term of office of these officers. Section 309 provides for the issue and responsibility for Orders in Council,—the Secretary of State being the Minister responsible for the Order, whether issued while Parliament is in sessions, and, therefore, upon an address of both Houses that the Order as submitted be issued; or in periods when Parliament is prorogued.*

On a general review of all these varied and substantial powers, the Secretary of State still stands out unmistakably as the most dominant authority in the Indian Constitution. His powers may not be so imposing in appearance as those of the Governor-General or the Provincial Governors. But these are merely his creatures, obedient to every nod from the jupiter of Whitehall, amenable to every hint from this juggler of Charles Street. His powers extend not merely to matters of fundamental policy; to the protection of British vested interests; to the safeguarding of Britain's imperialist domination. They comprise even matters of routine administration, the more important doings of the Indian Legislature, and even the appointments, payment or superannuation of certain officers in the various Indian Services or Governments. He has, in fact, all the power and authority in the governance of India, with little or none of its responsibility.

*Section 294, dealing with extra-territorial or Foreign Jurisdiction on behalf of India is of too technical a juristic nature to be commented upon in this work.

CHAPTER X

FEDERAL JUDICIARY

Part IX of the Act of 1935, sections 200-231, both inclusive, deal with the Judicature in India. We have already dealt, in the Volume on "Provincial Autonomy," with the Provincial section of the Judicial Administration in India. The most important,—in the sense of the most voluminous,—judicial work of the country is done in the Provincial High Courts, and Courts subordinate to those institutions. For the Federation, however, Judicial provision of some sort is indispensable, not only because there is a great likelihood, under the new Constitution, of considerable litigation of a Constitutional type; but also because of the need to co-ordinate the entire judicial system of the country.

Hence, for the Federation, there is to be a Federal Court* consisting of a Chief Justice of India, and such other puisne Judges, not exceeding six, as the King may from time to time direct. The number of Federal Judges may be increased by an address from the Federal Legislature to the Governor-General praying His Majesty to increase the number of those Judges.† Judges of the Federal Court are appointed by Royal Sign Manual, and hold office during good behaviour, or until they attain the age of 65, when they would be provided with a most handsome Pension if they

*Cp., Section 200.

†The Chief Justice of India was appointed, along with 2 Puisne Judges, for the Federal Court, in the Autumn of 1936. The Order-in-Council, fixing their pay, pension or gratuity allowances is on a most lavish scale imaginable. The Legal Profession thus continues to command the prize posts in the Government of the country, and more than maintains the common ground for criticism describing that Profession as parasitical.

have put in a requisite service. Apart from resignation in writing addressed to the Governor-General, Federal Court Judges cannot be removed from their office, except by His Majesty by warrant under the Royal Sign Manual.

> "on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the Judge ought on any such ground to be removed.*

That Judges should be beyond the buffets of political partisanship in Democracies would be almost axiomatic. But the old aphorism of Bacon, that Judges are lions, but lions under the Throne, has, in India, something more than a merely historical value to show off the obsequious nature of one of the greatest thinkers of Britain.

In this country, if the people's will is ever to take the place of the Royal authority as sovereign power, Judges, as well as any other officials, ought to be made responsible, in the ultimate analysis, to the popular will. More than in other countries, the problem is complicated in India because of the hold upon the country, its resources and its people, of a foreign exploiting, often un-understanding, and unsympathetic Bureaucracy. If the Judges are to be truly independent, and above the gusts of Party sentiment, they ought to be no more the minions of the Bureaucracy in power than of the changing Ministers created by the varying favour of Democracy. The appointment of the highest Judicial officers in the hands of the British King,—*i.e.*, in the hands of the Secretary of State, —and, through him, of the alien Indian Bureaucracy,—

*cp. Section 200 (2) (b).

is in itself an objectionable feature of the Constitution. So long as the Judges owe their allegiance, primarily and obviously, to an outside authority, unconsciously biassed in favour of the existing order, they cannot but,—quite unconsciously, perhaps,—lean in favour with the class or the power that gives them their place, and their importance in the scheme of life. In the United States, the complete separation between the Judiciary, the Executive, and the Legislature, has always caused Constitutional difficulties, which in India, by this arrangement, are likely to be tenfold more bitter, because of the suspicion of non-Indian or anti-Indian sympathies in the powers that be who really appoint Judges as well as all high officials of State in India. Class differences, and a class-conscious mentality, are rapidly growing in India; and Judges cannot be exceptions to this characteristic of our ago, so long as they are human. Hence the supposed attribute of impartiality induced or encouraged by this method of appointing Judges to the highest tribunal in India would fail to accomplish the object in view; while there is at least an equal danger of its promoting something quite the reverse.

