varies in different provinces, according to the view the executive head of each has taken of its necessities. The Bengal Government, it will be seen, has consented to work with the largest, while that of Madras has provided its Council with the smallest, non-official majority.

Constitutional understanding as to official members' votes

This scheme of official and non-official majorities has been based upon what has been deemed to be a legitimate constitutional understanding, that official members are bound to vote with the Government on all Government measures. There does not, however, seem to be any statutory warrant for this rule or any warrant under the Rules and Regulations framed under the Councils Acts. The understanding, however, has been a somewhat anomalous growth in Indian constitutional development. The position taken by the Government in this matter appears to be this. In respect of all measures of legislation introduced by the Executive Government, the Governor-General and the Members of the Executive Council—either in accordance with the decision at which they may have previously arrived, as embodied in the Bill or in pursuance of the instructions and directions of the Secretary of State, which they are bound to carry out—introduce a Bill into the Council as a 'Government measure'. In either case, the Ordinary or Executive Members of the Council find themselves bound to vote in favour of the measure they have introduced, and against any alterations or amendments

Position of Members of Executive Councils

thereto, if they are not in conformity with the plans of the Government. In the former case, their vote is based upon their convictions, and in the latter case, their vote is based upon the mandate of the Secretary of State which they are bound to have carried out through the Council. The position in this respect was well explained by the Marquis of Lansdowne in a speech which he made in the Legislative Council on the 27th December 1894, when he defended the position taken by himself and the other Members of his Executive Council in supporting the Cotton Duties Bill in pursuance of a mandate from the Secretary of State, and against their own previously expressed views. He said :—

"So far as the individual action of my colleagues and myself is concerned, Sir Henry Brackenbury, in the discussions on the last Tariff Bill, and again to-day, has said that we are bound to obey the orders given by the proper and constitutional authority. But, for my part, I do not think that exhausts the question. It is claimed that members must be free to speak and vote in this Council for the measure they honestly think best. I can accept that proposition only with the qualification that they duly recognise the responsibility under which they exercise their rights in this Council. Only in an entirely irresponsible body can members act entirely as their inclination leads them. In every legislative body a man must sit, unless he has an hereditary right, by what in modern parlance is called a mandate, and that mandate must be given by some authority. I need not remind you that, in a Parliament, a man is not free to act exactly as he pleases ; he is distinctly subject to the mandate he has received from his constituents ; and practice has shown that even this is not sufficient, but that to make Parliamentary government effective it has been necessary to introduce

party management; and the bonds of party, in the present day, certainly show no sign of being relaxed. Here we have no election and I am glad to say no party, but every man who sits here sits by the authority and sanction of Parliament; and to say that he can *refuse* to obey the decisions of Parliament would be absurd. But that is not all. Parliament has provided for the government of the Indian Empire. The British Raj can be provided for in no other way. Parliament has allotted his proper place to the Viceroy, as the head of the Executive in India, and it has given him a Council for the purpose of making laws and regulations which cannot have powers in which he does not share. But the Viceroy admittedly is not invested with supreme authority, but, as I understand, it is by distinct enactment entrusted to the Secretary of State and his Council; and to speak of this Council as supreme, if that means that it has independent and unfettered authority—is to say what is not the fact.

"I speak with some deference, after what fell from the Hon'ble Sir Griffith Evans; but, with all respect for his legal authority, I think that he is not correct in the view he took that a member of this Council is unfettered in the vote he gives here, or that he could 'hand over his responsibility' to the Secretary of State. I am inclined to think that the Hon'ble Mr. Mehta took a more correct view of the matter when he said that he would leave the responsibility with the Secretary of State, because the responsibility which the Secretary of State would exercise would be the responsibility which belongs to him."

Position of other official members

If the Viceroy and the Members of his Executive Council could be brought down to the position which the Marquis of Lansdowne admitted was the net result of the constitutional arrangements of the Government of India, it follows, as a further extension of the very same theory, that additional members nominated by the Government from among its subordinate

officials are bound to vote, on all 'Government measures,' in accordance with the declared intentions or policy of the Government, in respect of every matter on which they are called upon to vote. In the words of Sir James Westland, spoken in the debate above cited, "if the question before the Council is a 'Government question', the Government will, on the reasons and principles explained, exercise the whole of its voting power."

The position of the Legislatures altered in consequence

The effect of this state of things is to alter the actual position originally assigned to the Legislative Councils in the Constitution, in all cases where the Government has an official majority or a majority which it can create, control, or influence. Protests have now and again been made both in and out of the Councils as to this somewhat demoralising state of things. Sir Griffith Evans and Sir P. M. Mehta adverted to this during the debates in the Legislative Council in 1894 and, in the Madras Presidency, the late Sir V. Bhashyam Iyengar, the distinguished jurist, submitted a strongly worded minute against this procedure, last year, when giving his opinion in regard to the new Reform scheme. "We should be careful," said Sir Griffith Evans in the Viceregal Legislative Council, "to maintain the position assigned to us in the Constitution and not to abdicate our functions or allow the Executive to make laws when we only register them. The Secretary of State and the Executive Council have no legis-

lative powers and cannot be allowed to usurp them." Sir P.M. Mehta considered the position of the ordinary Members of Council to be different from that of the additional official members of Council and claimed that these had, for their part, more freedom of action. This, however, Sir James Westland did not concede in respect of what he termed 'Government questions.' Sir V. Bhashyam Iyengar's opinion is entitled to the greatest weight on this subject, as he has occupied the position of both an official and a non-official member of the Legislative Council and as he could by no means be considered to be biased against the Executive Government. The text of it appears in a note at the end of this chapter and is well worth persual by students of Indian constitutional history.

Official votes not analogous to Party votes in England

The enforcement of an understanding to the effect above referred to, with respect to the official Members of the Legislative Councils, is very different from that which prevails under the party system in England, and is much worse in its consequences. In England, the Party Whips insist on Members of Parliament voting with or against the Government according to the party to which they belong, in respect of all measures irrespective of their individual opinions. The ultimate sanction for this is the power of the constituencies to compel the Member morally to support the Government whom they desire to keep in power, or the Opposition with whom they side. The Govern-

ment and the Opposition in turn, rest and count on the support of the constituencies. But, while in the case of Members of Parliament, the submission to the Whip is purely voluntary and based on considerations of expendiency and party politics, the voting to order of the official Members in the Indian Legislative Councils, is based upon the official authority exercised by a superior over a subordinate in the public service, which virtually gives power to the former to materially alter the legal character and position of the Legislative Councils and their Members.

No qualifications for nominated Councillors

Such being the position of the Legislative Councils, we may next consider the qualifications necessary for the Legislative Councillors, Provincial and Imperial. In regard to the Members nominated by the Government, no specific qualification is prescribed under the Acts or the Regulations. It does not seem to be even necessary that the nominees should be literate in English; for, we find that among the rules of business provision is made for having bills or their purport to be translated in Hindustani or other local vernaculars for the use of Members unacquainted with English, and also provision for one Member to speak at the request and on behalf of another Member who is unable to express himself in English. Such contingencies are, of course, of rare occurrence. It is also to be noticed that the Rules and Regulations now framed under the Indian Councils Act, 1909, prescribing the qua-

lifications of Members, are applicable only to those elected by the constituents and not to those nominated by the Government. It, therefore, seems to be open to the Government, theoretically at least, to nominate to the Council persons who may be ineligible to be elected under the Regulations for any of the constituencies, such as bankrupts or convicted persons or others.

Qualifications and disqualifications of elected Councillors

The qualifications and disqualifications of Members elected by the constituencies are, however, prescribed in great detail under the new Regulations. In the first place, there are certain general categories of disqualification. Aliens, females, lunatics, minors, bankrupts, dismissed public servants, convicted persons, persons debarred from practice as lawyers and, lastly, persons who "have been declared by the Government to be of such reputation and antecedents that their election would, in the opinion of the Government, be contrary to public interests,"—are disqualified from being elected. In the next place, any person who is to be elected by any constituency should, except in one important instance, himself belong to the constituency as a voter entitled to elect the candidate of that constituency. He must, in order to be elected, be also duly nominated under the rules in force for each constituency and he must be duly elected according to such rules. Some of the disqualifications can be relieved against by the Executive Government, but others, from the nature of things, could not be so relieved against.

The term of office of Legislative Councillors is, as a rule, three years in the case of all elected candidates and three years or less in the case of members nominated by Government. Every member elected or nominated is to take the oath of allegiance before taking his seat. These, in brief, are the general qualifications necessary for the members of the Councils. Special qualifications are prescribed for special electorates, but these arise more from the nature of the constituencies which they represent than from the qualifications pertaining to the candidates themselves.

Complicated constituencies

The constituencies which are to elect members to the Legislative Councils in pursuance of the new Rules and Regulations are not so much electoral areas as electoral groups, so framed as to secure a certain proportion of representation of classes, interests and areas, and for this purpose the power of nomination is also intended to be used to supplement the elections. It is hardly possible to bring under any systematic treatment, from a constitutional standpoint, these various 'schedules' of electoral arrangements, but readers of this book may be referred to the whole scheme as summarised from the Despatches, Resoultions and Regulations which we publish in the Appendix. It may be mentioned, however, that, while the object and evident desire of the whole scheme is to secure some amount of real representation of the wishes and intentions of the

varied classes of the population in the country, it is doubtful whether the complicated machinery coupled with the intricate manner in which the electoral groups intersect each other and also divide themselves off one from another, is likely to work as smoothly as its authors expect it to do. One is reminded of the complicated and chaotic state to which the electoral arrangements in England became reduced at the end of the eighteenth century by the variety and antiquity of the franchise, which led subsequently to the famous Reform Bill of 1832. It may also be printed out that the power of enquring into and deciding the validity of disputed elections, disqualifications of voters and candidates—involving questions of title to property under the personal law of each Hindu, Mahomedan, Malabar or other, and the assessment of their rental values and so forth—is vested in the Executive Government, and not in the Courts, at the instance ot the legislature itself, as in England. It is hardly possible to exaggerate the burden which this might increasingly throw on its shoulders as time advances. To quote a remarkable petition which was presented to the House of Commons in the last decade of the eighteenth century on an analogous state of things :—

"Your honourable House is but too well acquainted with the tedious, intricate, and expensive scenes of litigation which have been brought before you in attempting to settle the legal import of the numerous distinctions which perplex

and confound the present rights of voting. How many months of your valuable time have been wasted in listening to the wrangling of lawyers upon the various species of burgage-hold, leasehold and freehold. How many committees have been occupied in investigating the nature of scot and lot, potwallopers, commonalty, populacy, resiant inhabitants, and inhabitants at large. What labours and research have been employed in endeavouring to ascertain the legal claim of boroughmen, eldermen, portmen, select men, burgesses, and councilmen ; and what confusion has arisen from the complicated operation of clashing charters from freemen, resident and non-resident, and from the different modes of obtaining the freedom of corporations by birth, by servitudes, by marriage, by redemption, by election, and by purchase."

It has also to be remembered that the franchise in respect of the constituencies or electoral groups above referred to, is distributed in as unsymmetrical and uneven a manner as the conditions of the country and its people are deemed to demand, so as to secure the proper representative elements in the Councils, and in proper proportions. Generally speaking, the franchise now conferred may be divided into three main classes : that of the normal territorial electorates, that of the electorate composed of the landed interest, and that of the electorate composed of the Mahomedan population whose political importance, it has been decided, requires special representation in excess of their numerical strength. The franchise is also bestowed to a more limited extent on certain other special interests, such as those of European and Indian commerce, the planting, jute and other special industries. The proportion in which representation is given to all these interests and

classes is not in accordance with either their numerical strength or their proprietary interests. Reasons of political importance, special minority representation and similar considerations have been set out in the whole scheme as having guided the Government in arriving at its decisions as to the numbers of seats to be allotted to each. The consequence has been that, from a theoretical point of view at any rate some electorates have double and sometimes treble representation in the different constituencies to which they belong.

Elective element by no means over-powerful

It is, however, not profitable to discuss the whole scheme at its inception as it were, at the present moment. It has moreover to be remembered that, after all, the elective element is only one and by no means an over-powerful element in the Legislative Councils, Provincial or Imperial. Even in regard to the territorial electorates, the franchise is bestowed on a fairly high class of citizens, namely, members of Taluq and District Boards and of Municipalities, a large proportion of whom the Executive Government nominates. Again, though the mode of election is based more or less upon the Ballot Act in England, still the power of deciding contested elections is vested in the Executive Government and not either in the Legislative Councils or the Courts as was and now is, the practice in England. Besides, the powers of the Councillors themselves in legislation and in administration, even

under the new scheme, are strictly limited. Experience might perhaps show that the power of consolidation of the Indian peoples is stronger than the tendency to isolation and differentiation, on the existence of which the Government has had to base its scheme. But to the student of politics, the present experiment will be from many points of view an extremely interesting one to watch.

NOTE

[*Extact from a Note by Sir V. Bhahyam Aiyangar on the proposed enlargement of the Legislative Councils and establishment of Imperial and Provincial Advisory Councils, submitted to the Government in* 1908.]

"Both under the Indian Councils Act of 1861 and under the Indian Councils Act of 1892, the Governor-General in Council and the Governors in Council of Fort St. George and Bombay, in exercising the power of making laws and regulations vested in such Councils, repectively, are to consist not only of the Governor-General, the Governor of Fort St. George or the Governor of Bombay as the case may be and the ordinary members of his Council but also of certain additional members whether in the service of the Crown in India or not, the minimum and the maximum numbers of such additional members having been originally prescribed by the Act of 1861 and since raised by the Act of 1892. The functions of a Government are both executive and legislative and the power of making laws and regulations is no less an important function of Government than its executive functions, and the fundamental principle of the British Indian constitution is, that the Indian Government in expressing its important function of legislation should consist not only of the individuals in whom the executive functions of Government are vested but of a certain number of additional individuals who, in so far as the passing to laws and regulations is concerned, form as much a com-

ponent part of Government as the former body of individuals. The only difference between ordinary members and the additional members is that the former form a component part of Government not only when the Government is discharging its legislative functions, but also when the Government is engaged in discharging its executive functions, whereas the additional members form a component part of Government only when the Government is engaged in exercising its legislative jurisdiction. It is therefore opposed to the very constitution of Indian Government that at meetings of the Council for the purpose of making laws and regulations, the individuals composing the executive Government should be regarded, or that they should assert themselves, as *the* Government, or as a component part of the Council, separate and distinct from the additional members of the Council.

