CHAPTER XIII

MISCELLANEOUS

There are certain provisions of the Constitution Act of 1935, which it is impossible to classify under any of the conventional divisions of a Constitution. Thus, Chapter III of Part VI of the Act of 1935, containing provisions with respect to discrimination etc., Sections 111 to 121, both inclusive; or Chapter III of Part VII relating to property, contracts, liabilities and suits, Sections 172 to 180; or Part VIII, relating to the Federal Railway Authority, Sections 181 to 199, are impossible to be classified under any of the ordinary heads, under which a national Constitution may be studied. Provisions with regard to the Reserve Bank, which is designed also to play an integral part in the Constitution, are not contained in the Act of 1935. We need not, therefore, discuss that mechanism, which controls a most important key position in the governance of India. We shall briefly outline some of these, partly because they are integral parts of the Indian Constitution, and partly as emphasising certain features in the governance of India, which constitute grave political problems that the future of India will have to face.

I Anti-Discrimination Clauses

Taking first, the Provisions in regard to the so-called Discrimination by legislation or executive action in India against British interests in India, it may be premised that the spirit of the entire chapter is to maintain sacrosanct the vested interests of British

capital, and so facilitate the continued exploitation in this country. Any desire that the Indian nationalist may have, however, legitimate it be, to neutralise at least the advantage which generations of connection and association have procured these British vested interests in India, in their competition with the nascent Indian enterprise in the same field, cannot be achieved so long as these interests hold the field, and so long as this Constitution remains unchanged.

These alien interests are established in the most productive branches of industry and commerce; in the most paying grades of the public service. Their toll, therefore, upon the national wealth of India is necessarily higher in proportion. The rôle of a national government in our days in aiding the local industry and enterprise pitted in unfair competition against the foreigners; and in encouraging local talent in all branches of the nation's life, is too well recognised to require any elaborate advocacy in support of it by Nationalist India. In all progressive modern communities, wherever nationalist consciousness has grown, legislation has been increasingly passed in recent years to reserve the corresponding field of economic activity or opportunity to the nationals of one's own country; and executive action has more than kept pace with this aim of the national legislature. India is stirred by their example. She is becoming more and more aware of the opportunities for remedying, in part of least, the impoverishment of the people, due to this connection with the British Imperialism and the Capitalist exploitation resulting therefrom. Had she the power, she would not fail, progressively and intensively, to develop her own industry and enterprise, and so

retain in the country for the benefit of her own people the advantages resulting from such development.

The provisions of Chapter III, Part V, are, therefore, intended to make the protection, safeguard and defence of the existing vested interests of British capital and British professional men working in India to be as comprehensive, rigid, universal, and permanent, as possible. It is not a matter to be left to the discretion of the Chief Executive; nor to be entrusted to the administrator of British blood in India. The progress of nationalist sentiment may render it impossible for these authorities, unbacked by statutory sanction, to safeguard adequately these precious interests. And the memory of treatment accorded to India in the height of British power are so strong that a guilty conscience itself has compelled the British Parliament to lay positive prohibition upon the Federal or Provincial authorities to disturb or endanger these interests in any way.

(a) Freedom of Movement for British Nationals

The very first section (111), therefore, provides that British subjects, domiciled in the United Kingdom, shall be exempt from any Federal or Provincial Law, which imposes a restriction on the right of entry of Europeans in India. The same applies if it creates any disability, liability, restriction, or condition in regard to travel, residence, acquisition, holding, or disposal of property, or of public offices, or carrying on any trade or business or profession, by reference to the place of birth, race, descent, language, religion, domicile, residence, of any such British national in India.

It may be noted that the Federal or the Provincial Legislature is not prohibited from passing any law restricting immigration into India of foreigners, or imposing any disability or conditions upon their movement and activities in this country. In so far as such restrictions are imposed against the Germans or the Japanese, the French or the Italians, Indian Legislature would be utterly free to do so. Perhaps the British authorities in India would even secretly welcome them, as leaving the field of competition more completely at their mercy. Even Dominion subjects are not included in the privilege of this section. It simply exempts the European British subjects domiciled in Britain from the operation of any such law being passed. It is permissible to hope that, in the event of reprisals becoming necessary against any of the Dominions, imposing discriminatory treatment against Indians within their jurisdiction, there will be no difficulty for the Federal Government of India to retaliate.

It must be added that the Section makes a show of reason and reciprocity of treatment between the United Kingdom and Federation of India by adding a proviso:

> "Provided that no person shall by virtue of this sub-section be entitled to exemption from any such restriction, condition, liability or disability as aforesaid if and so long as British subjects domiciled in British India are by or under the law of the United Kingdom subject in the United Kingdom to a like restriction, condition, liability, or disability imposed in regard to the same subject matter by reference to the same principle of distinction."