Apart from the power of appointment, the power of removal from office has also to be considered. In Britain, the Judges are, in effect, appointed practically for life by the Ministry of the day. But in the event of any misbehaviour, the removal is decreed by an address from both Houses of Parliament to the King, —the nominally appointing authority. That there has never been a case in which a Judge of the Supreme Court of Judicature has had to be removed from office in this manner only proves the soundness of the

doctrine which reserves the ultimate authority, in case of need, in the hands of the real Sovereign of the land. In India, the Judges of the Federal Court are appointed for a term of 12 (?) years ending with the 65th year of the incumbent, and not for life "during good behaviour" as in England.* This is a method of squeezing the country by such inflated salaries, pensions, and allowance, which cannot but react injuriously upon the aggregate national economy. Had the right to remove the Judges of the Federal or a Provincial High Court been left, with any reservations deemed necessary, in the hands of the local authorities,—*e.g.*, by means of an address of the Federal or Provincial Legislature (as the case may be),—for such action by the Governor as representing the King, the requirement of keeping the supreme judicial officers outside the vortex of Party Politics would have been met, side by side with securing the ultimate authority in the hands of those people who pay for these services.

Under Section 201:—

201:—The Judges of the Federal Court shall be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

Provided that neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

*The reason may, perhaps, be found in the desire to earn a Pension,—a handsome allowance to such officers. The maximum Pension of a Grade I Judge is £ 1800 p.a.; the salary allowed is Rs. 72,000 per annum to the Chief Justice of the High Court at Calcutta, Rs. 60,000 p.a., to the other Chief Justices, (Nagpur only Rs. 50,000), and Rs. 48,000 p.a., to the Judges of the High Courts at Bombay, Madras, Calcutta, Allahabad, Patna and Lahore. The Chief Justice of India is to be paid Rs. 84,000 p.a. and the Puisne Judges of the Federal Court Rs. 72,000 p.a. (?) Cp. Schedule 2, Order-in-Council, dated March 18, and published in the Gazette of India, April 1, 1937. p. 37 et seq.

By Section 33 (3) (d), the salaries, allowances and pensions of the Federal Court Judges are charged on the revenues of the Federation,—which means they are not to be voted in the annual Budget by the Federal Legislature. This corresponds to the British practice of placing these estimates on what are known as the Consolidated Fund Charges, which do not fall within the annual vote of Parliament, as the Supply Services do. But, what is for Parliament no more than a self-denying Ordinance, detracting in no way from the unquestioned and absolute Sovereignty of Parliament, becomes in this country an indisputable evidence of the distrust of the Indian people and their representatives in the Legislature, an index of the control reserved to Parliament, or guarantees exacted for good behaviour, as it were, of the Indian Legislature, on behalf of the Public Services.

The qualifications for appointment as Judge of the Federal Court are such that a foreign element must necessarily predominate. According to Section 200 (3).

200 (3):—A person shall not be qualified for appointment as a judge of the Federal Court unless he—

(a) has been for at least five years a judge of a High Court in British India or in a Federated State; or

(b) is a barrister of England or Northern Ireland of at least ten years standing, or a member of the Faculty of Advocates in Scotland of at least ten years standing; or

(c) has been for at least ten years a pleader of a High Court in British India or in a Federated State or of two or more such Courts in succession.

In computing for the purposes of this sub-section the standing of a barrister or a member of the Faculty of Advocates, or the period during which a person has been

a pleader, any period during which a person has held judicial office after he became a barrister, a member of the Faculty of Advocates or a pleader, as the case may be, shall be included.