Up to 1834, the executive and legislative functions of each province were vested in one and the same body of individuals constituting the respective Governments and by 3 and 4 William IV, Chapter 85, the Governments of Madras and Bombay were substantially divested of their legislative functions and the Governor-General and his Councillors were empowered as the central legislative authority to legislate for the whole of British India, the duty of one of such Councillors, namely, the fourth ordinary member, being confined entirely to the subject of legislation with no power to sit or vote except at meetings for the purpose of making laws and regulations.

Thus for the first time the principle was introduced enlarging the Council of the Governor-General by the addition of a member, a paid official, who formed a part of Government for purposes of making laws and regulations only. This principle was further developed by 16 and 17 Vic., Ch. 95, by which, the Chief Justice and a Puisne Judge of the Supreme Court of Calcutta, as well as four official representative members chosen by the Governments of Bengal, Madras, Bombay and the North-Western Provinces formed additional members of the Governor-General's Council for the purpose of making laws and regulations only, and the fourth

ordinary member of the Governor-General's Council was, like the other ordinary members, given a right to sit and vote at executive meetings. Under the Indian Councils Act of 1861, legislative powers were restored to the provincial Governments and it was provided that for the purpose of making laws and regulations the Councils of the Governor-General, as well as of the Governors of Madras and Bombay were to be re-inforced by the appointment of certain additional members, officials and non-officials. It will thus be seen that from 1833 to 1853 there was one additional official member in the Governor-General's Council and from 1853 to 1861 there were six additional members in that Council, who were all official; such additional members were undoubtedly, for purposes of legislation, as much a part of Government as the ordinary members of the Council, and it was only under the Indian Councils Act of 1861 that provision was made for the appointment as additional members of non-official persons also, and under the Indian Councils Act of 1892 not only was the number of additional members increased, but provision was also made for the introduction of an elective or quasi-elective principle in the nomination of such additional members. But the introduction into the Council of non-official members either by direct nomination, or by election under statutory rules subject to the approval of the Governor-General or Governor as the case may be, can in no way affect the constitutional aspect of the question namely, that all additional members, whether official or non-official, whether nominated or elected, are the colleagues of the Governor-General or the Governor and of the ordinary members of his Council and as such form a component part of the Government in the exercise of its legislative functions, and there is nothing in either of the said statutes affecting the status of the Legislative Council as the Government for the purpose of making laws and regulations.

Another cardinal principle of the constitution is that not less than one-half of the persons nominated as additional members of the Council including the Advocate-General for the time being shall be non-official persons and that the

seat in Council of a non-official member accepting office under Government should be vacated on such acceptance, there being however no corresponding provision that an official additional member vacates his seat on ceasing to be an official. Notwithstanding the provision of the law that not less than one-half of the additional members shall be non-official persons, it is no doubt possible for the Governor-General or the Governor as the case may be, to secure, as has almost invariably been the practice, an official numerical majority in the composition of the Council by appointing only the minimum proportion prescribed by law of additional non-official members, with the result that an official majority can be ensured by reckoning upon the additional official members voting with the ordinary members of the Council. The principle however, of the constitution is not that there *need* be a "numerical official majority" in the Council as now proposed, but that the numerical majority *may* be on the side of non-official members. So far as the relative proportion of non-officials to officials is prescribed by law, it is as already stated that the number of non-official additional members should be at least one-half of the additional members. I may also beg leave to assert emphatically that the notion of an official majority in the Legislative Council, or the notion that the additional official members should vote with the ordinary members of the Council or that the ordinary members of the Council and the President should vote alike, is entirely opposed to the fundamental principles of the constitution as stated above, namely, that so far as legislation is concerned, the Government consists of the Governor-General or Governor, his ordinary members *and* the additional members whether nominated by him or elected, subject to his approval, and all form but one component and indivisible part of Government for the purpose of making laws and regulations : and the division of this body into the Executive Government supported by an official majority and a non-official minority corresponding to an opposition to Government is the introduction of a principle which, in British India, is as unconstitutional as

it would be mischievous in the result. Until the enlargement of, and the introduction of a quasi-elective principle into, the Indian Legislative Councils by the Indian Councils Act of 1892, the fundamental principle of the constitution as settled by the Indian Councils Act of 1861 was not departed from, the official and the non-official members of the Councils co-operating as members of one body and there was no feeling that the non-official members were in the opposition or that the official members should vote together any more than they should in executive or other matters outside the Legislative Council. Neither when the Legislative Council and the Executive Council were identical, nor, later on when the Governor-General's Council was for the purpose of making laws and regulations reinforced by the addition of certain official members only, was there or could have been any theory or notion that all the individuals composing the Council should vote unanimously on every measure before it. A reference to the reports in the official gazette of the proceedings of the Legislative Councils as constituted under the Councils Act of 1861, and especially to the proceedings of the Viceregal Legislature would show that, when divisions in the Councils were recorded, it was by no means unusual that official members were as much divided among themselves as the non-officials were. If, in the deliberations of the Executive Council or of the Board of Revenue, the members are expected to, and do in fact, express and assert their individual views if they are unable to agree after consultation and discussion, it seems strange that in deliberations on legislative measures at meetings of the Legislative Council a different theory or practice should prevail by reason of the enlargement of the Council and the presence therein of elected members and that officials should all vote together irrespective of their individual, deliberate and mature opinions. According to the principle of the constitution of the Legislative Councils in India, there is no difference between official and non-official members, and it is because of the importance attached to the Legislative

function of Government that in addition to the ordinary members a certain number of additional members are associated with the Governor-General or Governor and the policy of the Act is that legislative measures should be publicly discussed and passed at meetings of such bodies in accordance with the views of the majority and it is a distinct violation of this principle that under the sanction of an unwritten law a theory should prevail and assert itself that officials should all vote solidly irrespective of their convictions and opinions and that non-official members, and the elected members, in particular, should be regarded and treated as being in the opposition to Government. Though in regard to unessential matters where there is a difference of opinion, it is a matter of comparative indifference if all the officials should vote together by their deferring to the judgment of the ordinary member in charge of the Bill, yet in controversial matters affecting the principles of the Bill, it will be a distinct violation of the constitutional principle that they should do so. I do not at all consider this matter from the standpoint of the moral philosopher but purely from the standpoint of an Indian constitutional lawyer and politician who is convinced of the wisdom of the constitutional principle in question and apprehends the evil political consequences of ignoring this principle and substituting therefor the principle of a standing official majority accompanied by the creation in the Council of an irresponsible opposition. Such has been the unfortunate and unexpected result of the operation of the Indian Councils Act of 1892 and it is a matter for extreme regret that the Government of India should now explicitly declare in writing that "they consider it essential that the Government should always be able to reckon on a numerical majority and that this majority should be strong enough to be independent of the minor fluctuations that may be caused by the occasional absence of an official member. The principle of a standing majority is accepted by the Government as an entirely legitimate and necessary consequence of the nature of the paramount power in India, and so far as they know it has never been disputed by any section of Indian opinon, that does not dispute the

legitimacy of the paramount power itself." That is not an open question and if two men are not able to wield one sceptre it is idle to dissemble that fact in constructing political machinery. I am however not surprised at this and nothing can be a greater condemnation, by the highest authority in India, of the practical working of the Indian Councils Act of 1892 than that it should publicly declare that the *legislative* function of Government cannot be safely and satisfactorily discharged unless a standing and decisive majority of official votes in the Council can always be reckoned upon. This necessarily implies not only that there should be a numerical official majority in the Council, but that they should all vote together. I was a member of the local Legislative Council for several years prior to 1892 and for several years subsequent thereto, and my humble opinion is that the working of the enlarged Legislative Council has by no means been satisfactory in a political point of view. An opposition has unconsciously been created and the relations between the official members and the non-official members and in particular the elected members are far from being cordial. There is no doubt that legislative measures are debated upon and criticised more ably and freely by the non-official members than was the case prior to 1892, but so far as official members are concerned, though their number has been increased, fewer of them take part in debates and the theory, unwritten though it be, that they should all vote solidly with the ordinary member of Council in charge of the Bill has a most demoralising effect. As a general rule, with the exception of one or occasionally two official members who actively assist the member in charge, the other official members pay little or no attention to the debates in Council and when meetings of the Council are sometimes protracted, they attend the Council much to the detriment of their other duties. Of course, if the theory is that an official member is to vote with the member in charge of the Bill and not according to the opinion which he may form by attending to and following the debate, it is no matter for surprise, that instead of paying close attention to the debates in

Council he should, while the debate is going on, prefer to attend to his own office work. Since the enlargement of the Legislative Councils in 1892 there has been a preponderance of leading vakils amongst the non-officials who, by their training at the bar, have a decided advantage over their official colleagues, most of whom belong to the Indian Civil Service the members of which have proved themselves remarkably successful as administrators by reason of the fact that their policy hitherto has been one of decisive action and discreet silence while their official training is not such as to qualify them to make extempore speeches or to meet debates in Council."

CHAPTER VIII

THE INDIAN LEGISLATURES—(*continued*)

THEIR LEGISLATIVE FUNCTIONS

Legislative and Executive Acts

From what has been said in the previous chapter, it will have been perceived that the Indian legislatures were originally created for a strictly limited purpose, namely, that of making laws and regulations, as a non-sovereign legislative body subordinate to the Imperial Parliament. The progress of constitutional development even in India has, however, led to the enlargement of both the constitution and the scope of work of these Councils. Both in the department of legislation and of administration, their functions are becoming enlarged from time to time. The powers of the Councils in regard to the latter, however, are of very recent growth and inappreciable. The distinction between legislation and the other functions of Government, namely, those comprised under administration is, no doubt, important from the point of view of political theory, but as is usual in all such cases, the line dividing them is hard to draw and the question whether a particular act done or required to be done is an act of legislation, or of

administration is not easy of solution. Moreover, it is very necessary to note that the power of a statute enacted by the legislature need by no means be confined to the province of what a jurist or political philosopher would consider the domain of legislation. This is as true of Acts of the Indian Legislative Councils as of the Acts of the Imperial Parliament. Taxation, for instance, in England is the undoubted province of the legislature, to vote by means of an Act, and in India legislation is invariably resorted to whenever fresh sources of raising taxation are proposed. Similarly, there are many fiscal and administrative enactments both in England and in India which could hardly be classified as legislation. On the other hand, there are many matters in which, as we have indicated in the last chapter, the Executive is empowered to practically legislate by rules and to administer the rules so legislated.

Their distinction one of method

The only legal distinction, therefore, between the acts of the legislature and the acts of the Executive is the method adopted in deciding on and pursuing a course of action with reference to the government of the country. This absence of a clear differentiation of functions between the legislatures and the Executive is accentuated in this country by the fact, to which reference has been made, that the Legislative Council practically grew out of the Executive Council. The Act of 1833 formally enhanced the legislative power of the Governor-General in Council

by the addition of a Law Member to it, by abolishing the legislative authority of the Madras and Bombay Councils (an authority which was subsequently restored) and by enacting that the body so constituted "is authorized to legislate for all persons, places and Courts within the Companys' territories", and that the laws made by it "are, subject to disallowance by the Court of Directors, to have the effect of Acts of Parliament." The Council was strengthened in 1853 by the nomination of additional members to it when acting for the purpose of making laws and regulations. The Indian Council's Act of 1861 formally consolidated, revised and regulated the legislative powers of the Councils. It also restored subordinate legislative authority to the Madras and Bombay Councils and provided for the creation of further Provincial Legislative Councils in fresh provinces to be created with Lieutenant-Governors.

Powers of Legislation of Indian Councils

The limitations put upon the power of legislation which was in general terms bestowed on the Governor-Generals' Council in 1833 will be gathered in their detail from the enactments printed in the Appendix. Generally speaking, the Imperial legislature has power (1) to make laws for all persons, for all Courts and for all places and things within British India, (2) for all Native Indian subjects of His Majesty whether within or without His Majesty's dominions in any part of the world, (3) for all British subjects of

His Majesty and servants of the Government of India who reside in parts of India outside British India, (4) for all persons employed in the Military or Marine Service of His Majesty in India and (5) for repealing or altering such laws or other laws and regulations for the time being in force in British India. No law so made is to be deemed invalid by reason only that it affects any of the prerogatives of the Crown or any of the statutes or laws of England not applicable to India. But the Imperial Legislative Council (i) has not power to make any law repealing or affecting the laws by which the Indian Government has been constituted, namely, *(a)* some of the provisions of the Government of India Act of 1833 and all the provisions of the Government of India Acts of 1853, 1854, 1858 and 1859, the provisions of the Indian Councils Act of 1861 and *(b)* any Act of Parliament passed since 1861 extending to British India, and a few minor Acts such as Acts enabling the Secretary of State to raise loans on behalf of India, the Army Act and Acts amending the same ; (ii) has not power to make any law affecting the authority of Parliament or any part of the unwritten laws of the constitution of the United Kingdom of Great Britain and Ireland 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 British India ; (iii) nor has power, without the

previous sanction of the Secretary of State, to pass any law empowering any Court other than the High Court to sentence European subjects of His Majesty to the punishment of death or abolishing any High Court. One restriction referred to above is perhaps of more importance than others, so far as constitutional rights go, *viz.*, that which refers to the allegiance to the Crown in clause (ii) above. This has virtually been interpreted as amounting to a compact on the part of the subject to bear allegiance to the Crown and on the part of the King to preserve the constitutional rights of the subject, contained in the unwritten laws of the United Kingdom of Great Britain and Ireland. Mr. Justice Norman, in the case of *In re Ameer Khan*, has explained this aspect of the question in the following words :—

"In order to see what is meant by the words 'unwritten laws or constitution whereon may depend in any degree the allegiance of any person," it is necessary to consider first what allegiance is. Every one born within the dominions of the King of England or in the Colonies or dependencies, being under the protection of the King, therefore, according to our common law, owes allegiance to the King. Every British subject is born a debtor by the fealty and allegiance which he owes his Sovereign and the State, a creditor by the benefit and protection of the king, the laws and the constitution. 'Allegiance,' says Sir William Blackstone, 'is the tie which binds the subject to the King in return for that protection which the King affords to the subject.' Foremost amongst the privileges assured to the subject by the protection of the Sovereign is liberty and security of the person. The Crown cannot derogate from those rights. Bracton tells us that

'the King is under the law, for the law makes the King.' The King cannot interfere with the liberty of the subject, nor deprive him of any of his rights. How absolute soever the sovereigns of other nations may be, the King of England cannot take up or detain the meanest subject at his will and pleasure.