This, however, does not apply to execute discrimination against Indians in Britain, as the Governor-General or the Governors are enjoined by their instruc-

tions, and in virtue of specific responsibility laid upon them, to see that no such administrative discrimbination takes place against Britishers in India. Much less can this prevent the private individual discrimination that takes place against Indian students or businessmen in Britain who are anxious to learn British technique in business or industry.

From the operation of this section, quarantine regulations even against Britishers are necessarily excluded. Individual British citizens, also, regarded as undesirables, are excluded from the operation of this section. This is to say, it is permissible, under section 111 (2), for India to pass regulations excluding undesirable individuals, or to deport them, from British India. Even if no law is passed on that behalf, under sub-section 3 of Section 111, it is permissible for the Governor-General or the Governor of a Province, by public notification, to suspend the operation of sub-section (1). He need only certify that, in order to prevent a grave menace to the peace and tranquility of any part of India or of a Province, or, in order to combact crimes of violence in India to overthrow the Government, the operation of sub-section (1) of Section 111, exempting the British European subjects from any Indian Legislation imposing restrictions upon the right of entry or movement within this country, should be suspended. Needless to add, the functions of the chief executive will be exercised in this connection **in his sole discretion** without any reference to the responsible ministers.

(b) Discrimination against Companies

The principle of no discrimination is enunciated generally by Section 112 (1), as regards individuals and companies. Any law, which seeks to discriminate

against British subjects of the United Kingdom or Burma, or companies incorporated in the United Kingdom or Burma, before or after the passing of this Act, would be invalid, in so far as it contravenes the provisions of Section 112. What exactly would constitute such a law, is not very clearly defined. Under sub-section 2 of Section 112, however it is laid down that, if the effect of any law is such that British subjects of the United Kingdom or Burma would become liable to greater taxation than that to which they would be liable if domiciled in British India or incorporated under the laws of British India, then that law would be invalid.

So far as Companies are concerned, Section 113 precludes the Federal or Provincial Legislation from any discrimination against companies incorporated in the United Kingdom before or after passing of this Act. Any attempt to introduce such discrimination, indirectly, *e.g.*, by prescribing that directors or shareholders upto a given proportion at least must be natives or residents of India is doomed to failure. For this section categorically lays down that Companies incorporated in the United Kingdom, before or after the passing of this Act, will automatically be deemed to fulfill all such requirements of language, religion, domicile, residence, etc. This means that the Federal or Provincial Legislature cannot pass laws, which would, in effect, debar British subjects of the United Kingdom from carrying on any company, or holding any stock or interest, by requiring that a given proportion of this interest, capital, or control should be held by people born in India, or of Indian descent, or speaking any Indian language, or domiciled in any Indian Province or State.

The principle of reciprocity, of course, is maintained in regard to this legislation, so that no corresponding discrimination could be made by any law of the United Kingdom, in regard to companies incorporated by or under the laws of British India and carrying on business in the United Kingdom. It is one thing, however, to prohibit, by such provisions, the discrimination, and a totally another thing to assure that no discrimination shall, in actual practice, take place, owing to the prejudices or self-interest of the individuals concerned. In India, particularly, the powers that be being sympathetic to individuals or companies of British origin exploiting Indian resources and Indian business conditions, such provisions may succeed in preventing any kind of indirect advantage sought to be given by the Indian Ministers or Legislatures to corresponding enterprise of their own country-men. But, in England, no such guarantees are really forthcoming, despite the provisions of this law. There is the same general *proviso* in regard to reciprocity under this section as under Section 111 (1).

It must also be noted, that the section precludes any discrimination on the grounds mentioned therein. But it does not preclude direct encouragement, which it may be possible by legislation or administrative action to give to the local industry from being so afforded. By the Instrument of Instructions, however, the executive chief in the Provinces as well as the Federation is required to see to it that no such administrative discrimination takes place against British subjects working in India. The sub-section (2) allows the same exemption from or preferential treatment in respect of taxation to British Companies as is given to Indian Companies under any Federal or Provincial

Legislation, conditioned by any of the conditions mentioned in sub-section (1).

As regards companies incorporated in India, British subjects domiciled in the United Kingdom are deemed, under Section 114, automatically, to comply with such requirements of any Federal or Provincial laws, relating to place of birth, race, descent, language, religion, domicile, etc., as may be imposed for serving as members of the governing body of the company, or to be holders of its shares, etc., or to be its officers, servants, and agents. The principle of reciprocity contained in the *proviso* to Section 111 (1) is applied here also.

Practically, also, the provision of Section 113 (2) is repeated under sub-section (2) of Section 114, as regards preferential treatment or exemption from taxation, imposed by Federal or Provincial law.

