be unavailing unless backed by the force of external opinion. And here was the constant difficulty indicated by another of Lord Salisbury's replies. Under the pressure applied by the House of Commons, every department desires to reduce its estimates. It is, therefore, tempted, without any desire to be unjust, to get money in the direction of least resistance. So long as the House of Commons is indifferent to Indian finance, there will therefore be a steady temptation to shift burdens upon India. The zealous watchfulness of the House of Commons, said Lord Salisbury, would be the best protection of the people of

The India  
Council  
ineffective

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\*Leslie Stephen—Life of Henry Fawcett.

India against such injustice, and he spoke of the desirability of exciting public opinion in England 'up to the point of integrity'."

The  
Constitution  
of the  
Council

It has thus happened that the body constituted by Parliament to watch over and act as a check on the Indian Secretary in the exercise of his powers has been, by the Parliament's own subsequent action, deprived of its power and that the object of the framers of the Act has been defeated. The India Council, in fact, possesses little real power and its only function is to constitute itself a body of advisers to the Indian Secretary, who are deemed specially conversant with Indian affairs. The constitutional distinction, however, between the Secretary of State in Council and the Secretary of State is still, in many cases, of practical importance. The powers of the Secretary of State, of the India Council and of the Secretary of State in Council will be found fully set out in the Act of 1858, which is published in the appendix, but a brief reference may be made here to a few noteworthy points. In general, under the terms of the Charter Act of 1833, the Secretary of State may, as inheriting the powers of the Board of Control, "superintend, direct and control all acts, operations and concerns which in any wise relate to or concern the Government or revenues of India." The Council of India, under the terms of Section 19 of the Act of 1858, conducts under his direction "the business transacted in the United Kingdom in

relation to the Government of India and the correspondence with India." The Council of India, as at present constituted, is to consist of not more than fourteen members and not less than ten members. These are appointed by the Secretary of State to hold office for a term of ten years which may for special reasons be extended for a further term of five years. The Secretary of State may also appoint to the Council a member having professional or other special qualifications. The members of the India Council can only be removed, like His Majesty's Judges in England, by an address of both Houses of Parliament. All powers required to be exercised by the Secretary of State in Council and all powers of the Council may be exercised at meetings of the Council at which not less than five members are present. The Secretary of State is authorised to divide the Council into committees for the more convenient transaction of business and to appoint a Vice-President.

The Indian Secretary and his Council, The control of the India Office between them, have succeeded, as we have seen, to all the powers previously exercised by the Board of Control with and without the Courts of Directors and Proprietors of the East India Company. The nature of the control which, prior to 1858, this Board exercised over the administration in India was thus described by John Stuart Mill :—

"It is not," he said, "so much an executive as a deli-



berative body. The Executive Government of India is and must be seated in India itself. The principal function of the Home Government is not to direct the details of administration, but to scrutinise and revise the past acts of the Indian Government, to lay down principles and issue general instructions for their future guidance and to give or refuse sanction to great political measures which are referred Home for approval."

Sir John Strachey \* is of opinion that this description holds good even at the present day. "The work of the Secretary of State," is, according to Sir John, "mainly confined to answering references made to him by the Government in India and apart from great political and financial questions, the number and nature of those references mainly depend on the character of the Governor-General for the time being. Some men in that position like to minimise personal responsibilities and to ask for the orders of the Home Government before taking action. Others prefer to act on their own judgment and on that of their Councillors. The Secretary of State initiates almost nothing." The last statement, however, appears too broad. Though it is supported in principle by the pronouncement of the present Viceroy that in the matter of the new reforms, the initiative came from the Government of India and not from Lord Morley, still instances can be quoted in which the Secretary of State initiated measures of reform owing to pressure of public opinion in India and England, in

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\* India : Its Administration and Progress. Third Edition, p. 78.

opposition to the views of the Government in India. Other instances can also be quoted in which the "Home" Government initiated and forced on this country measures of financial or fiscal policy under the pressure of powerful interests in England and against the declared intentions and policy of the Government in India as well as of public opinion in this country.

The work of the Council of India is usually to deal with such business as is placed before it by the Secretary of State. He may overrule his Council in all matters where there is difference of opinion between him and his Council, except as to those in which their concurrence is obligatory under the statute. He may despatch letters and issue orders directly to the authorities in India in the "Secret Department", wherever the matter is, in his opinion, or in that of the Indian authorities, one requiring secrecy or urgency, or concerns the making of war or peace, or the policy respecting the Native States and Princes, or for which a majority of votes of the Council is not declared to be necessary. A majority of such votes is necessary for decisions on the following matters :—

The business  
of the  
Council

- (i) Appropriation of the revenues of India or properties.
- (ii) Exercise of borrowing powers and entering into contracts.
- (iii) Alteration of salaries, furlough rules, etc.
- (iv) Appointments of Natives of India to offices reserved for the Indian Civil Service and the making of provisional appointments to the Governor-General's Council.

For the purposes of the exercise in England of the financial powers and duties in respect of the revenues of India or other properties which are by law vested in the Crown, and the incurring of rights and liabilities under contracts, the Secretary of State has been declared by the Act of 1858 a juristic person. The Act has also provided that the Secretary of State in Council may sue and be sued as well in India as in England as a body corporate and that every person has the same remedies against the Secretary of State in Council as he might have had against the East India Company.

An interesting  
distinction  
in law

In this respect, an important constitutional distinction exists between him and the other Secretaries of State. In England, an action does not lie against the Crown. The only legal remedy against the Crown is by Petition of Right. On the other hand, Ministers in England are not protected, except where expressly so provided by statute, in respect of legal wrongs by pleading the authority of the Crown, whereas in respect of India, the Secretary of State and every member of the India Council are expressly exempted from personal liability in respect of all contracts, covenants or other engagements entered into by them in their official capacity and "all costs and damages in respect thereof are borne by the revenues of India." Moreover, as Mr.

Ilbert points out, it has been held that a Petition of Right does not lie for a wrong committed, in pursuance of the maxim, that the King can do no wrong; and for a wrong done by a person in obedience or professed obedience to the Crown, the remedy is against the wrong-doer himself and not against the Crown. But, in India, it would seem as if a statutory remedy will lie against the Secretary of State in Council as a body corporate, not merely in cases in which a Petition of Right will lie in England, but in all cases in which the right of suit is given by statutes and in respect of acts done in the conduct of undertakings which might be carried on by private individuals without sovereign powers.

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\* The Government of India—Second Edition, p. 171.

## CHAPTER III

### THE IMPERIAL GOVERNMENT

The Executive  
authority  
in India

We have dealt, in the last two chapters, with the powers, functions and ordinary business of the Supreme Legislative and Executive authority over the Indian Empire, vested in the Parliament of Great Britain and Ireland and the Crown of the United Kingdom. The direct administration of an Empire like British India could not, however, be conducted by a body or bodies constituted in London and it is to the organs and institutions, evolved and established in India during more than a century and a half, that we must next look to obtain an idea of how the administration is carried on. In doing so, we may first of all deal with the executive authority, as being the older in point of origin and as the one from which the legislative authority subsequently expanded and became distinct. The 'superintendence, direction and control' in India of the civil and military Government of British India is vested in the Viceroy and Governor-General of India in Council. Statutorily, of course, the old provision in the Regulating Act of 1773 requiring and directing the Governor-General in Council "to obey all

such orders as they shall receive from the Court of Directors" of the East India Company is still operative and vests in the Secretary of State, who has succeeded to the powers of the Court of Directors under the Act of 1858, the power of requiring similar obedience to his orders.

The constitutional question, however, in this connection is not so much as to the subordinate or delegated executive authority of the Governor-General in Council, which is undisputed, as to the extent and limits of such authority. The relations between the Secretary of State and the Government of India are now regulated, as Mr. Ilbert says, by constitutional usage. Sir John Strachey, however, as we have seen, seems to think that the usage is not quite settled, at least so far as the every-day administration is concerned, and that it depends on the character of the Governor-General for the time being. It is not possible for those not directly acquainted with the administrative business and methods of the Imperial Government to venture any opinion on this subject. Nor could any definite and petrified usage in this respect be expected to outlive the requirements of the daily progressive administration in India. There are those who believe implicitly in "the man on the spot" theory, while there are others who believe in the corrective influences of control from the democracy in England and its agents, the Ministers of His Majesty, under the guidance of public opinion and progressive ideas.