"I will proceed to consider what are the 'unwritten laws and constitution' of the United Kingdom which are alluded to in the section (*b*). It is well known that the provisions of the Great Charter and the Petition of Right are for the most part declarations of what the existing law was, not enactments of any new law. They set forth and assert the right of the subject, according to what was assumed to be the ancient unwritten laws and constitution of the realm.

"Now if it be true that allegiance and protection are reciprocally due from the subject and the Sovereign, it is evident that the strict observance of the laws which provide for such liberty and security ensures the faithful and loving allegiance of subjects.

"On the faithful observance by the Sovereign of the unwritten laws and constitution of the United Kingdom, as contained in the Great Charter and other Acts which I have mentioned, depend in no small degree the allegiance of the subjects. It would be a startling thing to find that they could be taken away by an Act of the subordinate Legislature. It would be a strange thing indeed if a great popular assembly, like the Parliament of England, had put into the power of a Legislature which has not, and in the nature of things cannot have, any representative character, the power of abrogating or tampering with such fundamental laws."

Powers of Indian Legislatures plenary

The net effect of the powers and restrictions relating to the Indian legislatures cannot be better put than in the words of Lord Selborne in the case of *Queen* v. *Burah*. He says :—

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it

can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established courts of justice, when a question arises as to whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so is by looking to the terms of the instrument, by which affirmatively the legislative powers were created, and by which negatively they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would of course be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions."

Limited power of Regulation-making of the Executive

These plenary powers of legislation, which the Indian Legislatures at present possess, are the result of the series of enactments which we have referred to above, between the years 1833 and 1861 which had changed their original character of being delegates or agents of the Imperial Parliament. The delegated authority, originally in the hands of the Councils, then Executive as well as Legislative, ceased to exist with the constitution of plenary Legislative Councils with additional members, but the exercise of the delegated power of 'regulation-making' by Executive authority, continued without legal warrant for many years in respect of the administration of territories not brought within the regular administration of British Courts and British laws. The difficulty,

however, was found out during the time of Sir Fitz-James Stephen as Law Member in India, who placed the power of so-called regulation-making in the hands of the Executive on a legal and statutory basis. Under the Government of India Act of 1870, the power of making regulations at the instance of the local Governments concerned was vested in the Governor-General in Council in his executive capacity in respect of what are, by a curious contradiction in terms, called non-regulation provinces, or provinces in which, owing to their backward character, the regular Indian law and Law Courts could not be established. The Governor-General in his own person also has been vested with an extraordinary power of making Ordinances having the force of laws in cases of emergency for a period not exceeding six months.

The Rule of Law in India

These vestiges of the tendency to what may be termed non-legal methods of Government in India, are still noticeable here and there in the Indian Statute Book. Peculiar powers of deportation are, for instance, found in Regulations nearly a century old and these have recently been revived and exercised under circumstances, also deemed peculiar, but their exercise has been vigorously challenged both in England and in India. Subject to these exceptions, the Indian Constitution may be deemed to be as much subject to the rule of law as the British Constitution. What this singular advantage of

British institutions means to India has not always been grasped by many people who have a fondness for arbitrary methods and personal Government; but students of Constitutional History will easily discern that this is, perhaps, one of the most valuable advantages which the British connection has secured for this country. The value of this constitutional principle to India can hardly be over-estimated and cannot be put better than in the words of Sir Fitz-James Stephen, who was a Law Member of the Viceroy's Council during the time of Lord Mayo's Viceroyalty. "Peace and law," he said, "go together; whatever else we do in India, we must keep peace; and this is strictly equivalent to saying that we must rule by law." The remarks of this great jurist on the constitutional question whether India shall be ruled by law according to British traditions, or by arbitrary, personal government, according to what are fancied to be Oriental notions, are so apposite that we extract them in a note at the end of this chapter, from the chapter on 'Legislation' which he contributed to Sir W. Hunter's "Life of the Earl of Mayo."

Province of Indian Legislation circumscribed

While it will thus be seen that the province of legislation has been enlarged with very beneficial results to the people of this country, it has also to be remembered that it has been limited by other circumstances. The share of the representatives of the people

themselves in shaping them is, in the first place, extremely limited. In the next place, it has been the declared policy of the Government not to interfere with the personal law of the various communities inhabitating this country, but to respect and enforce them, as laid down in their legal text books and as deducible from their settled customs, and to maintain scrupulous regard for the religious and social usages of the people themselves. The province of legislation in these directions is extremely circumscribed, and does not lend itself to assisting social progress to the extent to which it has done in Western countries. Interesting questions, legal and social, arise in connection with this peculiar state of things in India, which it is not the province of a student of constitutional history to discuss or to express opinions upon ; but their existence has to be noted as a constitutional fact tending to show that the domain of legislation in India is not as large as in Western countries where a more homogeneous population exists. Legally, of course, Parliament can legislate with the utmost freedom in respect of social and religious matters in India and in the Indian Legislatures also, measures of legislation affecting social and religious usages may be introduced, with the previous sanction of the Governor-General ; but the declared policy of neutrality on the part of the State in such matters, a policy which has been solemnly re-affirmed in the

late Queen's Proclamation of 1858, makes any interference by Government in any way counter to the feelings of the people themselves as unlikely as possible.

Powers of Provincial Legislatures

The powers of the Provincial Legislatures are in general respects co-extensive with those of the Imperial Legislature, but only in respect of the territories made subject to their laws. There are, however, a few important matters excepted from their competence and reserved absolutely for the Imperial Council. Apart from the general restrictions on the powers of the Indian Legislatures which apply equally to the Provincial Legislatures, the latter have not power to deal with matters comprised under Imperial Finance, Currency, Posts and Telegraphs; and they cannot alter the Indian Penal Code, without the previous sanction of the Governor-General.

Veto on Indian Legislation by the Crown and its representatives

All legislative measures passed by the legislatures in India are subject to the power of veto on the part of the Crown and of the authorities representing the Crown in India, as in the case of all Colonial Legislatures. Every act passed by a Provincial Legislature has to receive the assent of the Governor first and the Governor-General next, whereupon it becomes law. It is, however, subject to subsequent disallowance by the Crown, on communication of which to India it ceases to be law. Every law passed by the Legislative Council of the Governor-General has to receive the assent of the Governor-General and

is also subject to similar disallowance by the Crown. According to Sir. C. P. Ilbert, assent has usually been withheld on one or more of the following grounds:—(1) that the principle or policy of the Act or of some particular provision of the Act is unsound, (2) that the Act or some provision of the Act is *ultra vires* of the Provincial Legislature and (3) that the Act is defective in form.

Legislative work in India and the Legislative Department

Such, in brief, are the powers of the Indian Legislatures. Though restrictions on their power, constitutionally speaking, are great, the amount and the character of legislation which they have produced have been extremely valuable and might form examples to other states where more advanced legislatures have hardly succeeded so well in the sphere of law-making proper. Not that the Indian Legislatures have not blundered nor that their enactments are perfect; but they have a record of achievement respectable and creditable. This is due to their possession of a special Legislative Department as well as a compact constitution which has enabled the Indian Government to make its laws, whatever they have been, more systematically arranged and more thoroughly worked out than, for instance, in the United Kingdom. In its Legislative Department, the Government of India possesses an office, the function of which is the superintendence of all matters connected with the enactment and revision of the laws and which is under the charge of a member of the

Legislature. "The small size of the Indian Legislature," Sir Fitz-James Stephen points out, "the fact that it consists of only one body and the fact that its duties are purely legislative and that it has nothing to do with the Executive Government, expedite its proceedings to an extent which it is difficult for any one accustomed only to England even to imagine. The comparative fixity of tenure of the higher Indian officials and the practice which prevails of carrying on the legislative business continuously and not in separate sessions at the end of which every bill not passed is lost, all give a degree of vigour and system to Indian Legislation unlike anything known in England and which I hope and believe compensate to a considerable extent for its unavoidable defects and shortcomings."

The reforms introduced under the Councils Act 1909, might to some extent modify the observations of Sir Fitz-James Stephen. Symmetry and system in Legislative enactments are not a *summum bonum* in themselves, nor is simplicity of procedure at all conducive to soundness and suitability of legislative measures. The primary need for making legislation popular and representative of the feelings of the people whom the laws affect, outweighs every such consideration, and there can be no doubt that measures taken towards this result will secure far better the real object of all legislation, *viz.*, to make them suited to the people, render them

acceptable to them and obtain willing obedience to the Acts of the legislature.

Mode of transacting Legislative business

The procedure of the Legislative Councils in the making of laws will be found fully set out in the rules for the conduct of legislative business, published in the Appendix. The power of the Government on its part to introduce legislation in the Councils is limited; in the first instance, statutorily, by the provisions which we have referred to in the previous pages and, in the next place, by the Legislative standing orders, which have been framed in conformity with the Acts and in pursuance of the policy laid down from time to time by the Secretary of State and the Government of India. There have been many disputes over questions connected with this matter, affecting the powers of the various Executive authorities responsible for the administration of India, in introducing legislation. Some of these are embodied in the standing orders from which we have extracted important portions in the Appendix. Special attention might be directed to one of these which is of more than administrative significance and has raised and decided a constitutional issue of importance to which we have already referred in Chapter II, *viz.*, the extent to which the Government of India is responsible to the Secretary of State in the matter of initiating legislation.

Note

[*Extract from the Chapter on "Legislation under Lord Mayo" by Sir James Fitz-James Stephen in Hunter's "Life of the Earl of Mayo".*]

"Many persons object not so much to any particular laws, as to the Government of the country by law at all. They have an opinion which I have in some instances heard very distinctly expressed by persons of high authority, that the state of things throughout India is such that law ought in all cases to be overridden by what is called equity, in the loose popular sense of the word. That the Courts of Justice ought to decide not merely whether a given contract has been made and broken, but whether it ought to have been made, and whether its breach was not morally justifiable. In short, that there ought to be no law at all in the country as far as natives are concerned, but that in every instance, the District Officers ought to decide according to their own notions, subject only to correction by their superiors.

In the second place, it is a favourite doctrine with persons who hold this opinion that the Government of India possesses the absolute power of the old native states subject only to such limitations as it has chosen to impose upon itself by express law. That every new law is thus a new limitation on the general powers of Government and tends to diminish them, and that there ought to be as few laws as possible, in order that the vigour of the executive power may be maintained at a maximum.

Nothing struck me more in my intercourse with Indian civilians, than the manner in which the senior members of the service seemed to look instinctively upon lawyers of all kinds as their natural enemies, and upon law as a mysterious power, the special function of which was to prevent, or at all events to embarrass and retard, anything like vigorous executive action. I was once discussing with a military officer of high rank, and in high civil employ, the provisions of a bill for putting certain criminal tribes in the North-West Provinces under police supervision. When I showed him the powers which it conferred upon executive officers, he said, "It is

quite a new idea to me that the law can be anything but a check to the executive power."

I may give a few illustrations, which will throw further light upon this way of thinking. One of the commonest of all complaints against Indian law is that it is stiff and inelastic, that it does not adjust itself to the exigencies of real business and so forth. I have heard these complaints perhaps a hundred times and whenever I heard them I asked the same question, 'which particular law do you refer to, and in what manner would you make it more elastic?' If, as was generally the case, I got no distinct answer to this question, I used to ask whether the objector thought that the Penal Code was too definite, and that it could be improved if its definitions were made less precise; and in particular, whether he would like to have the definitions of murder or theft, or of any and what other crime, altered and if so, where and how? These questions were hardly ever answered. I generally found that nearly every one, when closely pressed, gave the same illustrations as to what he understood by the stiffness and want of elasticity of the law. They all referred to those sections of the Code of Criminal Procedure which require the officer presiding at the trial to take down the evidence with his own hand, and their notion of rendering the Code more elastic was that this requirement should be relaxed.

These sections are the chief guarantee that a judge actually does this duty, and does not merely pretend to do it. They are the great security for a fair trial to the person accused. Before they were inserted in the code, it was a common practice for the judges not to hear the witnesses at all, but to allow four or five native clerks to take down the evidence of as many witnesses in as many different cases at the same time; and then to form his opinion, not from hearing the witnesses, but from reading, or from having read over to him, the depositions taken by the native clerks. In fact, the elasticity which the critics in question really wished for, appeared to me on full examination to be elasticity in the degree of attention which they were to bestow on the most important of their own duties.

A friend of mine, whilst inspecting an important frontier district, received complaints from the officer in charge of it as to the want of elasticity in the existing system; and on asking what he meant, was informed that he had found it imposble to punish certain persons whom he knew to be guilty of murder. His informants would not come forward as witnesses for fear of the vengeance of the relations of the criminals, and the law did not permit him to move without a regular trial. 'Then,' replied my friend, 'what you want is power to put people to death without any trial at all, and on secret information which is satisfactory to your own mind, of which the persons who give it are not to be responsible' This, no doubt, was what the officer in question did want. It had not occurred to him that the impunity of a certain amount of crime was a less evil than the existence of an arbitrary and irresponsible power, which would practically have to strike in the dark.

* * *

What I wish to notice is the gross fallacy of condemning law and legislation in general, because the provisions of one particular law which allows land to be sold for debts may be open to question. There is nothing specially refined or technical in the law in question. What is really objected is its stringent simplicity. A law which mediated between the usurer and the landowner, which tried to secure to the one his just claims, and to the other the enjoyment of what he had been accustomed to regard as his ancestral rights, would have to be far more complicated than a law by which a judgment-creditor may sell his debtor's land by auction. In this, as in numberless other instances, the commonplaces about simple and primitive populations and refined systems of law mean merely that particular laws ought to be altered, which is a reason for, not against, legislation. To wish to put an end to legislation because some laws are not wise, is like wishing to put an end to tailors because some clothes do not fit. To argue that, because some English laws are unsuited for some Indian populations, law in general is not the instrument by which India ought to be governed, is to assume that law is not that which a legislator enacts as such; but a mysterious

something which is to be found in England, and which must be introduced bodily into India, if India is to be governed by law at all.