(4) Every person appointed to be a judge of the Federal Court shall, before he enters upon his office, make and subscribe before the Governor-General or some person appointed by him an oath according to the form set out in that behalf in the Fourth Schedule to this Act.

This is welcome departure from that provision in Section 220 (3) which includes a Civilian element in the Judges of the Provincial High Court. For in the section just quoted, the Federal Court can have only professional lawyers as Judges, unless those promoted from a Provincial High Court are included even though they originally belonged to the Indian Civil Service with judicial experience. But in so far as equal rights to Indian lawyers born and trained in this country alone are concerned, this provision is no more liberal than the existing arrangement.

Temporary vacancies in the office of the Chief Justice of India, owing either to the absence from India of that official, or to some disability which incapacitates him for a while from discharging his duties, are filled by the Governor-General acting in his discretion* from among the other Judges of the Federal Court.

Jurisdiction of the Federal Court

The Jurisdiction of the Federal Court appears to be both Original and Appellate. The Court is also

*Cp., Section 202. There is no mention in this section, of a similar vacancy in the office of the other Judges of the Federal Court. Looking to the wording of Section 200 (2), it would seem that every substantive appointment to the office of a Federal Judge is made by the King; but there is no provision for officiating or acting Judges, Temporary or Additional Judges of the Federal Court, as there is in regard to Provincial High Courts under Section 222 (2) and (3).

authorized to advise the Governor-General on any point he may refer to them, under Section 213. We shall notice more particularly hereafter the intent and bearing of this section on the Constitution,—especially in comparison with the corresponding practice in the United States or in the United Kingdom itself. Under Section 204 of the Act, the Original Jurisdiction of the Court is confined to any dispute between any two or more of the parties in the Federation, *i.e.*, the Federation, any of the Provinces, or any of the Federated States, "if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.

This is, however, not confined only to Constitutional issues between the parties mentioned; but may involve any legal right. It is also not identical with a mere interpretation of the Constitution authoritatively, as the Supreme Court does in the United States, or as the Privy Council does for any British Dominion or Colony. The judgment of the Federal Court is to be purely a declaratory judgment in the exercise of its Original Jurisdiction; but even so, it can declare the existence or extent of a legal right, without making that right necessarily a constitutional right.

So far as a Federated State, or States, are a party to such a dispute before the Federal Court, the section clearly provides:—

Provided that the said jurisdiction shall not extend to—

(a) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order-in-Council made thereunder, or the extent of the legislative or executive authority

vested in the Federation by virtue of the Instrument of Accession of that State; or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State; or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute;

(b) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

This distinction between the Original Jurisdiction of the Federal Court in respect of the Federated States, and in respect of the Provinces, arises out of the different status and conditions attending the inclusion in, or accession to, the Federation of the two classes of units. Presumably, in the case of the States, the Federal Court would have no jurisdiction in:—

(a) any interpretation of a question of law or fact on which a legal right depends, even though the question may arise as between the State concerned and the Federation, or one of the Provinces.

(b) any dispute which is specifically excluded by agreement from the Jurisdiction of the Federal Court, even though it may involve questions of interpreting the Constitution.

In regard to the Federal Court's jurisdiction for the interpretation of the Constitution, the jurisdiction can apparently only arise if and when a dispute occurs

between the Federation and one of the Federating units, or between any two or more of such units.* Interpretation of the Constitution by a simple reference from a Provincial, State, or the Federal Government is not provided for, even though under Section 213:—

213.—(1) If at any time it appears to the Governor-General that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may in his discretion refer the question to that court for consideration, and the court may, after such hearing as they think fit, report to the Governor-General thereon.

(2) No report shall be made under this section save in accordance with an opinion delivered in open court with the concurrence of a majority of the judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a judge who does not concur from delivering a dissenting opinion.†

As already pointed out in the appropriate place, the Constitution, such as it is, is bound to cause infinite litigation, because of a wide region of doubtful provision, or overlapping authority. The absence of any authority finally to interpret the Constitution authoritatively, in the absence of any specific dispute arising, or even in the absence of any reference by the Governor-General, is likely to make the Constitution clumsy to work, and expensive. It is also very likely to lead to needless impasse between authorities, which

*The practice in this respect seems indentical with that in the United States, where the Supreme Court can not intervene except to try a specific case; and then give a decision which would interpret the Constitution.