The position  
of the man  
on the spot

His initiative  
in Legislation

Whatever be the right principle in this respect, we may refer to one or two understandings which have become settled in regard to the relations between the Governor-General in Council and the Secretary of State, as a result of controversies which arose after the Acts of 1858 and 1861 were passed. The interpretation put upon the Act of 1858 at the time it was passed by Parliament was, as Mr. George Yule pointed out, that the Government of India was to have the right of initiative, the Council in London the right of revision and the Secretary of State the right of veto, subject to the ultimate judgment of the House of Commons. Similarly, the India Councils Act of 1861 vested the power of previous sanction necessary for the introduction of certain important measures in the Legislative Councils in the Governor-General, and not in the Secretary of State—the power of subsequent disallowance by the Crown, exercised through the latter, being the only check retained in his hands under the Statute. Disputes, however, arose over this division of powers. The first of its kind was in 1870, when the Duke of Argyll was Secretary of State for India and Lord Mayo the Viceroy. There were differences of opinion between the Secretary of State and the Government of India in connection with some of the legislative proposals of the latter, then before the Legislative Council. Among these, the Punjab Drainage and Canal Act which set the whole

subject of irrigation works on a legal footing as regarded the Punjab, was the subject of a great controversy between Lord Mayo and the Duke of Argyll. In a despatch, dated the 24th November 1870, the Duke of Argyll laid it down that the prerogative of the Secretary of State was not limited to a veto of the measures passed in India. "The Government of India," he observed, "were merely Executive Officers of the 'Home' Government who hold the ultimate power of requiring the Governor-General to introduce a measure and of requiring also all the official members to vote for it." The Punjab Canal Act was afterwards repealed and re-enacted with modifications.

The next important dispute was in 1874 and was but the natural development of what took place in 1870. If the Secretary of State could and ought to do what the Duke of Argyll said he had the power of doing in respect of the legislative proposals of the Government of India, it follows that in order effectually to exercise such a power, action subsequent to the passing of measures by the Councils in India either by exercise of veto or by requiring the Governor-General to repeal and re-enact them with the necessary modifications, is not sufficient. This was exactly how it struck the Marquis of Salisbury who was Secretary of State for India in 1874. In a despatch to Lord Northbrook, the Governor-General, the Secretary of State directed that the Govern-



ment of India should in future communicate to him—in order that he may have an opportunity of previously expressing his opinion and directions thereon—information regarding any measures, except those of slight importance or those requiring urgent action, which they might intend to introduce into the Legislative Council. A similar course was to be followed in case any important alterations were made during the progress of a measure through the Legislative Council and the orders of the Secretary of State were to be awaited thereon. The Provincial Governments were also asked similarly to follow the same procedure. The Government of India pointed out difficulties in following this course, after once a measure had been launched, and suggested that the understanding should be that the measure might be proceeded with, if no reply were received to their communications within two months; and in regard to the Provincial Legislative Councils, Lord Northbrook's Government pointed out that the course proposed by the Secretary of State was likely to interfere with the power and the obligation, imposed by statute upon the Governor-General, of sanctioning or rejecting prior or subsequent to enactment the legislative proposals of the Provincial Governments. As a result of the correspondence that took place, the Government of India promised to bear carefully in mind the wishes of the Secretary

of State, more especially as he had assured them that his instructions were not intended to fetter the discretion which the law had vested in the various legislative authorities in India or in the Governor-General. The Secretary of State accepted the arrangement. But in 1875, in consequence of the financial state of the country, the Tariff Act was passed urgently without reference to the Secretary of State, imposing a duty of 5 per cent. on imported cotton and other goods, which had the effect of check-mating the Secretary of State in reference to a matter on which he had expressed contrary views before and in which the interests of the Lancashire cotton manufacturers were involved. He, therefore, censured the Government of India for having passed the Tariff Act without reference to him. He refused to accept the contention of the Government of India that the urgency of the case was their justification and that an additional reason for immediate action lay in the difficulty of carrying on prolonged discussions, pending a reference to the Secretary of State, with regard to measures 'involving alterations of customs duties without a disclosure of the intentions of Government which would be productive of considerable inconvenience to trade.' Lord Salisbury considered that the Government of India had over-rated the difficulty of keeping an official secret and re-affirmed his former position that the import duty on cotton manufacturers

should be removed as soon as the condition of the revenues enabled the Government of India to part with it. In regard to legislative measures, he directed for the future that whenever the Government of India found it necessary to pass an Act urgently, telegraphic intimation should be given to him beforehand without delay.

This decision led to the immediate resignation of Lord Northbrook and the appointment of Lord Lytton to the Viceroyalty, with a mandate on this and other questions—a mandate, however, which he found difficult to carry out and carried out eventually only by the exercise of his extraordinary power of overruling the majority of his Councillors. The effect of the Marquis of Salisbury's orders in connection with this question was considered to be, according to a great authority, "to transfer to a great extent the initiative of the measures required for the good government of India from the Viceroy's Council to the Secretary of State," and the despatch on the subject, though approved by a majority of the then members of the Council of India, was dissented from by such high authorities as Sir Erskine Perry and Sir Henry Montgomery. \*

His executive powers.

It may, therefore, be inferred that while the statutory powers vested in the Governor-General in regard to legislation have come to be

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\* The main despatches in connection with this controversy which set forth the constitutional understandings between the Secretary of State and the Government of India will be found in the Appendix.

controlled by the Secretary of State in the manner indicated in the foregoing paragraphs, his powers are even more liable to be interfered with in regard to executive administration, where the occasions for interference in the interests of good government or otherwise are likely to be more frequent. On all questions relating to foreign affairs, the Government of India equally with the self-governing Colonies, have no foreign policy of their own, because India's foreign relations must necessarily be co-ordinated with those of the Empire. The power of declaring war, commencing hostilities or concluding treaties is vested in the Crown, and in cases where these happen to be in connection with India, they have been subject, as we saw in the last chapter, to some amount of Parliamentary control where expenditure is involved. In regard to India's neighbouring Asiatic powers, the initiative in the conduct of foreign affairs must, to a large extent, be in the hands of the Government of India ; but the summary manner in which Mr. Brodrick (now Lord Middleton), Secretary of State in 1904, revised the treaty concluded by Colonel Sir Frank Younghusband with the Tibetan Government at the instance of the Government of India, is one example to show how limited the power of the Government of India might become should the Secretary of State choose to interfere. The recent Curzon-Kitchener controversy is also a measure of the extent to

which even a powerful Viceroy may have to yield in respect of large questions of administrative policy to the Secretary of State's views.

Extent of  
the Viceroy's  
responsi-  
bility.

The Governor-General and his Council are appointed from "Home," and the former is usually a politician or administrator of experience from England. The utmost effect, therefore, of his subordination to the Secretary of State could only be that, if he felt disposed to differ from the policy of the Secretary of State, he must yield up his private opinion or resign. If he yields, he becomes in effect a mere creature of the "Home" Government. If he resigns, there is no constitutional means in India by which he can vindicate his position, or have carried out the policy which he deems necessary for the welfare of India. It is to be noted that in this respect the Government of British India differs from that of the self-governing Colonies. If the Secretary of State for the Colonies, through the Governor or Governor-General of that Colony, vetoes any legislation or other proposal the members of the Colonial Government can resign and appeal to Colonial Constituencies and, if the latter support them, the "Home" Government is virtually powerless to proceed further. The responsibility of the government of a self-governing Colony rests upon the will of and could be enforced towards the people of the Colony and not the "Home" Government. The Governor-General in India may resign, but the Government of India, consisting of the Coun-

cillors and his successors, are bound to carry out the orders of the "Home" Government. The legal and political responsibility of the Government of India is only towards the "Home" Government, and there is no constitutional arrangement by which they could be made responsible to the people of the country. The Government in India is primarily based upon principles of benevolent despotism and such responsibility as the Government of India might feel to the people of India is only moral and based upon their sense of justice and righteousness and on the effect of such expressed public opinion in the country as could, if possible, make itself felt.

Yet, when all has been said as to the measure of subordination of the Governor-General to the Secretary of State, the fact remains that British India has to be under the immediate administration of the Viceroy and his Council. In the ordinary course of business, where the Secretary of State is not disposed unduly to interfere with the Governor-General and his Council, the powers of the latter are practically unlimited for efficient administration and the furtherance of the welfare and progress of the country. In a country where personal government has played so large a part, the personality of the Viceroy and Governor-General as the representative of His Majesty the King-Emperor in India has always been looked upon to a great extent as the sign

Wide powers  
of Viceroy.

of just and benevolent Government, enough the tendency of departmentalism, as we shall see presently, has steadily gone to reduce this personal factor in administration. The Governor-General, moreover, as we have observed in a former chapter, is the repository of all those legal prerogatives and powers, privileges and immunities, which have become vested in him as the representative of the British Crown and as the successor on behalf of the Crown, to the old territorial rulers and princes of the land. The rights which the Governor-General in person and the Executive Government collectively have inherited, vary from the important rights of the state to the land revenue in India, to receiving formal *nuzzers*, which are touched and returned, from chiefs and princes. The prerogative of pardon and mercy reside in the Governors and Governor-General, and the Imperial and Provincial Governments have been expressly strengthened in the exercise of this power by the Criminal Procedure Code. The Governor-General, and the provincial heads of Government too, can claim the priority of Crown debts over other debts. They are also entitled to the benefit of the rule that the Crown is not bound by statute unless expressly named therein. The Governor-General in Council has also, by virtue of delegated authority and subject to the control of the Secretary of State, the powers of making treaties and arrangements with Asiatic States, of exercising jurisdiction and other powers

in foreign territory, and of acquiring and ceding territory.