The only rational meaningwhich can be ascribed to such language as I refer to is one which is not expressed, because it cannot be avowed. It is, that the person who uses it would like the law to stand as it is, but that the District Officers should use their own discretion about putting it in force. This is only a weak form of the doctrine that India ought to be governed, not by law, but by personal discretion. A law which people may enforce or not, as they please, is not a law at all.

The theory that Government by law is not suitable for India, and that everything ought to be left to the personal discretion of the rulers, that is to say, of the District Officers, is one of those theories which many persons hold, though no one who regards his own reputation will avow it. In England, every one will admit in words that popular reduction is an admirable thing, whilst many persons couple the admission with qualifications intelligible only upon the supposition (which is undoubtedly true) that in their hearts they believe it to be mischievous. In India, whilst hardly any one will be found to maintain distinctly that the personal discretion of local rulers, free from all law whatever, is the true method of Government, numbers of people qualify their consent to the proposition that the country must be governed by law, by commonplaces like those of which I have given specimens, and which really mean that unfettered personal discretion would be a much better thing. The unavowed influence of this theory acts so powerfully, that it will be by no means superfluous even now to show how baseless and mischievous it is.

In doing this it is necessary to refer shortly to common places, which are often forgotten because they are so familiar. Often as it has been repeated, it is not the less true, that the main distinction between the Government which we have established and the government which it superseded is, that the one is in the fullest sense of the word a government by law, and that the

other was a government by mere personal discretion. It is also true that the moral and general results of a government by law admit of no comparison at all with those of despotism. I do not believe that the people of England, as a whole, would take any sort of interest in supporting a mere despotism, differing from those of the native rulers only in the fact that it was administered by Englishmen.

Government by law is the only real security either for life or property, and is therefore the indispensable condition of the growth of wealth. This is no mere phrase. Before the introduction of law, it admitted of considerable discussion whether property in land existed in India at all. It admits of no discussion that the value of funded property depends entirely upon the limitation of Government demand, and upon the due adjustment of the relations between the cultivators and the zamindars. Laws, therefore, of some kind there must be.

CHAPTER IX

THE LEGISLATURES AND THE EXECUTIVE

Attempted control of the Administration by the Legislature between the years, 1853-1861

When the function of legislation was differentiated from that of administration in British India and entrusted to the hands of the Councils expanded for legislative purposes by additional members, between the years 1833 and 1861, as we saw in the last chapter, it was found that they had to be further strengthened by the addition of Provincial and other representatives to assist in the making of laws. Legislative activity at that period was marked, and, between the years 1853 and 1861, the Indian Legislatures modelled themselves on the procedure of the House of Commons in England, and not only proceeded to deal with matters of legislation, pure and simple, but also with questions of administration. They showed what was then considered, in the words of Sir C.P. Ilbert, an inconvenient degree of independence by asking questions as to, and discussing the propriety of, measures of the Executive Government—deeming themselves competent to enquire into abuses and grievances, calling for reports and returns from the local administrations, debating long on

questions of public interest and introducing motions and resolutions independent of the Executive Government. In a despatch of Lord Canning at the time, he pointed out that the Council had become invested with forms and modes of procedure closely imitating those of the House of Commons, that there were 136 standing orders to regulate the procedure of a dozen gentlemen assembled in Council, that, in short, in the words of Sir Lawrence Peel, they had assumed jurisdiction in the nature of that of a grand inquest of the nation. It is needless to say that the Legislative Council came into constant conflict with the Executive Government of those days. The following, among others, may be cited as examples of the power which, whether originally intended to be vested in the Council or not, was actually exercised by the Governor-General's Legislative Council between the years 1853 and 1861 :—

At the meeting of the Council held on the 16th April, 1859, Sir Charles Jackson put the following question :— "Whether the Government have taken any and what steps for the erection of a jail in a suitable climate for the reception of European or American convicts sentenced to terms of penal servitude under Act XXIV of 1855?" In support of the question, he made a long statement giving his reasons for his inquiry; and the answer was also accompanied by a statement at some length.

On September 6, 1859, the Vice-President (Sir Barnes Peacock) called the attention of the Council to certain observations made by the Madras Supreme Court in the matter of an application by one Gunshamdoss, which observations were considered by Sir Barnes Peacock as 'at

reflection on the Legislative Council. Then, on the 4th February, 1860, the matter was by a motion referred to a select committee and the report of the committee was presented on the 25th February, 1860, when Sir Barnes Peacock moved the following resolution thereon, *viz.*, "the remarks of the learned Judges of the Supreme Court of Madras on Act XVI of 1859 in delivering judgment on the 8th August, 1859 on the case of Gunshamdoss, were unwarranted by the facts and were wholly unjustifiable." In moving the resolution, Sir Barnes Peacock made a very long and interesting speech in the course of which he said that the members of the Legislative Council were as independent as the learned Judges of the Supreme Court of Madras and generally defended the conduct of the Legislative Council against the attacks of the Supreme Court. Mr. Sconce, Sir Charles Jackson and Sir Bartle Frere and the Right Honourable Mr. Wilson all took part in the debate. The original motion was eventually withdrawn and a resolution that the report of the select committee be adopted and transmitted to the Secretary of State for India was unanimously agreed to.

On the 18th August, 1860, Sir Mordaunt Wells rose to call the attention of the Council to the evidence given before the Indigo Commission by the Hon'ble Mr. Eden, a member of the Bengal Civil Service, so far as his evidence referred to the administration of Criminal justice in Her Majesty's Supreme Court." In thus calling the attention of the Council to the subject, Sir Mordaunt Wells made an elaborate speech quoting facts and figures in defence of the Supreme Court of Calcutta against the charge made by the Hon'ble ... Ashly Eden, that the Supreme Court and the Calcutta Jury were partial to Europeans accused of offences. Sir Bartle Frere, Mr. Forbes, Member for Madras, Sir Barnes Peacock and Mr. Sconce, all spoke on the subject.

On the 15th December, 1860, Sir Barnes Peacock moved that Government be requested to furnish several items of information specified in the notice of motion in respect to certain grant by the Government to the descendants of

Tippu Sultan of Mysore. The Vice President made a most vehement and eloquent speech in support of his motion.

The motion was opposed most vigorously by Sir Bartle Frere and others on behalf of the Executive Government. The Council was divided and the votes were equal in number. Sir Barnes Peacock in the chair as Vice-President gave a casting vote in favour of his motion which was carried.

The information asked for by the resolution was substantially given by the Government on the 22nd December, 1860 when Sir Charles Jackson in the absence of Sir Barnes Peacock expressed his gratification and said that the message granting the information "would increase that confidence which the Council had in the Executive Government and would promote that harmonious action between the Executive Government and the Council which was so greatly to be desired."

Powers of Councils curtailed by Act of 1861

The activities of the Council at this time and the lively disputes which it had with the Executive Government finally led to an address of the Legislative Council for the communication to it of certain correspondence between the Secretary of State and the Supreme Government of India. These, together with the differences which arose between the Supreme Government and the Government of Madras on the Income Tax Bill and the doubts which had been raised as to the validity of laws introduced into non-regulation provinces without enactment by the Legislative Council, finally led to the revision and consolidation of the laws in regard to the Indian Councils in general. The Indian Councils Act of 1861 provided a most effective check against any interference of the Legislative Councils with the Executive

even by way of advice or suggestion. Under section 19 of that Act, it was enacted that no business shall be transacted at a Legislative Meeting of the Governor-General's Council other than the consideration of measures introduced or proposed to be introduced into the Council for the purpose of enactment or the alteration of rules for the conduct of business at Legislative Meetings, and that no motion shall be entertained other than a motion for leave to introduce a measure into Council for the purpose of enactment or having reference to a measure introduced or proposed to be introduced into the Council for that purpose, or having reference to some rule for the conduct of business. Similar restrictions were imposed on the Provincial Legislative Councils.

Restrictions slightly relaxed by Acts, of 1892 and 1909

These restrictions were somewhat relaxed by the Indian Councils Act of 1892, which permitted (1) the asking of questions in regard to administrative matters, under strictly limited conditions, by the Members of Councils and the eliciting of answers thereto, and (2) the explanation of the annual Financial Statements of the Imperial and Provincial Governments in the respective Councils and a general discussion of the same by the Members. The Indian Councils Act of 1909 has further relaxed the limitations imposed by the Act of 1861 limiting the business of the Council to purely legislative matters, by empowering the Governor-General in Council and the Provincial Governments to

make revised rules (*a*) for allowing supplementary questions to be put along with interpellations in the Council, (*b*) for moving resolutions on the Financial Statements presented to the Councils, and (*c*) for moving resolutions on matters of general public interest at meetings of the Legislative Councils. It is doubtful if the extent of what we may call concessions, thus granted to the Legislative Councils, in allowing them to deal with matters of administration, amount to a restoration of the position which they occupied and exercised under the Act of 1853. It may be pointed out, however, that under the Act of 1853 the powers of the Council, if they existed at all, were unrestricted by any legislative limitation and controlled only by the standing orders above referred to. The express limitation on the powers of the Councils imposed by the Act of 1861 is not repealed by the Indian Councils Act of 1909, but only modified to the extent to which the rules framed by the Governor-General in Council or the Provincial Governments may relax it, while the province of such concessions as the Executive Government may grant in this behalf is expressly forbidden to be widened by the Legislative Councils under their power of making rules for the conduct of business.

Extent of present powers

It is too early to decide to what extent the powers of the Legislative Councils to criticise and control the administration might be developed under the rules now framed by the Exe-

cutive Government. On the one hand, the Executive Government may not make such rules as to nullify in effect the privileges that have been granted; on the other hand, the Legislative Councils or their members may not so far extend the letter of the rules as to defeat the express limitations imposed on their powers by statute. The rules themselves which have now been framed by the Governor-General in Council for this purpose will be found in the Appendix. They are divisible into two sections, (1) those dealing with the powers which the Legislative Councils are now invested with in discussing and proposing resolutions on the Budget and (2) the powers which they are invested with in obtaining information from the Executive Government and in discussing questions of general public interest. The former are dealt with in the two subsequent chapters dealing with Indian Finance. The latter, which concern the more general respects of administration, may be dealt with here.

Powors and Procedure of House of Commons

The utmost powers which a Legislature could exercise over an executive, whom it can directly or indirectly control, are exemplified in the practice of the British House of Commons towards the Ministers of the Crown and the Departments of State. As the rules which have now been framed have, according to thet Government of India, been to some extent framed upon the practice of the House of Commons, it is useful to contrast the exact

limits of the steps now taken in India with those obtaining in Parliament. In theory, of course, the Executive is not in England subject to the control of Parliament, but in practice ministerial responsibility to Parliament has been more completely enforced in England than in any other modern democratic state. As Professor Dicey has pointed out: "There is not to be found in the law of England an explicit statement that the acts of the Monarch must always be done through a Minister, and that all orders given by the Crown must, when expressed in writing, as they generally are, be countersigned by a Minister. Practically, however, the rule exists, as the custody of the various seals of the Crown is in fact vested in several Ministers of State. What the law of England provides is that a Minister who takes part in giving expression to the Royal Will is legally responsible for the act in which he is concerned, and he cannot get rid of his liability by pleading that he acted in obedince to Royal orders".

Thus, the acts of the Executive are brought under the control of the law of the land, and this constitutional principle equally applies to the acts of the Executive in India, except in so far as the laws themselves may provide immunity from legal consequences in respect of acts done under such statutory powers. The tendency to grant such immunity is, no doubt, very much greater in this country than in England, mainly owing to the fact that a British

Parliament is unlikely to tolerate any such infraction of its rights in respect of the affairs of its own country. There are no doubt in England other weapons in the hands of Parliament by which the Executive is made subject to the complete control of the House of Commons, such as the power of impeachment, censuring etc, but the ordinary legal power which enables the House of Commons "to insist that the Ministers shall answer what are deemed proper questions and shall carry out resolutions which are the outcome of the deliberate will of the House of Commons," is, according to the late Professor Maitland, "in the last resort the power of withholding supplies or of refusing to legalise the existence of a Standing Army." In the absence of any such power in the Indian Legislative Councils, it is obvious that the effect which their resolutions may have on the Executive will be conditioned by the merit of the resolutions themselves, by the extent to which they express general or popular will and, this is the most important consideration, by the extent to which the Executive deems fit to accede to such expression of popular will in the Councils.

The usual methods adopted by the House of Commons in England in respect of administrative matters fall under three heads, namely, (1) the practice of Parliament in regard to asking for information from the Executive, by means

of questions or by motion for papers relating to matters of administration, (2) the exercise of what we may term an inquisitorial power by the House of Commons in respect of the administration of public affairs in any department of State, by the appointment of Select Committees or Commisions—either with a view to make the results of such inquiries the basis for legislation or with a view to introduce administrative reforms—and (3) by the practice of moving resolutions on all matters connected with administration, including motions of censure on the conduct of Ministers or of their departments and motions for adjournment on the refusal of any minister to give information to the House or to comply with other similar requests on the part of members. The general principles on which the above rights are based are laid down by Sir Erskine May in the following terms :—

"The limits, within which Parliament, or either House, may constitutionally exercise a control over the Executive government have been defined by usage upon principles consistent with a true distribution of powers in a free state and limited monarchy. Parliament has no direct control over any single department of the state. It may order the production of papers for its information ; it may investigate the conduct of public officers and may pronounce its opinion upon the manner in which every function of Government has been, or ought to be discharged ; but it cannot conveiy its orders or directions to the meanest executive officer nn relation to the performance of his duty. Its power over the executive is exercised indirectly, but not the less effectively, through the responsible Ministers of the Crown.

These Ministers regulate the duties of every department of the State, and are responsible for their proper performance to Parliament as well as the Crown. If Parliament disapprove of any act or policy of the Government, Ministers must conform to its opinion or forfeit its confidence. In this manner the House of Commons, having become the dominant power of the legislature, has been able to direct the conduct of the Government, and control its executive administration of public affairs, without exceeding its constitutional powers."

"Every measure of the ministers of the Crown" says Lord Grey, "is open to censure in either House; As that when there is just or even plausible ground for objecting to anything they have done or omitted to do, they cannot escape being called upon to defend their conduct. By this arrangement, those to whom power is entrusted are made to feel that they must use it in such a manner as to be prepared to meet the criticisms of opponents continually on the watch for any errors they may commit, and the whole foreign and domestic policy of the nation is submitted to the ordeal of free discussion."