†It is interesting to note that nothing is said in this section, or any where else in the Act, regarding the fate of the Report made under this section by the Federal Court to the Governor-General. Is the Governor-General bound to give effect to this opinion? Under Section 212, the law declared by the Federal Court is binding on all other Courts in British India, and, in respect of interpreting the Constitution, etc., upon the Courts in the Federated States; but it says not a word about the binding character of the opinion given by the Federal Court upon the Governor-General, even though he himself had made the reference.

honestly conceive their constitutional powers differently from one another.

Interpretation of the Constitution

The primary interpreter of the Constitution in India seems to be the Provincial High Courts.* Section 205, defining the Appellate Jurisdiction of the Federal Court, permits appeals to it

> "from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order-in-Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved, and of its own motion to give or to withhold a certificate accordingly."

The right of appeal is given, under 205 (2) in all cases where such a certificate is given by the High Court which originally tried the case. The ground for appeal may be that the question of law involved as to the interpretation of the Act, as stated in the certificate, was wrongly decided. Parties concerned are also entitled to appeal to the Federal Court on any ground on which they could have appealed, before the advent of this Constitution, to the Privy Council without special leave. "No direct appeal shall lie to His Majesty in Council either with or without special leave." But appeal may be made to the Federal Court, with the leave of that Court, on any other ground. This provides a very wide margin for appeal; and so does not in any way minimise the rather objectionable feature of litigation in India,—too many appeals.

The appellate Jurisdiction of the Federal Court is extended to Civil cases from any Provincial Court,

*cp. Section 223. Under the existing jurisdiction the Chartered and other High Courts are entitled to discuss constitutional issues in the form of specific cases coming before them; and that jurisdiction remains.

if the point at issue involves, both in the first instance and on appeal,

(a) a sum of money not less than Rs. 50,000, or such other sum not less than Rs. 15,000/- as may be prescribed by the Act of the Federal Legislature granting such appellate jurisdiction in Civil Suits;

(b) property of the like value;

(c) any case in which the Federal Court gives special leave for appeal.

This extension of appellate jurisdiction can only be made by the Federal Legislature by a solemn enactment; and if granted, provision may also be made, by the same or another Act of the Federal Legislature, to abolish appeals in such cases to the Privy Council as heretofore, either with or without special leave. There is, it may be noted, no provision in all these sections of corresponding appeals to the Federal Court in Criminal Cases, which, presumably, remain as under the existing constitution of the High Courts.

None of these provisions for appellate jurisdiction in Civil matters apply to the High Courts in any of the Federated States. But the right of appeal to the Federal Court from a High Court in a Federated State is provided for under Section 207, in cases involving questions concerning the interpretation of the Constitution Act, or of an Order in-Council made thereunder, or the extent of legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of the particular State. In cases, also, which concern the interpretation of administrative agreements made under Part VI of the Act.* Appeals

*Cp. Section 125 for such agreements.

to the Federal Court under this section are to be in the form of a case stated for the opinion of the Federal Court by the State High Court; and authority is vested, by sub-section (2) of this section, in the Federal Court to demand that a case be so stated for its opinion. An opinion given on such cases is as binding as an ordinary judgment on appeal, which is given effect to by the High Court from which the case was originally appealed against.*

This Original and Appellate Jurisdiction, as well as the general authority and prestige of the Court, are assured and safeguarded by Section 210. All authorities, civil and judicial, throughout the Federation, are required to act in aid of the Federal Court. The Court is empowered to call any witness, and require the production of any document needed in evidence. It can also punish any disrespect to its orders, summons, etc., as contempt of Court, like any High Court. All its orders regarding costs in any proceedings before it are made enforceable practically throughout the Federation as the orders of the highest tribunal within any unit through such tribunals.