In the exercise of such vast and varied powers and the discharge of responsibilities so great and growing towards the peoples in India and the Government in England, as those which the Acts of 1858 and 1861 and the subsequent course of administrative regulations have imposed on the Governor-General in Council, it is hardly to be expected that the plan of conducting the business of the Government of India should not from time to time undergo marked changes. These changes are in themselves illustrative of the adaptation of means to ends characteristic of British political methods. The Regulating Act of 1773 which first established the authority of the Governor-General in Council over British India directed the administration to be carried on by the vote or opinions of the Council over which the Governor-General presided. The administrative difficulties and dead-locks which arose in working this and other provisions of the Act during the time of Warren Hastings led to an alteration in the law—at the time when his successor, Lord Cornwallis, was appointed—which empowered the Governor-General to over-ride the majority of his Council in special cases and act on his own responsibility. In fact, Lord Cornwallis, mindful of the bickerings which had impeded Warren Hastings in his administration, went so far as to give it as his opinion, to Mr. Dundas, President of the

'Council Government': its merits.



Board of Control, at the close of his administration, that "nobody but, a person who had never been in the service and who was essentially unconnected with its members, who was of a rank far surpassing his associates in the Government, and who had the full support of the Ministry at Home, was competent for the office of Governor-General." These principles have, with a single exception, been kept in view since, and an Act passed in 1793 further strengthened the position of primary responsibility and power which the Governor-General thenceforth assumed. This system of "Council Government," as we may call it, to distinguish it from Government by a sole administrator, was deemed by John Stuart Mill to possess peculiar merits.

In his essay on "Representative Government," he observes :—

"The Councils should be consultative merely, in this sense, that the ultimate decision should rest undividedly with the minister himself ; but neither ought they to be looked upon, or to look upon themselves as ciphers, or as capable of being reduced to such at his pleasure. The advisers attached to a powerful and perhaps self-willed man ought to be placed under conditions which make it impossible for them, without discredit, not to express an opinion, and impossible for him not to listen to and consider their recommendations, whether he adopts them or not. The relation which ought to exist between a chief and this description of advisers is very accurately hit by the constitution of the Governor-General and those of the different presidencies in India. These Councils are composed of persons who have professional knowledge of Indian affairs, which the Governor-General and Governors usually lack, and

which it would not be desirable to require of them. As a rule, every member of Council is expected to give an opinion, which is, of course, very often a simple acquiescence; but if there is a difference of sentiment, it is at the option of every member, and is the invariable practice, to record the reasons of his opinion; the Governor-General or Governor doing the same. In ordinary cases the decision is according to the sense of the majority; the Council, therefore, has a substantial part in the Government, but if the Governor-General or Governor thinks fit, he may set aside, even their unanimous opinion, recording his reasons. The result is that the chief is, individually and effectually, responsible for every act of the Government. The members of Council have only the responsibility of advisers; but it is always known, from documents capable of being produced, and which, if called for by Parliament or public opinion, always are produced, what each has advised, and what reasons he gave for his advice; while from their dignified position and ostensible participation in all acts of Government, they have nearly as strong motives to apply themselves to the public business, and to form and express a well-considered opinion on every part of it, as if the whole responsibility rested with themselves."

The progress of Indian Government since Mill's day has made his language to some extent inapplicable to the actual methods of business and manner of administration pursued by the Government of India. The distribution of business amongst the members that has taken place since Mill wrote has devolved greater responsibility on them in regard to ordinary business. The Governor-General, of course, is nominally associated with every act of the executive Government and all orders issue in the name of the Governor-General in Council, thereby indicating the

Its present:  
altered  
character.

constitutional theory of a corporate executive. As a matter of fact, however, neither the Governor-General individually nor the Council collectively is actually responsible for much of the ordinary business of administration, which is transacted by the Member in charge of the particular department. So much as regards what Mill termed the chief's *individual* responsibility for every act of the Government. Turning now to *effectual* responsibility, Mill derived this characteristic of Council Government from the power possessed by the chief to override even a unanimous verdict of the Council. This power still exists on the statute-book, but has long since fallen into disuse. The power was originally vested in the Governor-General with a view to counteract factious opposition in the Council. The most notable exercise of it during the last 30 years was by Lord Lytton when he repealed the Indian Cotton duties in pursuance of a mandate from the 'Home' Government. Since then the power has lain dormant mostly and a tendency has developed in most Governors-General to embark on a policy only if a majority of the Council concur in it and not to take on themselves the sole responsibility of initiating and carrying it out. This is only natural. The task of Indian Government is becoming every day more complicated and an English statesman fresh from 'Home,' with no knowledge of India, has, of necessity, to defer to the opinions of his colleagues. This may mean in some cases the

surrender of his better judgment and wider outlook to the views of colleagues, most of whom are nurtured in a narrower groove and have not at any time in their career felt the restraining hand of popular control. On the other hand, it also acts as a curb upon a Governor-General who may wish to introduce and carry out in India measures unsuited to local conditions.

It is therefore apparent that, while the *individual* and *effectual* responsibility of the chief for every act of Government cannot be said to be a correct representation of the actual methods of Council Government at the present day, the status of the Councillors themselves has changed from that of mere advisers to that of heads of important departments of the State, responsible individually for all *ordinary* business relating to their particular departments. In this latter respect, the Governor-General and his Council have approximated to the position of Ministers in England in charge of great departments of administration held together by a system which has been frequently compared to the methods of the Cabinet in England, but which is in fact very different from the system of Cabinet Government.

It is worth while to go somewhat more fully into this question. The changes that have been brought about in the system of Council Government, as described by Mill, are the natural outcome of the rapid progress of the Indian Government and the

Its disadvantages.

changes it underwent in the middle of the nineteenth century. To us in the twentieth century, it is obvious that if every case or paper was supposed to be laid before the Governor-General and the whole Council and to be decided by them collectively, a "more cumbrous and impossible system," as Sir John Strachey says, could hardly have been invented. But those who had grown up under the system could not perceive its inconveniences as acutely. Moreover, the reason that enabled such a system to last so long was that in matters requiring prompt and vigorous action, it was not really acted upon. Events, however, precipitated the change after the Mutiny. The growth of administrative business became very great and Lord Canning availed himself of a power to make rules under the Indian Councils Act, 1861, to improve the usefulness of the Members of Council and the efficiency of administration. Section 8 of the Act empowered the Governor-General to make rules and orders for the more convenient transaction of business in his Council, and every order made or act done in accordance therewith was directed to be treated as being the order or the act of the Governor-General in Council. Rules were made by Lord Canning assigning to each Member of the Council a separate department, the Governor-General himself keeping the foreign department in his hands. The change, however,

does not seem to have gone far enough, for we find Sir Henry Maine complaining of the cumbersome manner in which business was done during the time of Lord Elgin, Lord Canning's successor in the following terms:—

"A division of business was made between the Governor-General in the Upper Provinces (whither he had gone on account of military and political business) and the President in Council at Calcutta. Everything which was of importance was referred directly to the Governor-General, and there was either a rule or an understanding that if any matter which came before the President in Council assumed, contrary to expectation, the least importance, it should be sent on to the Governor-General . . . Except in regard to matters belonging to the foreign department, of which it was usual for the Governor-General himself to undertake the primary management, the severance of the Governor-General from the Council dislocated the whole machinery of Government. I believe it to be impossible for any human arrangement to have worked more perversely. Lord Elgin was distinguished by remarkable caution—though I doubt whether his caution was practically greater than that which any man comparatively fresh from England would display under similarly vast responsibilities—and all or most important matters were transferred by him over a distance of 1,500 miles for the opinions of his Council. The result was that a great deal of work was done twice over, and a great deal not done at all."

The reform of procedure, however, was completed by Lord Lawrence and the mechanism of the Supreme Government of India as it worked during the time of the successor of Lord Lawrence has been graphically described by Sir William Hunter in his valuable book, the "Life of the Earl of Mayo," from which we

Its development.

take the following passages, as they serve to illustrate the next stage in the development of Council Government—

“Lord Mayo, besides his duties as President of the Council, and final source of authority in each of the seven departments, was therefore in his own person Foreign Minister and Minister of Public Works. All routine and ordinary matters were disposed of by the Member of Council, within whose department they fell. Papers of greater importance were sent, with the initiating Member's opinion, to the Viceroy, who either concurred in or modified it. If the Viceroy concurred, the case generally ended, and the Secretary worked up the Member's note into a letter or resolution, to be issued as the orders of the Governor-General in Council. But in matters of weight, the Viceroy, even when concurring with the initiating Member, often directed the papers to be circulated either to the whole Council, or to certain of the Members whose views he might think it expedient to obtain on the question. In cases in which he did not concur with the initiating Member's views, the papers were generally circulated to all the other Members, or the Governor-General ordered them to be brought up in Council. Urgent business was submitted to the Governor-General directly by the Secretary of the Department under which it fell; and the Viceroy either initiated the order himself, or sending the case for initiation to the Member of Council at the head of the department to which it belonged.