Powers of Indian Councils, as to (i) interpellation,

We may now proceed to consider how far or how little the new rules framed by the Governor-General in Council, in respect of the discussion of administrative matters by the Indian legislatures, bear resemblance to the practice of Parliament. To take the question of giving information to members of the Legislature, we may point out that the English practice is based on the principle "that it is imperative that Parliament shall be duly informed of everything that may be necessary to explain the policy and proceedings of Government in any part of the Empire and the fullest information is communicated by Government to both Houses from time to time upon all

matters of public interest." Information is, of course, withheld on the ground that public interests will suffer by their disclosure and Ministers cannot be compelled to give the same ; but when Ministers do so, they take the responsibility for so doing and if the House is of a contrary opinion, the member who asks for information can move for the adjournment of the House or move a resolution asking the Minister to furnish the information. The powers of interpellation given to members of the Legislatures in India proceed on the reverse principle that the Government is not bound to give any information except such as it deems necessary to give in the public interests, and it is a question whether the power of moving resolutions now vested in the Councils under the rules extends to moving resolutions asking for information or for adjournment, which is doubtful. The practice of putting supplementary questions in England has been developed into what we may term a fine-art, both on the part of those putting the questions and on the part of those Members of Government who answer them. Whether the strictly limited power of putting supplementary questions which has been granted this year to the Indian Councils, subject to the wide discretion vested in the President in respect thereof, could, and is likely to, be developed into a weapon of of heckling the Executive, as is done in England, it is too early to prophesy.

(ii) appointment of Select Committees and motions

We may next consider the practice as to the appointment of Select Committees. The appointment of Select Committees in the Indian Legislatures in respect of legislative measures introduced in the Councils has been used with very great benefit to the public interest, and in this respect this practice has been deemed to be a wholesome and advantageous variation from the practice and procedure of Parliament in England with respect to Bills which are usually discussed in committees of the whole House and are voted upon more or less on party lines and passed after the third reading. There seems to be nothing in the new rules preventing the Government or any member to move for the appointment of Select Committees of the Councils to enquire into matters of administrative reform or of administrative abuses, and it is sufficient to note that having regard to the nature of the constitution of the Councils, mixed committees of official and non-officials appointed for those purposes may be the best suited to advise as to the course of action to be taken by the Government. Of course, there is no scope for discussion of questions of public interest on, what are usually termed in the House of Commons, motions to go into committee, or motions for adjourment before the orders of the day are begun, so as to allow discussions in Council on questions of urgent public interest and an oppor-

tunity to the Executive to furnish the Councils with a statement of its policy or its procedure in regard to urgent adminstrative matters.

It is, as has been pointed out already, quite possible that if the powers now entrusted to the Councils are used with care, wisdom and discrimination, precedents and procedure analogous to those of the House of Commons might gradually grow up and might serve as a useful means, if not of directly controlling the Executive,—a power which, under the present constitutional arrangement of the Government of India, it is impossible that the Council could possess—at least of directing the Executive into correct and proper channels in regard to administrative policy and administrative action.

CHAPTER X

THE COURTS AND THE CONSTITUTION

The division of governmental functions

A description of the judicial system of the Indian Empire and the powers and duties of Courts is easily available in many recognised text books. In the pages of Cowell's "Courts and Legislative authorities in India" will be found an exhaustive discussion of how the jurisdiction of Courts, established under the authority of the British Government, arose and became established throughout the country and by what laws and rules they are now regulated. It is, therefore, not attempted to re-produce their substance here, nor to discuss the questions arising out of the Indian judicial system in itself, which are mainly of interest to the student of law rather than to the student of the Constitution, who is principally interested in the relationship of the Courts to the various executive and legislative bodies. It is usual to talk of the English Constitution as resting on a balance of powers and as maintaining a division between the executive, legislative and judicial bodies. Such a distinction, though not quite accurate as to actual facts, as was pointed out in an earlier Chapter, rests upon the definitely

recognised principle of the supremacy of the British Parliament and the supremacy of its laws, to which both the Courts and the Executive are subject. The Executive of the English Constitution, though distinct from the legislature, have been made completely subordinate to it in actual fact. The growth of constitutional principles and understandings have brought the Crown and its servants, in whom the theory of the English Constitution vests the executive authority, into entire subjection to the authority of the legislature. On the other hand, the position of the Judges, though of unquestioned subjection to the law of the land, has been made independent by placing their office on a permanent tenure and raising it above the direct influence of the Crown or the Ministry to whom they might have owed their original appointment.

This inter-relation of the three organs of Government necessarily underwent alterations when applied to the case of territories governed by non-sovereign legislatures within the British Empire. The legislatures of the Colonies and of India are, as pointed out before, subordinate law-making bodies, and it has, therefore, become the necessary function of the Judges of the Courts of the land to interpret the law made by these legislative authorities and to decide whether they are within or beyond of the scope and competence of their respective authority. The Courts, therefore, both in India and in the Colonies, are empowered to pronounce on the

validity or constitutionality of laws made by their respective legislatures. The position of the Judges of His Majesty's Courts both in the Colonies and in India has consequently been made one of independence of both the legislatures and of the Executive of these territories.

The authority of His Majesty's Courts

Since the days when Parliament began to seriously take upon itself the responsibility of the administration of this country, it has pursued the definite policy of establishing His Majesty's Courts in India, owing their authority to the Government at Home' (and not to the Company in India) and exercising jurisdiction subject to the sovereiguty of Parliament. This has been deemed as a necessary concomitant of the introduction of British institutions into this country, as well as elsewhere in the Empire. The Regulating Act of 1772 recited that the Charter Act which authorised the East India Company to establish courts did not "sufficiently provide for the due administration of justice in such a manner as the state and condition of the Presidencies do and must require", and empowered His Majesty to establish by Charter a Supreme Court of Judicature at Fort William, consisting of a Chief Justice and three other Judges exercising all the powers which the King's Courts might exercise in England. How far this Court was deemed to be independent of the Executive and the Legislatures in India—that is, the Governor-General and his Council—can be easily inferred

from the famous disputes which arose between this Court and the Governor-General's Council, which nearly reduced the Government of Bengal to a deadlock and necessitated the interference of Parliament to remove some of the anomalies which then arose. The Supreme Court at Calcutta and those at Madras and Bombay which were later established, were in fact originally created for the purpose of acting as a check upon the powers of the Government then administrating the affairs of India, and especially over English residents in India. It was considered at the time, as Sir Fitz James Stephen points out, "not without reason, that by establishing courts independent of the local Government, armed with somewhat indefinite powers and administering a system of law of which they were the only authorized exponents, a considerable check might be placed upon the despotic tendencies on the part of the Government. The effect of this policy was, in the first place, to produce bitter dissensions between the Government and the Supreme Courts both at Calcutta and at Bombay and, in the next place, to set the Supreme Courts and the English law of which they were administrators before, the eyes of every European in India, as representatives of a power not only different from, but opposed in spirit and principle to, the powers of the Government." This antagonism between the two authorities, the Governor-General in Council possessing legislative and executive functions and

the Courts of His Majesty, both simultaneously established by the Regulating Act, was eventually tided over by a series of enactments which enlarged and differentiated the legislative power from the executive and placed the authority of the Supreme Courts and of the High Courts which succeeded them, within bounds considered compatible with smooth and efficient administration.

Independence of the Judges

The Judges of the High Courts, with reference to the Indian Legislatures and the Indian Executive, then, do stand in a position of independence. They owe their appointment to Letters Patent from His Majesty, though the Governments in India may be and often are consulted as to their choice. They hold office during His Majesty's pleasure, and in this respect essentially differ from the Judges of the British High Court of Judicature, who can only be removed upon an address to His Majesty by both Houses of Parliament. The function of the Indian High Courts is to administer justice according to the law of the land, namely, the laws of the Imperial Parliament and the laws of the Indian Legislatures passed within the scope of their respective authorities, and according to the customs and usages of the communities inhabiting this land. While the position of the Judges has thus been made one of security against any improper influence of the Executive in India itself, the corrupt or improper exercise of their own powers was guarded against in the Regulat-

ing Act of 1772 by vesting the power to punish them for the same in the Court of the King's Bench in England, and for this purpose the Governor-General and the Governors in Council were made judicial authorities to take evidence and transmit the same to the Court in England when asked to do so. This provision has been reproduced in the collection of Statutes relating to British India, and we presume it applies to the Judges of the present High Courts which have succeeded the old Supreme Courts. The Judicial Committee of the Privy Council, constituted by an Act of 1833, is the highest judicial authority in respect of all judicial matters arising in India.

Combination of executive and judicial functions

The composition of the High Courts and of the Courts inferior to them has, however, to some extent, told upon their independence in relation to the Executive, which the judiciary was expected to possess under the original statutes. The position of the Judges of inferior courts is, so far as their discharge of judicial functions within their respective spheres is concerned, theoretically at any rate, one of independence of the Executive. The conduct of the Executive and its officers and the constitutionality of Indian Acts, in so far as they may come before them for judicial pronouncement, ought to be treated in the same way as any superior Court ought to treat it. The judges of the inferior courts are subject, no doubt, to the administrative control of the High Court, but the executive government, in the case

of a large number of them, has a good deal of voice in deciding their prospects and promotion. In the case of judicial officers who are Magistrates exercising criminal jurisdiction, the position of the executive officers of the Government is such as to permit of interference, sometimes serious, with the independence of the subordinate Magistracy in the discharge of their functions. The combination of executive with judicial functions in the same hands, which so largely prevails, however necessary or expedient in some circumstances it may be, has undoubtedly resulted in makig the actual discharge of judicial duties appear much less independent than was intended to be. Legally, of course, the two functions are clearly distinct, and the union of them in the same officer is only a matter of administration. The law does not recognise the prosecutor and the judge acting together in the same person, or in the same body of persons related to each other as superior and subordinate. On the other hand, the law does clearly distinguish between Magistrates and Judges who try cases and the prosecutor and police who prosecute and investigate. It is the union in practice of the two functions that has gone to interfere with the principle of the separation of functions on which all British institutions have been framed.

Special exemptions

There are, moreover, in India a few exemptions from the authority of the courts which are mainly of historical importance. The position

and prestige of the Governor-General and the Governors of the Presidencies has been enhanced from the time of the Regulating Act by the provision contained in it, that they shall be personally exempt from the original jurisdiction, civil or criminal, of the High Court or from arrest or imprisonment in any suit or proceeding of that Court. The Chief Justices and the Judges of the several High Courts are also similarly exempted. It has also been provided that an order in writing of the Governor-General in Council is a full justification for any act which may be questioned in any civil or criminal proceeding in any High Court, except so far as the act extends to any European British subject of His Majesty. The abuse of the authority or power vested in the Governor-General and the Members of his Council is provided against by vesting an authority to deal with them in the Court of the King's Bench in England and the High Court has been authorised, as the Governor-General and Governors in Council have been in respect of the High Courts, to take and transmit evidence to said Court in this behalf when asked to do so.

CHAPTER XI

INDIAN FINANCE

Wide field of Indian Finance

No account of the Indian Constitution can be considered complete without a brief description of Indian Finance. The total revenues of this country amount annually to more than 85 millions sterling and the total expenditure amounts to a like figure. The sources of these revenues are as varied as the purposes to which they are applied. We are not here concerned with the principles according to which the revenues of this country are raised. They vary from the extreme English conception of *laissez faire* to the equally extreme German conception of land and railway nationalisation. The history of Indian Finance is full of examples of financial statesmanship notable alike for resourcefulness and for success. Few modern states will furish adequate parallels to them. The study of Indian Finance, from a scientific point of view, has yet to be made in any serious fashion by students of Indian Politics or Economics. A proper presentation of its varied features and interesting tendencies during the last half-a-century and more is itself matter for a separate volume. Such a task is beyond the limits se for this book. All that is essayed here is merely

a brief examination of the relation that, under the present Constitution, exists between finance and government.

Control of Indian revenue and expenditure

By Section 2 of the Government of India Act, 1858, all the revenues of this country, from whatever source derived, are received for and in the name of His Majesty and must be applied to the purposes of the Government of India alone. By Section 41 of the same Act, the expenditure of the revenues of India, whether in India or elsewhere, is subject to the control of the Secretary of State in Council, and every grant or appropriation of such revenues cannot be made without the concurrence of the majority of votes at a meeting of the Council of India.

Indian public expenditure is either incurred in England or in India, roughly speaking. Expenditure in England is incurred only on the authority of the Secretary of State in Council; expenditure in India is incurred by the Government of India according to rules approved by the Secretary of State in Council. The sphere of expenditure, therefore, within which the Government of India may be said to have an unfettered discretion, is thus limited. To cite one example, no new appointment carrying a salary of over Rs. 250 per mensem can be created by the Government of India without the Secretary of State's sanction. In India itself, expenditure may be divided into Imperial, Provincial and Local, though all expenditure is

brought into the accounts of the Government of India.

Sources of Indian Revenue.

All revenue is raised in India. For constitutional purposes, it is sufficient to classify this revenue under two principal heads (i) that which has a legislative sanction and (ii) that which has not. The revenue derived from salt, customs, excise, assessed-taxes, provincial rates, stamps, registration and opium, come under the first head. The two considerable items under the second head are tributes and contributions from Native States, and land revenue. Tributes &c., from Native States form a class of revenue arising from the foreign policy pursued by the Government and foreign policy is, and largely ought to be, least controlled by the Legislature.

No legislative sanction for land Revenue

There appears, however, to be no constitutional reason for removing the item of land revenue from the sphere of those which require legislative sanction. This exclusion is generally justified on the ground that, ever since the days of Manu, the State has been entitled to have a share of the produce of the land from the cultivator. This customary right to a *Rajabhagam*, is said to be inherent in the British Government as the successors of the ancient Hindu Kings and is being enforced by such rules and according to such principles as the Executive have chosen to fix for themselves. Whether such a position could be considered sound from a modern financier's point of view is a question that need not be discussed in detail here. One argument may,

however, be stated in reply to it. In his Financial Statement presented on the 18th Feb. 1860, the Right Hon'ble James Wilson justified the imposition of frseh taxation by quoting the authority of Manu and proceeded as follows:—"Now, I must say that there is latitude enough here for the most needy Exchequer and for the most voracious Minister: a twenty per cent. income-tax upon profits; a tax varying from two to five per cent. upon accumulated capital; a share of almost of every article produced . . . I should imagine that revenue laws of the ancient Hindus must have been contributed to the sacred compiles by some very needy finance minister of the day!" And yet, though authority is found in Manu for income-taxes, customs and excise, all these have been imposed and are to-day collected only under legislative sanction. If a tax on income—a share of profits, as Manu put it—requires an Income Tax Act, why should a share of agricultural produce be levied without a legislative enactment? Into the vexed question of whether the land revenue is rent or tax, it is again unnecessary here to enter. Its assessment and collection are dependent purely on executive discretion and no one who pays land revenue has the right to question in a Court of Law the justice of the burden that is imposed upon him for the purposes of the State.