Federal Court not a Supreme Court

In spite, however, of this wide Original and Appellate Jurisdiction, the Federal Court of India is not the

*209.—(1) The Federal Court shall, where it allows an appeal, remit the case to the court from which the appeal was brought with a declaration as to the judgment, decree or order which is to be substituted for the judgment, decree or order appealed against and the court from which the appeal was brought shall give effect to the decision of the Federal Court.

(2) Where the Federal Court upon any appeal makes any order as to the costs of the proceedings in the Federal Court, it shall, as soon as the amount of the costs to be paid is ascertained, transmit its order for the payment of that sum to the court from which the appeal was brought and that court shall give effect to the order.

(3) The Federal Court may, subject to such terms or conditions as it may think fit to impose, order a stay of execution in any case under appeal to the Court, pending the hearing of the appeal, and execution shall be stayed accordingly.

same thing as the Supreme Court in the United States. It is not the final appellate authority,—the last authoritative judicial interpreter of the Constitution, or the ultimate declarer of the civil law of the land. That power is vested still in the Privy Council by Section 208. In all Constitutional cases,—*i.e.*, in cases in which the Federal Court has given judgment in the exercise of its original jurisdiction in the interpretation of the Constitution, the Instrument of Accession of any Federated State under this Act, or the interpretation of an agreement under Section 125, with a Federated State,—the appeal can be made *without leave* of the Federal Court; and in all other cases, by leave of the Federal Court, or of the Privy Council. The hope of any uniformity of the common law in India through the interpretation of a single Tribunal in appeal, is thus doomed to disappointment, until such time as a supreme Court of Justice is instituted in India, with the highest, final, appellate powers, and without any possibility of an appeal against its decisions in the cases in which it has original or appellate jurisdiction. The law declared by the Privy Council,—and, in cases unappealed against, by the Federal Court,—is the final exposition of the Constitutional law of India, as also of the ordinary law in so far as British India is concerned. As such, it is binding, until amended by the appropriate Legislature, on all Courts in British India, and, as regards constitutional matters, in all Federated States.

Power to make Rules

The Federal Court is empowerd, by Section 214, to make rules, with the approval of the Governor-General in his discretion, to regulate:—

"generally the practice and procedure of the Court, including rules as to the persons practising before the Court, as to the time within which appeals to the Court are to be entered, as to the costs of and incidental to, any proceedings in the Court, and as to the fees to be charged in respect of proceedings therein, and in particular may make rules providing for the summary determination of any appeal which appears to the court to be frivolous or vexatious or brought for the purpose of delay."*

These rules of procedure etc., also have to fix the minimum number of Judges that can constitute a proper Tribunal; but no Court can consist of less than three judges.† If the Federal Legislature enacts legislation extending the appellate jurisdiction of this Court, the Rules of the Court made under this section must provide for a special division of the Court to decide those cases which would have normally come before the Court even if its appellate jurisdiction had not been enlarged by Act of the Federal Legislature.‡ Much of the administrative powers and functions would be left to the Chief Justice of India, *e.g.*, what judges are to constitute a given Division of the Court, and what cases are to go before given Judges,—unless the Rules prescribe otherwise.§ Judgments of the Court must be delivered in open Court, and must be of a majority of the Judges present at the hearing of the case, though the right is expressly reserved of individual Judges, if they differ from the Majority, to record their dissent.

If these powers are not enough, the Federal Legislature may, under Section 215, enact legislation

*Cp. Section 214 (1).
†Cp. Section 214 (2).
‡Ibid., Proviso.
§Cp. Section 214 (3).

conferring such further supplemental powers upon the Federal Court, not inconsistent with the powers and functions assigned under the Constitution Act,

"as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Act."

Needless to add that the Federal Court is a Court of Record, and that it would ordinarily sit at the Federal Capital, Delhi. Section 203, however, permits of its sitting at any other place or places, if the Chief Justice of India so appoints with the approval of the Governor-General. This possibility of the Federal Court of India becoming an itinerant institution does not seem calculated to add either to its effectiveness or economy in administration. Its expenses, however, are charged, under Section 216, upon the Federal revenues, and as such are exempt from Public discussion.*