“This was the paper side of Lord Mayo's work. All orders issued in his name. Every case of any real importance passed through his hands, and either bore his order, or his initials under the initiating Member's note. Urgent matters in all the seven departments went direct to him in the first instance. He had also to decide what cases could be best disposed of by the departmental Member and himself, and what ought to be circulated to the whole Council or to certain of the Members. In short,

he had to see, as his orders ran in the name of the Governor-General in Council, that they fairly represented the collective views of his Government. ...

"The Viceroy also gives one day a week to his Executive Council. In this Oligarchy, all matters of Imperial policy are debated with closed doors before the orders issue; the Secretaries waiting in an ante-room and each being summoned into the Council Chamber to assist his Member when the affairs belonging to his department come on for discussion. As the Members have all seen the papers and recorded their opinions, they arrive in Council with their views accurately matured, and but little speechifying takes place. Lord Mayo, accustomed to the free flow of Parliamentary talk, has left behind him an expression of surprise at the rapidity with which, even on the weightiest matters, the Council came to its decision, and at the amount of work which it got through in a day. His personal influence here stood him in good stead. In most matters, he managed to avoid an absolute taking of votes, and by little compromises won the dissentient Members to acquiescence. In great questions he almost invariably obtained a substantial majority, or put himself at the head of it; and under his rule the Council was never for a moment allowed to forget that the Viceroy retained the constitutional power, however seldom exercised, of deciding by his single will the action of his Government."

It will be seen from this that though the Council was re-modelled after the Act of 1861, it continued for long to retain the essential characteristic which Mill claimed for the system of 'Council Government,' viz., that the chief is individually and effectually responsible, if not for every act of the Government, at least for all really important acts of the Government, the Members having only the responsibility of advisers therein. Now, if we next take a later description of the manner in which the ex-

Its present tendencies



cutive business of the Governor-General has been carried on, we find a few more changes. Sir John Strachey describes the system as follows :—

" Although the separation of departments in India is less complete than in England, and the authority of the Member of Council much less extensive and exclusive than that of an English Secretary of State, the Members of Council are now virtually Cabinet Ministers, each of whom has charge of one of the great departments of Government. Their ordinary duties are rather those of administrators than of councillors. The Governor-General regulates the manner in which the public business shall be distributed among them. He usually keeps the Foreign Department in his own hands; the other departments are—Home, Revenue and Agriculture, Finance and Commerce, Military, Public Works, and Legislative. While the Member of Council takes the place of the English Secretary of State, there is in each department a Secretary holding a position analogous to that of a permanent Under-Secretary in England. It is the duty of this Secretary to place every case before the Governor-General or Members in charge of his department, in a form in which it is ready for decision. He submits with it a statement of his own opinion. In minor cases, the Member of Council passes orders which are final. If the matter be one of greater importance, he sends on the papers, with his own orders, to the Governor-General for his approval. If the Governor-General concurs and thinks further discussion unnecessary, the orders are issued. If he does not concur, he directs that the case shall be brought before the Council, as in England an important case might come before the Cabinet. The duty rests upon the Secretary, apart from his responsibility towards the Member of Council in charge of the department, of bringing personally to the knowledge of the Governor-General every matter of special importance."

On the other hand, Lord Curzon, with all his bias towards pro-consular authority, was inclined

to the view that the Government of India was a Committee Government, and not one by the responsible head of it. In one of his farewell speeches in India, he said :—

“ Never let it be forgotten that the Government of India is governed not by an individual but by a Committee. No important act can be taken without the assent of a majority of that Committee. In practice this cuts both ways. It is the tendency in India as elsewhere, but much more in India than anywhere else that I have known, to identify the acts of Government with the head of the administration. The Viceroy is constantly spoken of as though he and he alone were the Government. This is, of course, unjust to his colleagues, who are equally responsible with himself, and very often deserve the credit which he unfairly obtains. On the other hand, it is sometimes unfair to him ; for he may have to bear the entire responsibility for administrative acts or policies which were participated in and perhaps originated by them . . . In the previous records of Indian Government, I have often come across sparring matches between the illustrious combatants, and contentious minutes used to be fired off like grape-shot at the head of the Secretary of State . . . The Viceroy has no more weight in his Council than any individual Member of it.”

If the Council or the system under which the Council works has come to wield the power which even such a strong Viceroy as Lord Curzon is prepared to attribute to it, we may form some idea of the extent to which departmentalism and devolution have tended to remove the Viceroy and Governor-General from that position of primary responsibility which the statutes intended to vest in him.

It is no doubt true, as a former Member of the Viceroy's Executive Council wrote, that the

old system involved an amount of Minute writing which seems now hardly conceivable and that fifty years ago, the Governor-General and the Council used to perform work which would now be disposed of by an Under-Secretary. But the evolution of departmentalism, even if inevitable or necessary in administrative progress, is by no means a merit in the political progress of Governments unless it is the result of popular or legislative control over the executive; and, if carried too far in the administration, it will tend to diminish, if not the sense of personal responsibility to the public in India and to the Government in England in the head of the Indian Government, at least the opportunities for his personal initiative in the several departments of administration; and it is also likely to reduce his personal factor in an impersonal system which is subject to no systematic constitutional checks.

It may be noted in this connection that Lord Morley, our present Secretary of State, with whose name the present political reforms are associated, like the profound student of Mill that he is, has apparently adopted the older view of Mill as regards the character of the Executive Councils. In his famous Reform Despatch of the 27th November 1908, dealing with the proposals for the creation of Executive Councils in the Provinces under Lieutenant-Governors, he seems to take the view that the functions of the Councils should be, more especially in view of

the enlargement of the powers and duties of the Legislative Councils, to ensure that "the judgment of the Lieutenant-Governor should be fortified or enlarged by two or more competent advisers, with an official and responsible share in his deliberations."

Whether this is so or not, it will be obvious that 'Council' Government, whether of the old or the new type, is not Cabinet Government nor the members of Council Cabinet Ministers, as Sir John Strachey seems to put it, and students of the Indian Constitutional system should clearly note the distinction. The necessary implication of the words, "Cabinet Government," is government by a body of people constitutionally responsible to the Legislature—a thing which is entirely absent in the Indian Executive. "The essence of responsible government," said an eminent English statesman, the late Lord Derby, "is that mutual bond of responsibility to Parliament one for another, wherein a Government acting by party go together, frame their measures in concert, and where, if one member falls to the ground, the others almost, as a matter of course, fall with him." This is as far from being the case in regard to India as is possible. The Members of Council are of the permanent Civil Service and do not and need not resign if their policy is disapproved. For instance, when in consequence of the censure of the Marquis of Salisbury, above referred to, Lord Northbrook

Council  
Government,  
not Cabinet  
Government

resigned, Lord Lytton had to take the headship of a Council in which he found himself in a permanent minority as to the policies on which he came with a mandate \*. With the power to overrule the majority which he possessed with the support of the Home Government and the exercise of great deal of tact and good feeling, he managed to get on, though in one important matter he had to exercise his extraordinary powers. The political conception of a Cabinet, on the other hand, is the reverse of this state of things. A Cabinet has been defined "as a body necessarily consisting (a) of members of the legislature, (b) of the same political views and chosen from the party possessing a majority in the lower House of Legislature, (c) prosecuting a concerted policy, (d) under a common responsibility to be signified by collective resignation in the event of Parliamentary censure; and (e) acknowledging a common subordination to one chief minister.

This description cannot by the boldest flight of imagination be attributed to either the Imperial or Provincial Governments in India, and the present reforms of Lord Morley, so far at least as their main principles are concerned, have hardly aimed at making them approach to

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\* "From day to day and hour to hour," wrote Lord Lytton to the Marquis of Salisbury as soon as he arrived in India, "I found as I approached Calcutta, that the spirit of anticipative antagonism to the new Viceroy was so strong on the part of the Council here that any appearance of scolding or lecturing them would have been fatal to our future relations".

Cabinet Government or attempted their approximation to any form of Parliamentary Executive. The semblance to it, such as there is, exists only in the form. In essence and in spirit, the Government of India is as unlike Cabinet Government as could be imagined.