Financial and constitutional drawbacks thereof

The exclusion of land revenue from the province of the Legislature practically removes between 40 and 50 per cent. of the net public reve-

nues from any sort of control. Two considerations may be urged in this connection from a financial and constitutional stand point :—

(*a*) The amount realised as land revenue —which over a large part of India is subject to periodical revision—has grown and is growing and the funds at the disposal of Government are thereby swelled. Expenditure, therefore, also tends to increase in order keep pace with the increased revenue (*b*) when a surplus occurs and the Finance Minister casts about for the best means of effecting reduction of taxation, he finds himself unable to give any substantial relief to the class which pays the largest slice of the public revenue and which also really parts with the largest proportion of its income for the needs of the State. And, no wonder, he certainly cannot make any suggestions for reducing the amount taken as land revenue, because the principles of its assessment are not fixed by legislative enactment. He has, therefore, to fall back upon the abolition of a few unimportant cesses on land or upon the reduction or abolition of other taxes which have been sanctioned by the legislature. It seems to the present writer unnecessary to further press this constitutional objection against the present method of making land revenue assessments. The recent Royal Commission on Decentralisation has recommended the placing of these assessments on a legal and statutory basis and it is to

be hoped that that recommendation will be acted on.

Taxation voted by Legislature

It may, therefore, be stated that all *taxation* in India, except the one item of land revenue, has to be voted by the Legislative Council. Such, at any rate, has been the practice—the constitutional convention, if we may so put it—though there appears to be no definite statutory prohibition apart from the principles of the English Constitution, in the way of the Executive Government imposing a tax without reference to the Legislative Councils.

Executive uncontrolled in expenditure

With regard to public expenditure, however, the Executive both in practice and in theory has been absolutely uncontrolled. How far the reformed Councils will be able in future to exercise any control in this matter will be discussed in some detail in connection with the Budget.

Originally, the administration of the whole of Indian Finance was vested in the Government of India, a task which, with the growing development of the country, became both difficult and inefficient. A policy of decentralisation was initiated by Lord Mayo's Government in 1870 and the 'Provincial Contracts' came into existence. This policy has been considerably improved and developed of late. It must be clearly borne in mind, however, that the various Provincial Governments are merely repositories of financial powers delegated to them by the Imperial Government. Within the sphere

limited by the provincial settlements, they are free to order their own revenue and expenditure subject to various rules as regards the creation of appointments, raising of fresh revenue &c. The following passage taken from the new "Imperial Gazetteer of India" Vol. IV, p. 190, describes the system as it was introduced :—

Decentralisation of Provincial Finance in 1870

"The objects aimed at were to give the Local Governments a strong inducement to develop their revenue and practise economy in their expenditure, to obviate the need for interference on the part of the Supreme Government in the details of Provincial Administration, and at the same time to maintain the unity of the finances in such a manner that all parts of the administration should receive a due share of growing revenues, required to meet growing needs, and should bear in due proportion the burden of financial difficulties which must be encountered from time to time. This problem has been solved by the Government of India delegating to the Local Governments the control of the expenditure on the ordinary provincial services, together with the whole, or a proportion, of certain heads of revenue sufficient to meet these charges. The heads of revenue selected are such as are most susceptible of improvement under careful provincial management." These 'Settlements' with Provincial Governments were subject to revision periodically, but recently this policy has given place to a more permanent system. Provincial finance, on the whole, is under

the constant check and supervision of the Supreme Government and is only a part—and not independent—of Imperial Finance.

Local Finance.

The features of strictly Local Finance in this country are still more interesting, though they cannot be discussed in detail here. The revenues and expenditure of Local Boards and Municipalities are now separately shown in the Financial Statement of the Government of India. The revenue is mostly derived from taxes on houses, professions, vehicles &c. and from tolls. Both the imposition of these taxes and their expenditure are under the control of the Government. As has been already said in a previous chapter, a detailed description and discussion of the activities of these bodies must be held over till after the impending measures of decentralisation have been carried out in their case.

CHAPTER XII

BUDGETS AND BUDGETARY RULES

Finance and constitutional Government

"Money is the vital principle of the body politic. He who controls the finances of the State controls the nation's policy. Constitutionalism is the idea, budgets are the means, by which that idea is realised."* These are the words of a well-known writer on Public Finance. They describe most effectively the close relation that subsists between finance and constitutional government. One of the fundamental principles of every State that either recognises constitutional limitations or purports to develop a constitutional form of government, is the vesting of some measure of control of the public purse in the representatives of the people. This control—the measure of which varies with the stage which each particular community and state has arrived at in the development of free institutions—is usually exercised through the Budget.

What is a Budget

The Budget, broadly speaking, is an account of the finances of the State presented by the Executive to the legislature. Its presentment is necessary in order that the representatives of the

* H. C. Adams' Finance, pp. 115-6.

people constituting the legislature may ensure that care and economy is secured in the finances of the nation. In highly developed forms of popular government, it passes through two stages. In the first stage, it is a report prepared for the purpose of giving the legislature an idea of the condition of the finances and of what is needed and proposed for the year that is budgeted for. In its second stage, it is treated as a project of law and passed like other legislative measures. With these prefatory remarks, we may proceed to the study of the Budget in India, as a means of exercising control over financial administration.

Control of Parliament over Indian Finance

From what has been said in the earlier chapters of this book, it will be clear that the Parliament, though it is the ultimate sovereign authority in respect of all revenue that is raised and all expenditure that is incurred by the Government of India, does not, and is unable to, regularly and systematically exercise any control over Indian finances, as it does in the case of the finances of the United Kingdom. Its control is mainly confined to two matters, *viz.*:—
(*a*) No expenditure of the revenues of India can be incurred for defraying the cost of any expedition beyond the Indian frontiers (except for preventing or repelling actual invasion) without the consent of both Houses of Parliament (*b*) It is also directed by the Government of India Act of 1858 that the Indian Budget shall be laid annually before the House of Commons

to enable its members to offer suggestions, ask for information and generally criticise the policy of the Government in relation to India. In practice, however, the 'resolution to go into Committee to consider the East India Revenue Accounts' is purely a fomal one, consisting of the identical proposition that the Accounts show what they show. Not only is Parliament unable to control Indian Finance, but careful students of the tendencies of constitutional development in India ought also to recognise that, so far as the people of India are concerned, this control should be exercised not in England, but in India. The Indian Constitution, even as it is, clearly points to the latter tendency and rightly too.

Indian Legislature cannot vote or veto a Budget.

It is true that the Indian Legislatures possess no statutory powers for voting, much less for vetoing, a Budget. Their functions have been confined to discussing the Budget and criticising the general administration. This right was conceded to them since the Viceroyalty of Lord Mayo when financial administration was decentralised. It was considered at that time that the Resolution of the Government of India on the subject vested the Provincial Legislative Councils with the power of passing the Budget by means of an Appropriation Bill. In Madras, at any rate, in 1871, the Executive Government, under the guidance of Sir Alexander Arbuthnot, took up such a position, but the Government of India subsequently dis-

abused them of that impression. For a long time after, the discussion over the Budget was neither systematic nor regular. Under the law, the Councils could only meet for legislative purposes. In the absence of any Bills imposing fresh taxation, there was no legal or constitutional obligation thrown on the Executive to present the Budget or to allow its discussion. The difficulty was obviated by the Indian Councils Act of 1892, which authorised the Governor-General in Council to make rules from time to time permitting the Legislative Councils to discuss the annual Financial Statement of the Governor-General in Council. Similar provisions were enacted for the Provincial Legislative Councils also.

Budget Rules under Act of 1892

Under these rules, the procedure with regard to the preparation and presentment of the Financial Statement to the Imperial Legislative Council was as follows. The Comptroller and Auditor-General prepared the Budget Estimate and forwarded it for approval to the Finance Member. The Finance Member examined the same and suggested or made alterations in the proposals necessary for meeting fresh expenditure or disposing of surpluses. It was then laid before the Governor-General in Council. On being passed by them, a Financial Statement was made by the Finance Member to the Legislative Council. After an interval of at least a week, the Members delivered speeches which generally ranged over the whole field of adminis-

tration. The President w und up the debate with a speech of his own. No vote was taken; no amendments were allowed. The Budget, for the year at any rate, was neither better nor worse on account of this debate. If the latter had any effect at all, it was only posthumous, so to speak; it might result in improving the statement for the following year.

No 'Budget right' in India

A radical change in this procedure has now been effected by the Rules recently published by the Government under the Councils Act of 1909. These Rules will be found published in the Appendix. The Councils are still far from having obtained anything like the control of the national purse. In the Despatch which the Government of India sent to the Secretary of State in October, last year, they took care to insist upon one proposition as a constitutional fact, namely, that the power of passing the Budget is vested not in the Legislative Council, but in the Executive, and that it is the latter and not the former that decides any question arising on the Budget. There can be no doubt that, under the law, there is no power in the Legislative Council to claim to meddle with the Financial Statement of the Governor-General in Council. If the constitutional proposition enunciated by the Government of India were accepted literally, it would mean that the Legislative Council has no control over either the raising of revenue or the incurring of expenditure. In other words, the Executive

Government would be at liberty to impose a tax and collect it with the same ease as it is able to incur expenditure. As a matter of fact, however, these legally unrestrained powers of the Executive have been considerably modified by constitutional usage. During the last half-a-century and more, no fresh taxation or alteration in existing taxation has been resorted to without the sanction of the Legislative Council. Of course, care has always been taken to present the Bill for a fresh tax as a separate measure and not as part of the Budget and with the official majority in the Councils, the powers of the Executive were practically unlimited. The established consitutional practice will, however, be of advantage in the future, especially in regard to Provincial Legislative Councils. With a non-official majority, these Councils must be able, with sufficient unanimity, to indirectly control Provincial finance by the power they have of consenting to fresh taxation, though it must be recognised that purely provincial taxation is not a field large enough for exercising such control effectively. In the field of expenditure, however, no such constitutional usage has grown up, and the Executive have been supreme therein. The Rules which have now been framed constitute, however, a distinct step in advance and, if acted upon with care and discrimination are ultimately likely to lead to the realisation of a fully developed Budget right.

The British Budget Procedure

Let us digress for a moment and consider what 'Budget right' means in England. It is really composed of three distinct rights, *viz.*, the right to determine the annual expenditure, the right to consent to the imposition of a fresh tax or the alteration of an existing one, and the right to decide the extent of national borrowing. The Budget, in England, as in all civilised countries, is drafted by the Executive. The King's Speech opening Parliament informs the latter as to the estimated immediate needs of the State. The House of Commons then votes a supply which enables the ordinary work of administration to be carried on while the details of the Budget are being discussed and settled. The next step is the fixing of a day for a discussion in Committee of the expenditure side of the Budget. The House on that day resolves itself into Committee, called the Committee of Supply, for the purpose of considering the supply that has been already voted. The informal procedure in Committee enables the House to thoroughly thresh out every item of expenditure and a general agreement is arrived at as to the total expenditure to be incurred for the year. The House then goes into Committee again, *viz.*, the Committee of Ways and Means, and the Chancellor of the Exchequer opens discussion in it by making his Budget speech. The Budget has afterwards to be passed into law.

New Indian Budget Procedure

It would be idle to expect all the details of such procedure in a government like India. It is only possible in states which have established Constitutional Government, in the strict sense of the term, and which recognise the doctrine of ministerial responsibility. The Constitution of India is, however, different. Party Government and ministerial responsibility are non-existent and the ultimate right of the Executive to determine the Budget is considered necessary to prevent a deadlock in the work of Government. The Executive in India is permanent and cannot be altered. It can, therefore, not afford, at present, to render its hold over the purse weakened by an adverse vote of the representative body. An adverse vote is the same thing as a vote of censure, but the Executive, being permanent, cannot resign and make way for the leaders of those who have censured them. They have to continue in office and must carry on the work of Government. This is the constitutional ground on which the Government of India has, in the Rules now framed, refused to permit the legislatures to vote or veto a Budget. It has, however, been recognised in the new Rules that the representatives of the people should be consulted and their advice taken before the Executive decides on the final form which the Budget should assume. Herein lies the cardinal point of difference between the old practice and the new. Formerly, the details of the Budget were

determined without any possibility of alteration before it was presented to the Legislative Councils. The latter were, therefore, powerless to effect any amendments in it. Under the new Rules, thowever, a distinction has been made between the 'Financial Statement' and the 'Budget'. The former may usefully be termed the 'preliminary Budget.' It is ordered to be presented to the Council with an explanatory memorandum. An interval is then allowed and a day fixed for the first stage of the discussion. The Council has, then, the opportunity of moving any resolution relating to (1) any alteration in taxation, (2) any new loan or (3) any additional grant to Local Governments. The resolutions may be voted on. After all the resolutions on these three items have been fully discussed and disposed of, the Council enters upon the second stage of the discussion. It presumably goes into Committee for discussing groups of financial heads under the guidance of the Member in charge of the particular Department. Resolutions can be moved and voted on at this stage also. After this discussion also is closed, the Budget is decided on by the Executive Government—after giving due weight to such resolutions as the Legislative Council may have passed, but on the responsibility of the Executive only—and presented to the Legislative Council by the Finance Member, and it is followed subsequently by the usual general discussion.