Peculiarities of Judicial Administration in India

Though the preceding outline of the organisation of the Judicial administration in the proposed Federation of India may have noted, in the appropriate places, the several peculiarities of that system, let us sum up these special features in a single place at this stage. The Judicial system in India, as every other aspect of the country's governmental machine, is subordinate to the supreme authority located outside the country. The highest appellate Tribunal, and the most authoritative exponent of the Constitutional as well as the common law of the land, is not in India. The fact

*Sub-Section (2) of Section 216 is not calculated to make any economy in this regard, apart from the fact that it seems inconsistent with the spirit of sub-section (1).

that an outside body, whose members or a majority of them must necessarily be unfamiliar with our customs, and often unsympathetic to our ideals and aspirations, is empowered to lay down the final law binding on all the citizens, authorities and tribunals in this country, is bound to militate, not only against the correct, sympathetic, and satisfactory interpretation and application of our juristic ideas and ideals; it is likely to thwart, unconsciously perhaps, our ambitions in the political or constitutional field, which depend in no small measure upon a sympathetic outlook of the highest Courts of Justice for their fructification. Those who know the history of the growth of constitutional freedom in England cannot but be aware of the supreme importance a sympathetic judiciary has, not only in guarding and enforcing popular liberties against encroachments of autocratic rulers, but also in protecting the community against the vagaries of the political atmosphere. They will, also, readily understand the hardship and handicap this absence of the final appellate power and authority in the Indian judicial system for deciding all questions of common or constitutional law. But, whether the British politician still distrusts the Judiciary in India, or treats it as incompetent in the inmost recesses of his heart, or desires to reserve the fat profits to the legal profession of this monopoly of ultimate appellate powers for his own countrymen, the fact remains that, in spite of all persuasions to the contrary, Parliament has refused to accompany this dose of constitutional advance in India with the gift of the supreme judicial authority for Indian cases to the highest tribunal in India.

The real interpretation of the Constitution, also, is left with an outside authority, even though those who suffer from a defective or objectionable interpretation or application of constitutional powers would be Indians. The Federal Court has, as already noticed, certain limited powers in the interpretation of the Constitution. But these can only be used to determine the existence of a legal right, or to interpret an Instrument of Accession, or an agreement signed thereunder. It can only apply to cases of disputes between members of the Federation, or between the Federation and any unit composing it. The constitutional rights of the individual citizens, or constitutional problems,—such as the one which occurred at the very outset of the system of Provincial Autonomy, when the majority party in some of the leading Provinces refused to undertake Ministerial responsibility unless certain assurances were given by the Governor,—cannot be pronounced upon finally and authoritatively, unless and until a specific case arises, within the terms of Section 204, between the parties therein described. The Governor-General may, no doubt, under the power given to him by Section 213, invite the opinion of the Federal Court upon any question of law actually before the country, or which is likely to arise, and which is of such a nature and of such public importance, that he considers it expedient to obtain the opinion of the Court upon it. But the Governor-General acts, in this matter, *in his discretion i.e.*, no one can make him use this power to solve peacefully and amicably such a problem as agitated the whole of India when the system of Provincial Autonomy was first introduced. The fact that the Governor-General never lifted his finger all through that historic impasse, in

this direction, is sufficient evidence to conclude that this will not be one of the normal ways in which constitutional issues of such importance could and would be judicially settled. The Act does not lay an obligation upon the Governor-General; nor is the wording of the section referred to such as to make it imperative upon the Court necessarily to make a report to the Governor-General giving the highest available judicial solution to the problem.* Ordinary citizens in this country are either too indifferent to such matters, or too unfamiliar with the mysteries of Constitutional law, or too unconcerned in the actual problem, personally to move the machinery of Justice to redress such wrongs, or solve such issues. There is, therefore, no means of interpreting finally, authoritatively, and sympathetically, the constitutional law of India in India; and, consequently, there is no machinery to allay needless public apprehensions on this vital national concern.