The departmentalisation of Council Government, which is really what has been effected since 1861, is governed by the rules and orders above referred to, made by the Governor-General, which are treated as confidential by the Government. Their general effect will be gathered from the quotations we have cited. There are now nine departments, namely, Home, Foreign, Finance, Legislative, Revenue and Agriculture, Public Works, Commerce and Industry, and Army and Military Supply. All minor questions are settled departmentally by the Secretary who is at the head of each department, or by the Member of Council in whose charge the department is placed. All important questions, questions involving any difference of opinion between two departments, or raising any general question of policy or gravity, are brought before the Council which meets generally once a week, and the Secretaries in charge then take note of the orders passed and issue them as resolutions or proceedings.

Departmentalism  
and Centralisation

It is not possible within the limits set for this book to deal exhaustively with the administrative mechanism—tracing it from the Crown downwards to the District Officer and the Village Headman and Panchayat.

The mechanism itself is subject to frequent changes and divergent tendencies, now veering towards centralisation and again towards decentralisation. At the present time, changes of a somewhat far-reaching character are in contemplation, tending towards a large decentralisation of administrative authority and the development of local self-government. One or two essential and general principles and features of the whole of the British Indian administrative system may, however, be dealt with. In the case of what are called unitary constitutions, the governmental functions are usually and clearly divisible into central and local, the former comprising those of the immediate executive agents of the sovereign authority and the latter the agencies, official and non-official, on the spot. In the case of federal constitutions like the United States or the German Empire, on the other hand, the governmental functions are divisible into those performed by the Federal executive, the State executive and the local authorities.

Decentrali-  
sation and  
division of  
powers

An Imperial Government like that of British India partakes more of the nature of the latter, so far as the methods of administrative work are concerned. In the nature of things, it is impossible for any central Government directly to carry on the administration of an Empire consisting of a fifth of the human race, under such diverse physical and social conditions. The Imperial Government can only carry it on through Provincial Govern-

ments retaining a control and direction which might vary according to the circumstances of each case. In the case, again, of a country where a constitutional Government,—i. e., a Government in which the people themselves participate largely in the work of governing,—does not exist, it is inevitable in the interests of efficient administration that the control of the central authorities, provincial or imperial, should be larger over its paid officers or agency of administration, than in a country where local or provincial affairs are largely in the hands of the representatives of the people themselves. Between these two wide limits, set by the area and conditions of the Indian Empire and the character of its Government, the nature and extent of centralisation or its reverse has varied from time to time. But in so far as the tendency to employ unpaid, unofficial and popular agency in the administration grows, the tendency towards decentralisation becomes increasingly manifest.

The executive government of British India, therefore, may be conveniently grouped and studied under the three heads, Imperial, Provincial and Local, instead of under the time-honoured classification of Central and Local Governments. The process of consolidation which the Indian Government underwent, immediately after the transfer of the rule from the Company to the Crown, has tended to unify the Indian Empire in respect of administrative

Imperial,  
Provincial  
and Local  
administra-  
tion



policy and methods, while the measures of decentralisation from time to time adopted have tended to increase the authority and the initiative of subordinate authorities subject to such control. The administrative work of the Imperial Government thus divides itself into two groups, namely, that in which its action is only by way of supervision and control and that which it directly deals with. The Secretariats, of course, are only concerned with control, but the public services controlled by them are divided into Provincial and Imperial. The former are the larger and more important group, but they are performed by Local, or as we should more accurately describe, Provincial Governments, while the latter are conducted by the officers under the Government of India. The latter comprise such departmental services as for Imperial, fiscal or administrative reasons the Imperial Government has deemed necessary to keep in its own hands. Under the former group, the ordinary functions of administration, the maintenance of law and order, the collection of revenues, education and sanitation, provincial and local finance, agriculture, roads, forests, &c., are included. Under the latter, are included : (i) the Railways, Posts and Telegraphs and the Opium Department, all of which may be described as coming under the quasi-commercial functions of the Government ; (ii) the Political, Foreign and Military Departments, which, for obvious reasons, have not been provincialised.

The Finance Department also derives its authority from the Government of India and exercises a control over finance, Imperial, Provincial and Local, and an independent audit over public accounts, which is all the more necessary in India in the absence of a systematic legislative check.

The duties of the group of officers immediately under the Government of India, outside the Secretariat, who form the connecting link between the Provincial officers and the Imperial Government, differ according to the group of services with which they are connected. In regard to the matters under the control of the Provincial Administrations, comprising such work as that of the new offices created during Lord Curzon's regime, namely, the Inspectors-General of Agriculture, Forests, Irrigation, &c., the Directors-General of Education, Medical Service, &c., their function is mainly that of advisers of the Provincial and Imperial Governments, with some amount of control derived from the latter as their administrative advisers and guides. In regard to the other matters directly under the Government of India, the officers such as the Directors-General of Posts and Telegraphs, the Railway Board, the Surveyor-General and others, exercise authority all over India and conduct the business of their departments in direct subordination to the authority of the Governor-General in Council.

## CHAPTER IV

### THE PROVINCIAL GOVERNMENTS

The old  
Presidencies

We may next proceed to deal briefly with the Provincial Executive and the local administrative authorities. The Indian Provincial Administrations, though they owe their later development and organisation to political and administrative causes, are historically of an earlier origin and of more importance in the early history of British rule in India than the Government of India. Until the acquisition of Bengal and the passing of the Regulating Act, the system of government was that known as the Presidency system, viz., that in which a group of factories and their adjoining acquisitions within a certain area were placed under the administrative control of a President and Councillors, otherwise known as the Governor and Council. The three Presidencies under which the territories of the East India Company were originally comprised were, till 1773, distinct from one another and under the direct control of the Court of Directors. In 1773, under the Regulating Act, the Bombay and the Madras Presidencies were placed in subordination to the Governor of Bengal, which had no separate Governor, and he was thereafter styled Governor-General of Bengal. This

Presidency system endured till 1833. As fresh territories came into the possession of the Company, they became attached to one or other of the Presidencies according to their proximity, but the additions to the Presidency of Bengal, which was in the hands of the Governor-General himself, became so heavy, especially after the beginning of the nineteenth century, that the Charter Act of 1833 authorized the creation of another separate Presidency, to be styled the Presidency of Agra. The provisions in this behalf were, however, suspended by a statute of 1835 which directed that during such suspension the Governor-General in Council might appoint any servant of the Company of not less than ten years' service to "the Office of Lieutenant-Governor of the North-West Provinces now under the Presidency of Fort William in Bengal." Thus was the first Lieutenant-Governorship created. Very soon after this, the further growth of the work of the Governor-General made it imperative that he should cease to directly administer the Presidency of Fort William or of other territories. The Act of 1853, therefore, provided that the Governor-General of India (not of Bengal, as he was till then called) should not be Governor of the Presidency of Fort William thereafter, that a separate Governor should be appointed thereto, but that until this was done the Governor-General was not to appoint a Deputy Governor from his Council—as was done till then—but to appoint a Lieutenant-

Governor for such portion of the territories of the original Presidency as was not under the Lieutenant-Governor of the North-West Provinces. The Act also authorised the creation of one more new Presidency and the appointment of one more Lieutenant-Governor similar to those of the two Bengals.

The later  
Lieutenant-  
Governor-  
ships

The origin of the Lieutenant-Governorship of the North-West Provinces and Lower Provinces was thus a tentative one, the constitution of Presidencies with Governors and Councils being then deemed the normal method of administering a Province. This idea, however, was subsequently given up, and the two Bengal Lieutenant-Governorships remained. A third was added to them in 1859, by constituting the Punjab a Lieutenant-Governorship, the first appointment in which capacity was held by Sir John Lawrence. Further powers of constituting new Lieutenant-Governorships have been given by Section 46 of the Indian Councils Act, 1861, but, according to Sir C. Ilbert, they are exercisable only when a new Legislative Council is established. Burma in 1897, and Eastern Bengal and Assam in 1905, became Lieutenant-Governorships under this provision.

The tendency to the creation of Lieutenant-Governorships without Councils in preference to the Presidencies with Governors and Councils, seems likely to receive a marked check with the passing of the Councils Act of this year, which has authorised

the creation of Executive Councils for the Lieutenant-Governors. Apparently, the advantages of "Council Government" as opposed to pro-consular government, as Lord Curzon would put it, seem to have again acquired importance with the political and administrative changes which are now being made. We do not deem it proper to enter into the controversies which took place over this question during the debate in Parliament last session, nor to discuss the merits or demerits of either system. But it may perhaps be right to infer that Lord Morley is inclined to agree with Mill in his view of the merits of "Council Government", quoted in the last chapter.

Besides the Presidencies and the Provinces under the Lieutenant-Governors, there are other Provinces and territories which are administered by Chief Commissioners and Commissioners, under the more direct control of the Governor-General in Council. The position of these heads of Provinces with reference to the Governor-General varies both according to their status and according to the powers and responsibilities specifically entrusted to them. There are thus thirteen separate Provincial administrations in India, consisting of the two old Presidencies of Madras and Bombay, the five Lieutenant-Governorships, Bengal, Eastern Bengal and Assam, the United Provinces of Agra and Oudh, the Punjab and Burma; and the six Chief Commissionerships of the Central

The Chief  
Commis-  
sioner ships

Provinces, Ajmere-Merwara, Coorg, British Baluchistan, the North-West Frontier Province and the Andaman Islands, some of which are combined with other offices.