To the present writer, these Rules appear to recognise three very important principles of great constitutional significance. The first stage of the discussion and the matters comprised therein enunciate the important maxim that alteration of taxation must be made with reference to the Budget statement, though the alteration itself will presumably have to be passed by a separate legislative measure. In other words, the Members are given the privilege of discussing *before hand* the question of such alteration with reference to the necessities of the Budget. The second stage of the Budget discussion, for the first time in Indian Constitutional History, takes the non-official Members of Council into confidence in regard to the determination of public expenditure. The members have the right of placing on record their views, as to the items not excluded from their cognisance, in the form of resolutions. It is true that a good deal of the value of this concession is lost by the exclusion of important heads of revenue and expenditure from discussion, but the principle has been recognised and it may be hoped that it will gradually be extended in application. The third stage of the Indian Budget is also of very great importance in that it imposes on the Finance Member the obligation to explain why any resolutions that may have been passed in the two first stages have not been accepted by Government. The ability and discretion of Members of the Legislative

Its constitutional importance

Council in rendering this particular obligation of real and lasting constitutional significance, will be measured by the soundness of the suggestions and the practicability of the recommendations that they decide to shape in the form of resolutions. It will be difficult for them to get resolutions passed in the Imperial Council with an official majority ; but further development of constitutional rights is likely to be retarded and endangered if resolutions of an impossible or unpractical character are moved. A few well-considered resolutions may well prevent the Executive from brushing them aside and help to build up constitutional usage, strengthening the rights of the representatives over Indian finance, while a large number of ill-considered and wild-cat schemes will, on the other hand, help to create a body of precedents which will be a standing obstruction to further constitutional progress. What is required to avoid the latter and to build up the former is a satisfactory organisation of the people's representatives and a readiness in them to choose and to follow the leadership of those who are by their knowledges, their patriotism and their sagacity, pre-eminently fitted to lead them.

Scope for growth of constitutional conventions

The progress of Constitutional Government is not dependent so much upon what is expressly declared to be constitutional rights as upon what is silently built up in the form of constitutional conventions. The

Rules now promulgated do not place the Legislative Councils of British India in a position very much worse than that of the Reichstag in Germany. The theory of the German Constitution is that the Reichstag should control expenditure. In actual practice, the Executive has acted several times in defiance of the Reichstag, but the apology which the Government has, soon or late, to make for such unconstitutional action is really the best guarantee for the people's right. The King of Prussia once carried out a reorganisation of the army in spite of the refusal of the legislature to make an appropriation for the purpose. But, four years later, he admitted the unconstitutionality of his act, begged the pardon of the legislature and requested them to legalise his procedure. In India, the legislature has not the power to refuse an appropriation, legally; it can only make a recommendation to the Executive in the form of a resolution that certain expenditure need not be incurred. Of course, the Executive may accept this recommendation or not in its discretion. But it is bound to make an explanation as to why a resolution has not been accepted. The necessity imposed by the Rules for making this explanation is a great moral weapon in the hands of the Legislatures, capable of being wielded with great effect, if only the resolutions which necessitate the apology are such as cannot admit of being explained away.

CHAPTER XIII

CONCLUSION

The Reforms and parliamentary Government

The introductory study which has been made in the foregoing chapters hardly pretends either to exactness or thoroughness, but is only intended as a means of directing attention to the systematic study of the Indian Constitutional System, now being enlarged and developed on the lines of Western institutions. It would, of course, be the height of folly to imagine that the steps now taken lead, or are likely to lead, in the near future to Parliamentary Government, in the sense in which it is understood in Europe. Lord Morley, at any rate, has definitely disclaimed any such intention in the initiation of the reforms with which Lord Minto's and his name will for ever be associated. In the course of a speech last year, in the House of Lords, he observed: "If I know that my days, either official or corporeal, were twenty times longer than they are likely to be, I shall be sorry to set out for the goal of a Parliamentary system in India. The Parliamentary system in India is not the goal to which I for one moment aspire". It seems, however, to be necessary, in view of misconceptions which have prevailed as to this statement of Lord Morley, to have a clear idea of what he has termed the 'Parliamentary

system'. It is easy to show from Lord Morley's other speeches in regard to Indian Reforms that what he has said is not to be understood as meaning either that he disfavours the development of representative government or is against the gradual concession of self-governing powers to the people of India in their own country. The words 'Parliamentary system' seem to the present writer to have a special significance and are not merely equivalent to 'popular government'. Representative government, for instance, of one kind or another exists at this moment in most Western countries as well as in all countries which have come within the influence of European ideas. As one writer has put it: "There are few civilised states in which legislative power is not exercised by a wholly, or partially, elective body of a more or less popular or representative character." Representative Government, however, does not mean everywhere one and the same thing. It exhibits or tends to exhibit, according to him, "two different forms or types which are discriminated from each other by the differences of the relation between the executive and the legislature. Under the one form of representative government, the legislature or, it may be, the elective portion thereof, appoints and dismisses the executive which under these circumstances is, in general, chosen from among the members of the legislative body. Such an executive may appropriately be termed a 'Parliamentary execu-

tive. Under the other form of representative government, the executive, whether it be an Emperor and his Ministers, or a President and his Cabinet, is not appointed by the legislature. Such an executive may appropriately be termed a 'non-parliamentary executive."

Lord Morley and John Bright

If Lord Morley's words are taken in the above significance, it is plain that a Parliamentary system of government for India is a goal to which neither Lord Morley nor anybody who has given more than a superficial consideration to the Indian political problem can aspire in the present state of things. What probably was meant by Lord Morley in the above words—and what possibly was in his mind when he initiated the reforms, as to the political tendencie which they may foster—are explained by what he said in his Budget speech in January 1908, in the House of Commons. He then said:—

"Mr. Bright was, I believe, on the right track at the time in1858 when the Government of India was transferred to the Crown ; but I do not think he was a man very much for Imperial Dumas. (Laughter). He was not in favour of universal suffrage—he was rather old-fashioned—(Laughter) but Mr. Bright's poposal was perfectly different from that of my honourable friend. Sir Henry Maine and others who had been concerned with Indian affairs came to the conclusion that Mr. Bright's idea was right—that to put one man, a Viceroy, assisted as he might be with an effective Executive Council, in charge of such an area as India and its 300 millions of population, with all its different races, creeds, modes of thought, was to put on one man's shoulder a load which no man, of whatever powers, how-

Dicey's Law of the Constitution pp. 411-412.

ever gigantic they might be, could be expected effectively to deal with (Hear, hear.) My hon'ble friend and others who sometimes favour me with criticisms in the same sense, seem to suggest that I am a false brother, that, I do not know what Liberalism is. I think I do, and I will even say that I do not think I have anything to learn of the principles or maxims, aye or of the practice of Liberal doctrines, even from my hon'ble friend. You have got to look at the whole mass of the great difficulties and perplexing problems connected with India from a commonsense plane and it is not commonsense, if I may say so without discourtesy, to talk of Imperial Dumas."

Now, if we refer to what John Bright has said as to the future political evolution of this country, we find the following :—

"The point which I wish to bring before the Committee and the Government is this, because it is on that I rely mainly, I think I may say, almost entirely, for any improvement in the future of India. I believe a great improvement may be made, and by a gradual process that will dislocate nothing. What you want is to decentralise your Government . . . . You will not make a single step towards the improvement of India unless you change your whole system of Government—unless you give to each presidency a Government with more independent powers than are now possessed. What would be thought if the whole of Europe were under one Governor who only knew the language of the Feejee Islands, and that his subordinates were like himself, only more intelligent than the inhabitants of the Feejee Islands are supposed to be . . . How long does England propose to govern India? Nobody answers that question, and nobody can answer it. Be it 50, or 100, or 500 years, does any man with the smallest glimmering of common-sense believe that so great a country, with its twenty different nations and its twenty languages, can ever be bound up and consolidated into one compact and enduring Empire? I believe such a thing to be utterly impossible. We must fail in the attempt if ever we make it, and we are bound to look into the future

with reference to that point. The presidency of Madras, for instance, having its own Government, would in fifty years, become one compact state, and every part of the presidency would look to the city of Madras as its capital, and to the Government of Madras as its ruling power. If that were to go on for a century or more there would be five or six Presidencies of India built up into so many compact states; and if at any future period the sovereignty of England should be withdrawn, we should leave so many presidencies built up and firmly compacted together, each able to support its own independence and its own Government; and we should be able to say we had not left the country a prey to that anarchy and discord which I believe to be inevitable if we insist on holding those vast territories with the idea of building them up into one great empire."

Self-Government and federalism

Whether or no Lord Morley subscribes to the whole of the position taken up by Mr. Bright, it has fairly to be inferred that he is against any development of political institutions in India in the direction of constituting a centralised parliamentary system for the whole country. Whether he meant to imply, by his words above referred to, that the progress of self-Government in India should therefore be in the direction of federalism-that is of developing provincial autonomy in the various Councils and the Executive of the Provinces and the Governments of Native States-or merely meant to state that the Indian Government must necessarily be decentralised, whether based on popular government or bureaucratic government, it is useless to speculate ; but from what we know of Lord Morley's political views, his disbelief in a thorough-going imperial organisation is pronounced, and his faith in

popular government has always been great. How far both have influenced the scheme of Reforms which he has initiated and how far their spirit is likely to be infused in the actual carrying out and working of his scheme by the Governments in India—both during his tenure of office and subsequent thereto—remains to be seen. In the meanwhile, it is necessary to remember that changes in the mere machinery of Government are but one part, though an important part, of the process which this country has to undergo and is likely to undergo in its political evolution.

Dependency and Representative Government

It has, moreover, to be remembered that there are a few essential characteristics impressed on the constitutional arrangements of this country which it will be futile to ignore. British India is what is generally spoken of as a dependency. A dependency has been defined by Sir George Cornwall Lewis as "a part of an independent political community which is immediately subject to a subordinate Government." The test of a dependency is that it is substantially governed by the dominant country, and a self-governing dependency is a contradiction in terms. Do the Reforms, which have from time to time been made in the constitutional machinery in India, tend towards reducing this "dependent character of the Indian Constitution? To answer this, it is necessary to look at two aspects of the question. We have to look at the character of the agency of

administration and we have next to look at the character of the institutions which are being developed in the process of political re-construction. Perhaps the most important step taken for over half a century as regards the former aspect, viz, that implied in India being a dependency, governed by a dominant foreign agency, has been taken by Lord Morley in the highest ranks of public service. Where what has been termed the essentially English element of administration was so long deemed necessary to be preserved, he has introduced changes of a most far-reaching character. The appointment of Indian Members to the Council of the Secretary of State, to the Executive Councils of the Viceroy and the Governors and Lieutenant-Governors of the Provinces and the the appointment of an Indian to the Privy Council in its Judicial Committee—these seem to us likely to go a great way towards rendering the differentiation between the ruling and the ruled elements, much less acute than ever before.

Agency and methods of Indian Government

It may, however, be deemed immaterial, from the point of view of constitutional development, what the agency of administration is, if the methods of government continue bureaucratic. The essence of bureaucracy is centralisation, and decentralisation, in its widest sense, necessarily implies co-operation of the representatives of the people, not merely in legislation, but in the actual working of administration. What the outcome of the recommendations in this

behalf of the Decentralisation Commission in India will be, cannot be stated with any definiteness at present. But the whole feature of the Reform Scheme of Lord Morley may be summed up in (1) the immediate step forward of directly associating Indians in the work of every-day administration, and (2) the attempt to decentralise administrative machinery so as to make Provincial and Local Administration, if not autonomous, at least self-contained, with a strong infusion of the popular element—(3) based upon what Lord Morley deems to be the essential need of enforcing the central control of the Government of India as the responsible representative of His Majesty's Government and the House of Commons in England. These seem to the present writer the three limitations within which constitutional progress will for some time to come have to advance. As to what results are likely to be achieved in the political future of the Indian peoples by the steps now taken, the writer must leave to better minds to judge.

Progress in the future

Whatever these results might be, the duty of the Government and the people in the immediate future is clear enough and it cannot be put better than in the words of one of the historic figures who fought in the cause of freedom and of order so early as the beginning of the Civil War in England—John Pym. "The best form of Government," he said, "is that which doth actuate and dispose every part and member of a state to the common good ; for as those parts give strength and ornament to the

whole, so they receive from again strength and protection in their several stations and degrees. If, instead of concord and interchange of support, one part seeks to uphold an old form of Government, and the other part a new, they will miserably consume one another. Histories are full of the calamities of entire states and nations in such cases. It is, nevertheless, equally true that time must needs bring about some alterations . . . Therefore have those commonwealths been ever the most durable and perpetual which have often reformed and recomposed themselves according to their first institution and ordinance. By this means they repair the breaches, and counterwork the natural effects of time."

The true disposition to further the common good in its highest form, so necessary for future progress in India, can only be attained by the rulers of the land ceasing to take narrow views of mere administrative "thoroughness," and by taking and imposing on the administration, broad views. What the people, on the other hand, need at this moment is sound organisation and sage counsel and leadership. They want leaders who possess, in the words of Lord Morley, "the double gift of being at once practical and elevated, masters of tactics and organising arts, and yet the inspirers of solid and lofty principles." Will our rulers in India take broad views and will such leaders of the peoples be forthcoming?

APPENDIX

I

The Government of India Act, 1858[1]

(21 and 22 Vict., C. 106.)

AN ACT FOR THE BETTER GOVERNMENT OF INDIA

[2nd August, 1858.]

Whereas by the Government of India Act, 1853, the territories in the possession and under the Government of the East India Company were continued under such Government, in trust for Her Majesty, until Parliament should otherwise provide, subject to the provisions of that Act, and of other acts of Parliament, and the property and rights in the said Act referred to are held by the said Company in trust for Her Majesty for the purposes of the said Government : 16 and 17 Vict., C. 95

And whereas it is expedient that the said territories should be governed by and in the name of Her Majesty * * * * ;

TRANSFER OF THE GOVERNMENT OF INDIA TO HER MAJESTY

1. The Government of the territories now in the possession or under the Government of the East India Company and all powers in relation to Government vested in, or exercised by, the said Company in trust for Her Majesty, shall cease to be vested in, or exercised by, the said Company ; Territories under the Government of the East India Company to be vested in Her

[1] The provisions of this Statute cannot be affected by legislation in India—secs. 24 and 25, Vict., c. 67, s. 22. For digest and notes, see Ilbert's Government of India, pp. 309-313.

Majesty, and powers to be exercised in her name

And all territories in the possession or under the Government of the said Company, and all rights vested in or which if this Act had not been passed might have been exercised by the said Company in relation to any territories, shall become vested in Her Majesty, and be exercised in her name ;

And for the purposes of this Act India shall mean the territories vested in Her Majesty as aforesaid, and all territories which may become vested in Her Majesty by virtue of any such rights as aforesaid.