The lack will be felt all the more because there are, under the Constitution, no specific Fundamental Rights of citizenship, which could be relied upon, in the ultimate analysis, to safeguard civil liberty. True, there are no such specifically defined Rights of the Citizens, guaranteed by the Constitution, even in Great Britain. But the traditions of constitutionalism, of the rule of law, universally prevailing there; and the

*During the Constitutional impasse at the commencement of Provincial Autonomy, the entire Federal Court was not constituted. But the Chief Justice of India and two other Federal Court Judges had already been appointed; and had the Governor-General desired to solve the tangle in this manner, he could have availed himself of the provision contained in Section 213 just as much as they might have had recourse to Section 310, and obtained an Order-in-Council,—recording or embodying a judgment of the Privy Council,—so as to satisfy the very modest demand of the Congress, and allay apprehensions which had been aroused in the public mind as to the nature and use of the Extraordinary Powers of the Provincial Governors.

identity in race of the governors with the governed in that country, automatically avoid such constitutional complications, and psychological misunderstandings, which are unfortunately inevitable under Indian conditions. Given the communal discord and the habits of autocratic rule ingrained in the entrenched bureaucracy, it is more important in India than any where else, that certain common rights of the Citizens should be declared to be sacrosanct and guaranteed by the Constitution, even as the privileges of the Services, the claims of the creditors, and the demands of the Minorities have been guaranteed and safeguarded by specific provisions of the Constitution.

Says the report of the Joint Select Committee of Parliament, which examined this Constitution in its Bill form, apropos of the proposal of the British India Delegation to introduce in the Constitution Act a declaration of the Fundamental Rights of Citizenship:—*

> "The Statutory Commission observe with reference to this subject: 'We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the War.' Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exist the will and the means to make them effective."

And this they deem sufficient answer to those who demanded a specific inclusion of a categoric declaration of the Fundamental Rights of Citizenship! Further comment is superfluous.

Because there is no specific declaration and guarantee of the fundamental rights of Citizenship in India,—and because such a clear enunciation is

*Cp. Report Joint Select Committee para. 366.

particularly necessary in the proposed new members of the Federation,—the Indian States, where hitherto Civil Liberties are conspicuous by their complete absence,—the problem of maintaining the Civil Liberties of the Indian people, and keeping up the progressive ideals of Government, becomes all the more difficult in this country. The Federal Court, constituted as it is, and with the powers and functions it is entrusted with, cannot reasonably be expected to aid the ordinary citizen in this regard. The other High Courts are equally powerless to protect that which does not exist. The Bureaucracy has, of late particularly, been conspicuous by its disregard of the liberties of the Indian people. Government by Ordinance, which was the order of the day between 1930-1934, amply testifies to the alarm that they have taken, and the fear complex that seems to have overwhelmed the reason of the *de facto* rulers of India. In the times to come, this alarm, and this fear complex are not likely to abate. Hence it is all the more necessary to have, in the Constitution Act proper, some clear enunciation of the Fundamental Rights of Citizenship under the new regime. Once declared, the will to maintain these rights and the power to make them effective will be forthcoming of their own accord.

Because there are no specifically declared Rights of the Citizens, the presence in the highest Judiciary of India of a large element of non-Indian lawyers, and administrative officers, makes the administration of Justice in India fundamentally different from that in the other Dominions or in the United Kingdom. All throughout the British Commonwealth of Nations,

the tradition is observed of elevating to the highest judicial posts only those who have distinguished themselves as practising advocates. To that extent the Continental model of appointing to judicial offices only trained jurists in preference to advocates; or experienced judicial officers, is both different and perhaps unsuitable. But India is unique, even among the British countries, in having (i) non-Indians in considerable proportions in the highest Judiciary; and (ii) in having senior Civil Servants on the Bench of the High Courts, and perhaps also of the Federal Court. Not only these might lack a proper appreciation of the people's customs and ideals, and so fail to render real justice; they might even be,—and, under existing conditions, there is grave risk of their actually being,—unsympathetic and hostile to the aspirations of the people towards fuller civil liberties and greater national freedom. Cases may arise involving directly or indirectly, such issues; and on those occasions, the presence on the Bench of such non-Indians, or Civilians, might conceivably result in a serious miscarriage of justice, and a needless thwarting of the people's ideals. Indianisation of the highest Judiciary,—and its recruitment from among trained, experienced jurists, even in preference to practising advocates, is a desideratum for reform in the judicial administration of India which is bound to come into the forefront, as public consciousness awakens.