Their  
gradation  
and powers

Madras and Bombay, with their Governors and Executive Councils, are, historically and from a constitutional standpoint, the most important of the provinces. The Lieutenant-Governors in the other provinces have no Executive Councils at present, but power has been taken under the India Councils Act of this year to constitute such Councils for them and it is likely that one or more of them will soon have Councils established in their provinces. In many respects, the position of the Governors in Council is somewhat different from that of other administrative heads. The reasons therefor lie in the past history of the Provinces and their political importance and extent. Though, under the provisions of the Regulating Act, the Governments of Madras and Bombay are directed "to pay due obedience to such orders as they shall receive from the Governor-General and Council for the time being", and are expressly prohibited from making hostilities, or peace, &c., except in pursuance of express orders, the control of the Supreme Government over the Governors in Council of Madras and Bombay is less complete than over the Lieutenant-Governors. The position of the Chief Commissioners is the lowest in the scale of subordination.

A Chief Commissioner, according to the view taken of his functions by the Government of India, merely administers territory on behalf of the Governor-General in Council, and the Governor-General does not divest himself of any of his powers in making over the provincial administration to a Chief Commissioner\*. The creation of a Chief Commissionership and the delimitation of the territories placed under him is, therefore, made by a Resolution of the Executive Government of India, and a proclamation is issued whenever a territory under the Viceroy's direct control is made over to a Chief Commissioner. When, however, a territory once placed under a Governor or Lieutenant-Governor is proposed to be transferred to a Chief Commissioner, the statutory power under the Government of India Act of 1854, has to be invoked and the sanction of the Secretary of State has to be obtained, for the same. It would thus seem that the Government of a Chief Commissioner is deemed to be a less developed form of administration than that of a Lieutenant-Governor or a Governor-in-Council.

The somewhat undefined limits and extent of subordination of the Governors-in-Council to the Governor-General in Council have, as in the case of the position of the latter to the Secretary of State, led to many historic disputes and is regulated by usage and rules which are more or less confidential. The position of partial

The control  
of the Impe-  
rial over the  
Provincial  
Govern-  
ments



freedom and prestige which the Presidency Governments have enjoyed, has not been without administrative difficulties even in recent years. A masterful personality like Lord Curzon—who disbelieved in devolution and decentralisation, who had a firm faith in a strong Government of India, “gathering into its hand and controlling all the reins,” and who “would ride local governments on the snaffle,” though not on the curb—was able to boast that there never had been a time when the relations between the Supreme and the Provincial Governments had been so free from friction or so harmonious, as in his days. But other masterful rulers like Lord Mayo or Lord Lytton were not able to avoid the frequency of “peppery letters or indignant remonstrances” or “the spectacle of infuriated pro-consuls strutting up and down the stage.” During the famine of 1877 in Madras, for example, Lord Lytton was hard put to it to manœuvre a satisfactory arrangement with the Duke of Buckingham in Madras, in regard to an efficient and uniform famine policy, for, as he said, he was unable “to force upon the Madras Government advice which it will neither invite nor accept.” Provincial Governments, it would then seem, were often “more strongly represented than the Supreme Government, not only in the India Council, but throughout the whole region of Anglo-India.” The danger of provoking the resignation of provincial pro-consuls even by the use of slight

pressure from above, which Lord Lytton feared, is perhaps less likely now than before, but the opportunities therefor have also become less owing to the growth of system, routine and uniformity in administrative methods. In truth, however, the legal powers of compelling obedience in the case of obstructive Provincial Governments in the ordinary course of business are, as Lord Lytton found out, much feebler and fewer than might be supposed. Now-a-days much more depends on diplomacy and influence and the personal qualities and characteristics of the Supreme and the Provincial rulers than on statutory powers and rules, in enforcing the due limits of the authority of the Supreme Government on the one hand and the amount of independence and autonomy allowed to the Provincial Governments on the other.

The checks against the wrongful exercise by the Lieutenant-Governor of arbitrary powers are, however, much more complete than in respect of Governors and Councils. There is no branch of the administration, according to Sir John Strachey, in which he is not bound either by the positive law or by the standing orders of the Supreme Government or by the system which has gradually grown up under his predecessors. Any great changes which he may desire to introduce must first receive the approval of the Governor-General in Council. It is not perhaps so well known that this tendency to secure the previous approval of the Government of India

is silently, but steadily, finding expression in the methods of the Provincial Governments of the two older Presidencies also, a tendency which, if allowed to persist, will destroy independence of action even in the limited sphere in which they are at present able to exercise it. The freedom of action of the Chief Commissioner is still more restricted, for it merely exists at the discretion of the Supreme Government to whom the Chief Commissioner has not only to look for the support which is necessary to carry on his administration, but for the approval and credit on which his future and further prospects depend.

Provincial  
Department-  
alisation

The Executive Councils of Madras and Bombay are modelled on similar lines to those of the Governor-General. The Governors, who like Governor-General, they are usually appointed from England from among distinguished politicians or administrators, have the power of overruling their Councils under circumstances similar to those defined in the case of the Governor-General. The work of a Governor-in-Council has also been "departmentalised"; more or less in the same way as that of the Governor-General in Council, under the powers given by the Act of 1861 to the Governors to frame rules for the efficient conduct of business. While Governors of Madras and Bombay are thus assisted by the Executive Councils in the work of every-day administration, the Lieutenant-Governors of the two Bengals and the United

Provinces are assisted by Boards of Revenue, and the Lieutenant-Governors of the Punjab and Burma by Financial Commissioners. Each Provincial Government has a Secretariat of varying strength according to its needs, and the departments of administration are presided over by heads variously termed in different provinces, while there are also special departments presided over by special officers.

The actual executive functions of the Provincial Governments need not be referred to here in detail. In respect of all functions of administration which are not kept under direct imperial control, authority in every branch of the public service, except the judicial, is concentrated in the hands of the Provincial Governments, subject only to the paramountcy of the Governor-General in Council. The powers of the Governors and Councils to introduce large reforms and the powers of raising fresh revenue or incurring additional expenditure, although large, are subject to restrictions. As to the methods by which the Supreme Government exercises control, it has been said that, in India, the Provincial Administrations and the Heads of Departments under the Government of India represent the initiative, and the Secretariats, the critical element in the Government. The Head of a Department or a Provincial Government, "is almost *ex-officio*, one that has something to propose. And his plans of improvement, however admirable in them-

Provincial  
Executive  
functions

selves, and however economical they may purport to be at the outset, mean an eventual increase of expenditure. The function of the Secretariat is to pull such schemes to pieces, to expose their weak points and to put down the drag upon every proposal that sooner or later will cost money. A strong Viceroy acts as arbiter between the two sets of forces thus constantly set in motion".\* *Mutatis mutandis*, the same description might be given of the relationship between the Provincial Secretariats and the Heads of Administration and the District Heads of the several Provinces. With a Viceroy or Governor inclined to place more faith on his own Secretariat than on the "Heads," the latter prone to suffer, while the reverse happens with one who gives more regard to the views of "Heads" and local officers. The question whether and how far "Secretariat tyranny" has grown in recent years, is one on which controversy has been rife, but it may be noted that the Royal Commission on Decentralisation has voted in favour of enlarging the powers of the District Officers and enhancing their position and prestige.

The mechanism of administrative machinery under the Provincial Governments varies greatly in different provinces, is often subject to changes and is hardly of a kind which would throw light on the constitutional aspects of Indian Administration. It is, however, necessary to

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\* Hunter's Life of Lord Mayo, Vol. II, pp. 2-3.

examine a few of the general principles which bear on the local functions of Government, and no account of the Indian Executive Government will be complete without a description, however brief, of the District Collector and a reference to the Local and Municipal bodies to which are being delegated increasing duties of local administration. These two may, therefore, be conveniently dealt with in the next chapter.