India to be governed by and in the name of Her Majesty, &c.

2 India shall be governed by and in the name of Her Majesty ;

And all rights in relation to any territories which might have been exercised by the said Company if this Act had not been passed shall and may be exercised by and in the name of Her Majesty as rights incidental to the Government of India ;

And all the territorial and other revenues of or arising in India and all tributes and other payments in respect of any territories which would have been receivable by, or in the name of the said Company if this Act had not been passed, shall be received for, and in the name of, Her Majesty, and shall be applied and disposed of for the purposes of the Government of India alone, subject to the provisions of this Act.

Secretary of State to exercise powers now exercised by the Company, &c.

3. Save as herein otherwise provided, one of Her 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 this Act, as might or should have been exercised or performed by the East India Company, or by the Court of Directors or Court of Proprietors of the said Company, either alone or by the direction or with the sanction or approbation of the Commissioners for the Affairs of India in relation to

such government or revenues, and the officers and servants of the said Company respectively, and all such powers as might have been exercised by the said Commissioners alone ;

Countersigning of warrants. 17 & 18 Vict., C. 77

And any warrant or writing under Her Majesty's Royal Sign Manual which by the Government of India Act, 1854[1], or otherwise, is required to be countersigned by the President of the Commissioners for the Affairs of India, shall in lieu of being so countersigned be countersigned by one of Her Majesty's Principal Secretaries of State.

Four Principal and four Under Secretaries of State may sit as members in the House of Commons

4. * * * * any four of Her Majesty's Principal Secretaries of State for the time being, and any four of the Under Secretaries for the time being to Her Majesty's Principal Secretaries of State, may sit and vote as members of the House of Commons ;

But not more than four such Principal Secretaries and not more than four such Under Secretaries shall sit as members of the House of Commons at the same time.

Salaries of one Secretary of State and his Under Secretaries to be paid out of the revenues of India

5. [Rep. 41 and 42 Vict., C. 79 (S. L. R.)[2]]

6. In case Her Majesty be pleased to appoint a fifth Principal Secretary of State, there shall be paid out of the revenues of India to such Principal Secretary of State and to his Under Secretaries respectively the like yearly salaries as may for the time being be paid to any other of such Secretaries of State and his Under Secretaries respectively.

COUNCIL OF INDIA.

Council of India established

7. For purposes of this Act a Council shall be established, to consist of fifteen members, and to be styled the Council of India ;

1. S. 1 of the Government of India Act, 1854 (17 & 18 Vict. C. 77), which contained the provision referred to, was repealed as to the U. K. by 55 & 56 Vict., C. 19 (S. L. R.).

2. There appears to be mistake in this connection in the Statutes revised in which 38 and 39 Vict., C. 66 (S. L. R.) is cited as the repealing enactment.

And henceforth the Council of India now bearing that name shall be styled the Council of the Governor-General of India.

8. (Rep. 41 & 42 Vict., c. 79 (S. L. R.).]

9. (Rep. 55 & 56 Vict., c. 19 (S. L. R.).]

The major part of the Council to be persons who shall have served or resided ten years in India, &c

10. The major part of the persons to be elected by the Court of Directors and the major part of the persons to be first appointed by Her Majesty after the passing of this Act to be members of the Council, shall be persons who shall have served or resided in India for ten years at the least, and (excepting in the case of late and present Directors and Officers on the Home establishment of the East India Company who shall have so served or resided), shall not have last left India more than ten years next preceding the date of their appointment ;

And no person other than a person so qualified shall be appointed or elected to fill any vacancy in the Council unless at the time of the appointment or election nine at the least of the continuing members of the Council be persons qualified as aforesaid.

Tenure of office of Members of the Council

11. Every member of the Council appointed or elected under this Act shall hold his office during good behaviour ;

Provided that it shall be lawful for Her Majesty to remove any such member from his office upon an address of both Houses of Parliament.

Members of Council not to sit in Parliament.

12. No member of the Council appointed or elected under this Act shall be capable of sitting or voting in Parliament.

Salaries of Members of Council

13. There shall be paid to each member of the Council the yearly salary of one thousand two hundred pounds, out of the revenues of India.

14. [Rep. 32 & 33 Vict., c. 97. s. 5.].

Establishment of the

15. The Secretaries and other officers and servants on the Home establishment of the said

Company, and on the establishment of the Commissioners for the Affairs of India, immediately after the commencement of this Act, shall on such commencement be and form the establishment of the Secretary of State in Council ; Secretary of State in Council

And the Secretary of State shall with all convenient speed make such arrangement of the said establishments, and such reductions therein, as may seem to him consistent with the due conduct of the public business, and shall within six months after the commencement of this Act submit a scheme for the permanent establishment to Her Majesty in Council.

And it shall be lawful for Her Majesty, by the advice of Her Privy Council, upon consideration of such scheme, to fix and declare what shall constitute and be the establishment of the Secretary of State in Council, and what salaries shall be paid to the persons on the establishment ;

And the Order of Her Majesty in Council shall be laid before both Houses of Parliament within fourteen days after the making thereof, provided Parliament be then sitting, or otherwise within fourteen days after the next meeting thereof ;

And after such establishment has been formed by such Order in Council, no addition of persons shall be made to such establishment, nor any addition made to the salaries authorized by such Order, except by a similar Order in Council, to be laid in like manner before both Houses of Parliament.

16. After the first formation of the establishment it shall be lawful for the Secretary of State in Council to remove any officer or servant belonging thereto, and also to make all appointments and promotions to and in such establishment : Removal of officers and supply of vacancies in the establishment

Provided, that the Order of Her Majesty in Council of the twenty-first day of May, one thousand eight hundred and fifty-five, or such other regulation as may be from time to time

established by Her Majesty for examinations, certificates, probation, or other tests of fitness in relation to appointments to junior situations in the Civil Service, shall apply to such appointments on the said establishment.

17 [Rep. 41 and 42 Vict., c. 79 (S. L. R.).]

18. It shall be lawful for Her Majesty by warrant countersigned as aforesaid to grant to any such Secretary, officer or servant as aforesaid, retained on such last-mentioned establishment, such compensation, superannuation, or retiring allowance on his ceasing to hold office, as might have been granted to him if this Act had not been passed ;

And the transfer of any person to the service of the Secretary of State in Council shall be deemed to be a continuance of his previous appointment or employment, and shall not prejudice any claims which he might have had in respect of length of service, if his service under the said Company or Commissioners had continued ; and it shall be lawful for Her Majesty, by warrant countersigned as aforesaid, to grant to any Secretary, officer or servant appointed on the said establishment after the first formation thereof, such compensation, superannuation, or retiring allowance as, under the Superannuation Act, 1834, or any other Act for the time being in force, concerning superannuations and other allowances to persons having held civil offices in the public service, may be granted to persons appointed on the establishment of one of Her Majesty's Principal Secretaries of State.

4 & 5 Will 4, c. 24

DUTIES AND PROCEDURE OF THE COUNCIL.

Duties of the Council, &c.

19. The Council shall, under the direction of the Secretary of State, and subject to the provisions of this Act, conduct the business transacted in the United Kingdom in relation to the Government of India and the correspondence with India.

But every order or communication sent to India shall be signed by one of the Principal Secretaries of State ;

And, save as expressly provided by this Act, every order in the United Kingdom in relation to the Government of India under this Act shall be signed by such Secretary of State ;

And all despatches from Governments and Presidencies in India, and other despatches from India, which if this Act had not been passed should have been addressed to the Court of Directors or to their Secret Committee, shall be addressed to such Secretary of State.

Secretary of State to divide the Council into Committees, and to regulate the transaction of business

20. It shall be lawful for the Secretary of State to divide the Council into Committees for the more convenient transaction of business, and from time to time to re-arrange such Committees, and to direct what departments of the business in relation to the Government of India under this Act shall be under such Committees respectively, and generally to direct the manner in which all such business shall be transacted.

President and Vice-President of the Council

21. The Secretary of State shall be the President of the Council, with power to vote ;

And it shall be lawful for such Secretary of State in Council to appoint from time to time any member of such Council to be Vice-President thereof ;

And any such Vice-President may at any time be removed by the Secretary of State.

Meeting of the Council

22. All powers by this Act required to be exercised by the Secretary of State in Council, and all powers of the Council, shall and may be exercised at meetings of such Council, at which not less than five members shall be present ;

And at every meeting the Secretary of State, or in his absence the Vice-President, if present, shall preside ; and in the absence of the Secretary of State and Vice-President, one of the members of

the Council present shall be chosen by the members present to preside at the meeting ;

And such Council may act notwithstanding any vacancy therein ;

Meetings of the Council shall be convened and held when and as the Secretary of State shall from time to time direct :

Provided that one such meeting at least be held in every week.

Procedure at meetings.

23. At any meeting of the Council at which the Secretary of State is present, if there be a difference of opinion on any question other than the question of the election of a Member of Council, or other than any question with regard to which a majority of the votes at a meeting is hereinafter declared to be necessary, the determination of the Secretary of State shall be final ;

And in case of an equality of votes at any meeting of the Council, the Secretary of State, if present, and in his absence the Vice-President, or presiding member, shall have a casting vote ;

And all acts done at any meeting of the Council in the absence of the Secretary of State, except the election of a Member of the Council, shall require the sanction or approval in writing of the Secretary of State ;

And in case of difference of opinion on any question decided at any meeting, the Secretary of State may require that his opinion and the reasons for the same be entered in the minutes of the proceedings, and any Member of the Council who may have been present at the meeting may require that his opinion, and any reasons for the same that he may have stated at the meeting, be entered in like manner.

Orders, &c., to be open to the perusal of Members

24. Every order or communication proposed to be sent to India, and every order proposed to be made in the United Kingdom by the Secretary of State under this Act, shall, unless the same

has been submitted to a meeting of the Council, be placed in the Council room for the perusal of all members of the Council during seven days before the sending or making thereof, except in the cases hereinafter provided ; of Council who may record their opinions

And it shall be lawful for any member of the Council to record in a minute book to be kept for that purpose, his opinion with respect to each such order or communication, and a copy of every opinion so recorded shall be sent forthwith to the Secretary of State.

25. If a majority of the Council record as aforesaid their opinions against any act proposed to be done, the Secretary of State shall, if he do not defer to the opinions of the majority, record his reasons for acting in opposition thereto. Secretary of State acting against the opinions of the majority to record his reasons

26. Provided that where it appears to the Secretary of State that despatch of any communication, or the making of any order, not being an order for which a majority of the votes at a meeting is hereby made necessary, is urgently required, the communication may be sent or order given notwithstanding the same may not have been submitted to a meeting of the Council or deposited for seven days as aforesaid, the urgent reasons for sending or making the same being recorded by the Secretary of State, and notice thereof being given to every member of the Council, except in the cases hereinafter mentioned. Provision for cases of urgency

27. Provided also, that any order, not being an order for which a majority of votes at a meeting is hereby made necessary, which might, if this Act had not been passed, have been sent by the Commissioners for the Affairs of India, through the Secret Committee of the Court of Directors to Governments or Presidencies in India, or to the officers or servants of the said Company, may, after the commencement of this Act, be sent to such Governments or Presidencies, or to any officer or servant in India, by the Secretary of Orders now sent through Secret Committee may be sent by Secretary of State without communication with the Council

State without having been submitted to a meeting, or deposited for the perusal of the members of the Council, and without the reasons being recorded, or notice thereof given as aforesaid.

As to communication of secret despatches from India

28. Any despatches to Great Britain which might if this Act had not been passed have been addressed to the Secret Committee of the Court of Directors, may be marked "secret" by the authorities sending the same ;

And such despatches shall not be communicated to the Members of the Council, unless the Secretary of State shall so think fit and direct.

APPOINTMENTS AND PATRONAGE.

Appointments to be made by or with the approbation of Her Majesty

29. The appointments of Governor-General of India * * * and Governors of Presidencies in India now made by the Court of Directors with the approbation of Her Majesty, and the appointments of Advocate-General for the several Presidencies now made with the approbation of the Commissioners for the Affairs of India, shall be made by Her Majesty by warrant under Her Royal Sign Manual;

The appointments of the Lieutenant-Governors of provinces or territories shall be made by the Governor-General of India, subject to the approbation of Her Majesty; and all such appointments shall be subject to the qualifications now by law affecting such offices respectively.

Appointments now made in India to continue to be made there

30. All appointments to offices, commands and employments in India, all promotions, which by law, or under any regulations, usage or custom, are now made by any authority in India, shall continue to be made in India by the like authority, and subject to the qualifications, conditions, and restrictions now affecting such appointments respectively ;

Powers of Secretary of State in

But the Secretary of State in Council, with the concurrence of a majority of members present at a meeting, shall have the like power to make

regulations for the division and distribution of patronage and power of nomination among the several authorities in India, and the like power of restoring to their stations, offices, or employments, officers, and servants suspended or removed by any authority in India, as might have been exercised by the said Court of Directors, with the approbation of the Commissioners for the Affairs of India, if this Act had not been passed. Council as to appointments, etc., in India

31. [Rep. 41 and 42 Vict., c. 79 (S. L. R.).]

32. * * * * regulations shall be made by the Secretary of State in Council, with the advice and assistance of the Commissioners for the time being, acting in execution of Her Majesty's Order in Council of twenty-first May one thousand eight hundred and fifty-five for regulating the admission of persons to the Civil Service of the Crown, for admitting all persons being natural-born subjects of Her Majesty (and of such age and qualification as may be prescribed in this behalf) who may be desirous of becoming candidates for appointment to the Civil Service of India to be examined as candidates accordingly, and for prescribing the branches of knowledge in which such candidates shall be examined, and generally for regulating and conducting such examinations, under the superintendence of the said last-mentioned Commissioners or of the persons for the time being entrusted with the carrying out of such regulations as may be, from time to time, established by Her Majesty for examination, certificate, or other test of fitness in relation to appointments to junior situations in the Civil Service of the Crown ; Secretary of State in Council to make regulations for the admission of candidates to the Civil Service of India

And the candidates who may be certified by the said Commissioners or other persons as aforesaid, to be entitled under such regulations shall be recommended for appointment according to the order of their proficiency as shown by such examinations ;