## CHAPTER V

### DISTRICT AND LOCAL ADMINISTRATION

Local organisation and control

The Provincial and Imperial executive authorities in India owe their constitution and powers more or less directly to statutes of Parliament. The departments of administration which carry on the work of the central government, Provincial or Imperial, depend for their authority, on the other hand, on laws passed by the Indian Legislatures, or administrative regulations and organisation, hardly susceptible of general treatment in an introductory study like the present. But, while a description and study of the duties performed by the various ministerial officers under the Government is not of much constitutional importance, the division of administrative duties in general between central and local bodies in its general outlines ought to be noted. From the standpoint of political development, the form of local organisation will undoubtedly react with momentous effect on the national character. As a recent writer \* on Constitutions has put it, "the citizen who from boyhood expects to take, sometime or other, of his own free will, an active part in the administration of local affairs, is likely to be

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\*Leonard Alton, M. A., in 'his Modern Constitutions'.

found a very different citizen from the man who may be authoritatively commanded, at the most inconvenient juncture of affairs, to serve his locality without remuneration, and both from the citizen who perpetually finds himself 'cabin-ed, cribb'd, confined', by the cramping influences of an all-pervading bureaucracy." The French local administrative system has, for instance, reduced local administrative councils to the position of more or less consultative bodies under the all-powerful authority of the central government, through its *Prefet*. The Prussian system has, on the other hand, introduced a network of committees and councils composed of officials and non-officials, in which the former, as being the expert class, have obtained a preponderating voice. It is the English Local Government organization, however, which, though full of complications, has left the largest province for local, unpaid, un-official administrative efforts. The extent to which the citizen is actively and in a very real manner associated with the discharge of the functions of local administration in England is the widest till now attained in modern states. In the United States, the theory of popular Government is carried to the extremest logical limits, all local officials being practically elected and discharging their functions, not so much under superior administrative control as in England, as under the provisions of laws enforceable and enforced by courts of justice.



The Collec-  
tor-Magis-  
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The Indian local administrative system partakes mainly of the French and the Prussian. In each Province, the one uniform and important administrative unit is the district, at the head of which is the District Collector and Magistrate, or Deputy Commissioner, as he is termed in some of the Provinces. In spite of the encroachments which the progress of centralisation and of communications have made in his authority, he is, in the eyes of the ordinary people of the country, the most important functionary of the British Administration in India. The oft-quoted description of the ideal Collector-Magistrate, by the late Sir William Hunter, will bear repetition here :

"The District Officer, whether known as Collector-Magistrate or as Deputy Commissioner, is the responsible head of his jurisdiction. Upon his energy and personal character depends ultimately the efficiency of our Indian Government. His own special duties are so numerous and so various as to bewilder the outsider ; and the work of his subordinates, European and Native, largely depends upon the stimulus of his personal example. His position has been compared to that of the French *Prefet*, but such a comparison is unjust in many ways to the Indian District Officer. He is not a mere subordinate of a central bureau, who takes his colour from his chief and represents the political parties or the permanent officialism of the capital. The Indian Collector is a strongly individualised worker in every department of rural well-being, with a large measure of local independence and of individual initiative. As the name of Collector-Magistrate implies his main functions are two-fold. He is a fiscal officer, charged with the collection of the revenue from the land and other sources; he is also a revenue and criminal judge both of first instance and in appeal. But his title by no

means exhausts his multifarious duties. He does in his smaller local sphere all that the Home Secretary superintends in England, and a great deal more, for he is the representative of a paternal and not of a constitutional Government. Police, Jails, Education, Municipalities, roads, sanitation, dispensaries, the local taxation, and the imperial revenues of his district are to him matters of daily concern. He is expected to make himself acquainted with every phase of the social life of the natives, and with each natural aspect of the country. He should be a lawyer, an accountant, financier, and a ready writer of State papers. He ought also to possess no mean knowledge of agriculture, political economy, and engineering. " •

The purely bureaucratic character of local government in India, as thus originally organised, has led to an inordinate amount of centralisation in finance and administration. Some decentralisation of administration and finance became absolutely necessary more than 30 years ago, and the first step in both directions was taken by Lord Mayo, who first clearly recognised that administrative decentralisation cannot go very far without detriment to the well-being of the State, unless local agency and popular co-operation in the performance of administrative duties are resorted to. The really important step, however, in the direction of local self-government was taken by Lord Ripon. The principles of Lord Ripon's scheme, though often questioned, have now been definitely accepted by Lord Morley who has, in his Despatch on the Reform Scheme, laid down that " it is necessary to attempt without delay an effectual advance in the

direction of local self-government," going down to "the smallest unit *viz.*, the village community—the fundamental and indestructible unit of the social system, surviving the downfall of dynasty after dynasty—and to make the village the starting point of public life."

It is, therefore, not of much practical value at present to discuss the existing arrangements and state of things in regard to local government in India, until the changes foreshadowed by Lord Morley and recommended by the Royal Commission on Decentralisation are carried into effect. Both Lord Ripon's famous Resolution on Local self-Government and Lord Morley's Despatch are printed in the Appendix, as they embody the principles on which future progress is expected to be made. It may, however, be stated with reference to the existing system in general, that so far as the discharge of local administrative functions are concerned, the Indian administrative system bears resemblance to that of the French *departments* with their *prefets*. In so far as the discharge of such of the functions as have been and are being entrusted to local and Municipal bodies are concerned, the system of Councils and Boards bears more resemblance to the Prussian system than to the French. As in the Prussian system, two distinct classes of members sit in these local bodies—"unpaid residents of the locality and highly trained professional servants of the bureaucracy. As far as possible, (and in India, it is hardly far enough) matters

of purely local interest are controlled by councils on which the lay members have the preponderating weight. Matters of national interest (including education and the state taxes in Prussia, but many more matters in India) are more under professional control." The German and the French local government arrangements may, therefore, be usefully studied along with the English system and with the indigenous and undying communal system in India, to learn what may be avoided and what may be adapted to the political needs of this country.

## CHAPTER VI

### THE INDIAN LEGISLATURES—GENERAL FEATURES

Legislative  
and Execu-  
tive func-  
tions

In dealing with the powers and functions of the executive authority in India, we began by pointing out that it was of earlier origin than the legislative authority. This is true in a general sense of all political communities, but it is true in a special sense with reference to the origin and growth of British Government in India. Logically, no doubt, the making of the law is antecedent to its execution and to decisions as to its meaning, and the legislative power, as Judge Story put it long ago, "is the great and overruling power in every free government". Historically, however, it is the decisions of disputes and the specific regulation of the conduct of the individuals composing the community by its ruler or rulers, that have preceded the formulation of general rules to guide the rulers and the ruled. The modern distinction of governmental functions into legislative, executive and judicial—in which the organ representing the legislative function is regarded as supreme and as determining the rules applied by the judicature and carried into effect by the executive—did not find its counterpart in the

earlier history of communities, as Sir Henry Maine's great works have demonstrated.

Even in the case of highly developed modern states, it would be a serious mistake to imagine that the Executive *organ* of Government is confined to the carrying out merely of what may be strictly termed, *Executive functions*. No matter how explicitly and comprehensively laws are made, they must of necessity leave a wide discretionary power in the hands of the Executive. To the extent to which the Executive exercise this discretion, they are really supplementing express legislation. A more modern development of what we may call the legislative side of Executive activity, is the power expressly delegated to them by the legislative *organ* to make rules and regulations, to determine the details of laws to be enforced. We may even go further and state that in the constitutions of the most advanced nations, the legislative function which the strictly legislative *organ* of Government exercises, is not that of *law-making*, but only that of *law-sanctioning*. In those countries, like England, in which the Parliament has developed into what the late Professor Seeley called a Government-making organ, it entrusts most of the work of law-making to the Executive in office. For instance, in England, it is the Cabinet that really makes the laws; Parliament, however much it may amend, or turn them out of shape, only *sanctions* them. As one writer on Political Science

Legislatures  
and law-mak-  
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has put it : "It is true that all the work of law-making is done *in* Parliament, but it is misleading at the present day to speak of Parliament as the legislative body in contradistinction to the Cabinet, which is called the Executive, because it leads us to forget that the course of legislation (except in Norway) is habitually regulated by the Cabinet through its influence over its supporters in Parliament."

Origin of  
Indian Legis-  
latures

If such is the case with the most highly developed constitutions in the world, it need not be wondered at that the Executive in India are possessed of large legislative powers. In fact, it was originally the Executive that was empowered "to make regulations and ordinances," for the good government of the factories or territories at first acquired in India, "so as they be not repugnant to the laws and customs of the United Kingdom." The earlier charters and the later statutes up to 1853, vested both the executive and legislative functions in the same body of individuals. The power of making regulations thus vested was in character the same as that which the Executive is invested with by modern statutes. The only laws, properly so called, which the Governors and the Governor-General and their Councils in their Executive, as well as in their legislative, capacity, were subject to, were the laws of the Parliament in England. The legislative and legal sovereignty of Parliament was,

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Hammond's 'Comparative Politics' pp. 407, 408.

as it still is, the only theoretical and legal safeguard against the executive becoming a law unto themselves.

But the power of regulation-making in India gradually grew as the territories of the British rulers increased, and the need for Indian legislation in India itself became imminent. Thus, the executive function became early differentiated from the legislative function even when both were vested originally in the same body or bodies. It was in 1833 that, along with the appointment of a Law Member to the Governor-General's Council, Parliament declared that the laws of the Governor-General's Council were "to have the effect of Acts of Parliament." With the addition, in 1853, of additional members to the Council when sitting for the purpose of making laws and regulations, law-making became a distinct branch of the work of Government in India, and laws, strictly regarded as rules enforceable by the Courts and to be carried out by the executive, came into existence, admirably codified and enacted.

The character and constitution of the Indian legislatures are distinct from analogous institutions elsewhere. They have therefore to be carefully noted. We have already seen that the Indian Constitution is really a creature of the British Parliament. That is itself one mark of the subordinate character of the Indian legislatures. The body or organ in the Indian Constitution which enacts laws is legally the same as

Legislative  
organ  
subordinated  
to the  
executive



the body which administers the State. In other words, there is only one body, *viz.*, the Governor-General in Council—or the Governor in Council—which is both the Executive and the Legislature in India. The Executive organ of the State expands itself by means of *additional* members into the *legislative* organ. Modern law-making, as has been pointed out already, is now-a-days done only by the Executive. The *legislative* organ confines its legislative functions only to the giving or refusing of assent to the laws made by the Executive. This practice obtains in India also, though it would be erroneous to trace its origin in India to the same process of development as in Western countries with representative institutions. It does not need proof, therefore, to see that so long as the Legislative Councils in India maintained an official majority, the Executive did not only *make* laws, but sanctioned them also. Hence the anomaly to the student of modern constitutions that, in a constitution which is every day being more closely approximated to Western representative institutions, the legislative organ is really subordinated to the Executive. This fact may or may not be a defect. One organ in every State has to be *superior* to all others in order that stability and strength may be secured. The legislative organ in a State will not be fit for this superior position till it is sufficiently developed to make and unmake Governments. The Indian Constitution is based on the assumption

that India has of necessity to wait a considerable time before she can claim that her Legislative Councils should possess the power of deciding who shall be the Executive.

These are such marked features of the Indian Constitution that Mr. Cowell in his "Courts and Legislative Authorities in India" regards even the Councils—enlarged under the Act of 1892; by the addition of some practically elected representatives of the people,—as "mere committees for the purpose of making laws, committees by means of which the Executive Government obtains advice and assistance, and the public derive the advantage of full publicity being ensured at every stage of the law-making process." "Although the Government enacts the laws through its Council," he observes, "yet the public has a right to make itself heard and the Executive is bound to defend its legislation. And when the laws are made, the Executive is as much bound by them as the public, and the duty of enforcing them belongs to the Courts of Justice. Such laws are in reality the orders of Government, but they are made in a manner which ensures publicity and discussion, and are enforced by the Courts and not by the Executive." It does not follow from this that the executive authority in India is constitutionally irresponsible to any legislative authority, but only that its responsibility is not to the Indian Legislatures. This matter has been made clear in Lord Morley's Reform Despatch. "It is an essential condition

Indian  
Legislatures-  
Committees  
of advice

of the reform policy," wrote Lord Morley, "that the Imperial Supremacy shall, in no degree, be compromised. I must, therefore, regard it as essential that your Excellency's Council, in its legislative, as well as in its executive, character should continue to be so constituted, as to ensure its constant and uninterrupted power to fulfil the constitutional obligations that it owes and must always owe, to His Majesty's Government and to the Imperial Parliament." The executive authority in India is thus constitutionally regarded only as a subordinate agency of His Majesty's Government and by that very fact responsible to the legislative authority of the Imperial Parliament, and not to that of the Indian Legislatures which are themselves subject to the same authority, deriving their very constitution and functions from its enactments.

This theory of the responsibility of the Indian Executive and of the Indian Secretary of State, to Parliament means however, in practice, as we have seen in Chapters I and II, but little useful or effective control over them, and the manner in which the legislatures have been constituted and are likely to be constituted even under the Indian Councils Act of this year, has but strengthened the practically absolute power of the Government of India. The chief characteristic, therefore, which ought to be noted with reference to the Indian Legislatures is the independence of the Executive towards them, coupled with the power which the latter possesses

of virtually controlling them and reducing them, in the words of Mr. Cowell, to mere committees of advice. This state of things has not been altered under the new Reform scheme of Lord Morley, as will be seen presently. In fact, the relationship of the Executive to the Legislatures in India is not what has been described as that of "a parliamentary executive," as in the Self-Governing Colonies, but that of a "non-parliamentary executive," virtually capable of controlling the legislatures. Hence we arrive at the same result which we referred to in a former chapter as deducible from the constitutional position of the executive authority in India *viz.*, that there is no Constitutional arrangement by which the Executive is or could be made responsible to the people of the country or to the Legislatures in which the people are to some extent represented.

It follows from what has been stated above that the Indian Legislatures are, according to constitutional theory, strictly non-sovereign law-making bodies; and it becomes necessary to note the characteristics flowing therefrom, before proceeding to discuss their constitution and functions. The general characteristics of such bodies are, according to Professor Dicey:—first, the existence of laws affecting their constitution which such bodies must obey and cannot change; hence, secondly, the formation of a marked distinction between ordinary laws and fundamental laws; and lastly, the existence of a

Non-sovereign characteristics of Indian Legislatures

person or persons, judicial or otherwise, having authority to pronounce upon the validity or constitutionality of laws passed by such law-making bodies.' Each of these three characteristics is noticeable with reference to the Indian Legislatures, Provincial and Imperial. Although the Council of the Governor-General can pass laws as important as any Acts passed by the British Parliament, the authority of the Council in the way of law-making is completely subordinate to, and dependent upon, the Acts of Parliament which constituted the Legislatures. The legislative powers of the Indian Councils arise from definite Parliamentary enactments, the chief of which will be found printed in the Appendix. They form what might be termed the 'constituent' laws of the Indian Government. In the next place, the Indian Councils are also non-sovereign in that they are bound by a large number of regulations and rules which the Executive is empowered to frame under the 'constituent' statutes above-mentioned, which cannot be changed by the Indian legislative bodies themselves, but which can be changed only by the Executive Government or by the superior power of the Imperial Parliament. If we for a moment turn to these regulations and rules and observe what they provide for, it will be seen, as has been pointed out in the previous paragraphs, that the Executive has been invested with very large powers in framing not only the constitu-

tion—fixing<sup>s</sup> the franchise and the qualifications of representatives and so forth—but also in prescribing the functions and the authority exercisable by the Councils themselves. This aspect of the matter will, however, be presently discussed in connection with the more detailed consideration of the constitution and the functions of the Councils. It is sufficient to note here that not only the Acts which created the Councils, but also the rules and regulations framed by the Executive under the sanction of these Acts for the constitution and working of the Councils, could not be changed by the Councils themselves. Again, the powers of the Councils as to law-making proper are also specifically restricted by the rules as well as by the statutes. Thus, the Governor-General in Council has no power of making laws which may affect the authority of Parliament or any part of the unwritten laws or constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the Sovereignty or dominion of the Crown over any part of India or any of certain specified statutes of the British Parliament applicable to this country. Lastly, the Courts in British India are constitutionally vested with the power of pronouncing upon the validity or constitutionality of laws passed by the Indian Councils.

## CAPTER VII

### THE INDIAN LEGISLATURES— THEIR CONSTITUTION

Official and  
non-official  
elements in  
the Indian  
Legislatures

We now proceed to describe briefly the constitution of the various legislatures, Imperial and Provincial. The Imperial Legislative Council and the Legislative Councils of Madras and Bombay are, in legal theory, but expansions of their Executive Councils by the presence of additional members nominated or elected, for the purpose of making laws and regulations. The Legislative Councils of the Lieutenant-Governors of East Bengal, the United Provinces, the Punjab and Burmah have been separately constituted under statutory powers vested in the Governor-General. It is a curious fact to note in this connection that subsequent to the passing of the Indian Councils Act of 1861, no new Lieutenant-Governorships could be created without Legislative Councils accompanying them. In fact, the power to constitute the latter under the Act seems to be derivable from the former.

In reference to all these Councils, it is necessary to note that their constitution consists of two elements, the official and the non-official, and that they are recruited both by nomination

and by election. While the Government, Imperial or Provincial as the case may be, is on its part empowered to nominate additional members to the Councils from officials and non-officials alike, the constituencies or electorates are on their part empowered to elect members to these Councils who may be officials or non-officials. In practice, however, officials are not usually elected, as this would virtually be equivalent to losing the right of election and representation on the part of the electors electing them. The particulars in regard to the formation of these Councils will appear from the Regulations and the Despatches of the Government of India published in the Appendix, and it is not proposed to repeat them here. A few facts bearing on their constitution may, however, be drawn attention to, to show their main characteristics.

The first among these is the proportion between the official and the non-official members in the Councils. Under the new scheme of Lord Morley, it has been settled as essential that the official majority in the Viceroy's Council should be retained, in order "to enable the Government of India to discharge the constitutional obligations which it owes to His Majesty's Government and the Imperial Parliament." The principle of a standing official majority is, however, dispensed within the case of all Provincial Legislatures, but the proportion which this majority bears to the official minority

Their  
proportion  
in the several  
Councils