(c) Discrimination re: Shipping and Air-craft

Provision has been made by Section 115 as regards ships and air-craft plying in Indian waters, or carrying on transport business in India. No ship registered in the United Kingdom can be subjected, under any Federal or Provincial law, to any discriminatory treatment affecting either the ship itself, or the captain, officers, crew, passengers or cargo, in contrast with corresponding ships registered in British India, on a basis of reciprocity with regard to Indian registered ships in the United Kingdom. The same provision applies as regards air-craft in India.

The effect of this prohibitionary legislation is that any attempt at recapturing the coastal or overseas carrying trade of India by ships owned or built in India, or manned by Indians, is doomed to failure. For

no encouragement can be given by law to Indian enterprise of this kind against its most formidable competitor,—the British enterprise of the same kind working in India. British enterprise of this kind is not only well established, and has far-reaching business connections in India; it has evolved methods of retaining such business, in the shape of secret rebates, etc. which no new commercial competitor of Indian origin can hope to counteract without some sort of a State protection or encouragement.

(d) Subsidies & Bounties

The same may be said as regards any kind of direct encouragement to be given by Indian Government, Provincial or Federal, in the shape of subsides, etc. For, Section 116 (1) lays down that any company, incorporated in the United Kingdom, and carrying on business in India, shall be eligible for any grant, bounty or subsidy, etc., payable out of the revenues of India or of any Province, for the encouragement of any trade or industry, in the same manner as companies incorporated under British India may be eligible therefor. Neither the key industries nor any other business of national importance may be directly encouraged by means of bounties or subsidies out of India's own resources, which are not automatically extended to the corresponding enterprise of Britishers in India. In so far as India is backward in regard to many a key industry, or essential business; and in so far as in the corresponding industries and business British competition is already well-established, and, so more to be dreaded, no headway can be made by native Indian enterprise, unless an equal benefit is simultaneously extended to the most formidable rival

of such Indian enterprise. Protection, or encouragement, of local industry by such direct methods is both more effective and economical, than by the indirect method of protective customs duties. For the latter bear upon the consumers, and so their real incidence is lost sight of; while the full burden of the former is always noticeable. In the past, whenever any Indian industry has demanded fiscal protection, the spokesmen of British interests have emphasised the claims of the consumers to deny or minimise such protection. But they had no such opposition to offer against this provision of direct burden upon the Indian tax-payer, the moment they themselves were made eligible to this benefit,—which, probably, they least need.

It may be added that this provision, however, is confined, by sub-section (2) of Section 116, to British companies, which are engaged in British India already, before any law, giving any special encouragement or assistance was passed. That is to say, a company, which was not engaged in British India at the time of passing of such legislation in any branch of trade or industry, proposed to be encouraged by direct grant, bounty, or subsidy, will not be eligible for such benefits. Indian legislation may require that such a company would be eligible for such encouragement, only if it is incorporated under the laws of British India, or even of a Federated State; that a certain proportion, not exceeding one-half, of the members of the governing body, are British subjects, domiciled in British India or Federated States; and that the company should provide such facilities, as may be prescribed under the law, for training British subjects, domiciled in India or Indian Federated States. By this provision, future competitors of non-Indian origin seem

to be excluded. But, even there, sub-section (3) says that an established company, incorporated under the laws of the United Kingdom, must be deemed to be carrying on business in India, if it owns ships which habitually trade to and from ports in India.

Section 117 extends the principle of this provision to any "ordinance, order, bye-law, rule or regulation," which has the force of law, under any existing Indian, or Federal, or Provincial Legislation.

It is provisions like these which will force the pace for the nationalisation of all key industries and business. Once nationalised and conducted as Government enterprise, there can be no question of descrimination of this type.

(e) Trade Convention

After all these restrictions upon Indian Legislatures to enact any law which would introduce discriminatory treatment in respect of any special encouragement from the State to any particular trade or industry, or exemption from taxation or disability in settlement, and movement of British individuals within the Federation, Section 118, however, provides for the conclusion of a trade convention or agreement between the British Imperial Government and the Federal Government of India.* Under such convention, similarity of treatment would be assured to British subjects, domiciled in the United Kingdom, as also to companies incorporated by or under the laws of British

* 118.—If after the establishment of the Federation a convention is made between His Majesty's Government in the United Kingdom and the Federal Government whereby similarly of treatment is assured in the United Kingdom to British subjects domiciled in British India and to companies incorporated by or under the laws of British India in British India to British subjects domiciled in the United Kingdom and to companies incorporated by or under the laws of the United Kingdom respectively, in respect of the matters, or any of the matters, with regard

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India. Conversely, the same treatment would be accorded in British India to British subjects and companies of the United Kingdom. If such an agreement is made, and the necessary legislation passed to give effect to the legislation, the King-in-Council may declare that the purposes of Sections 111 to 117 are covered by that Convention. Britain herself desires to reserve her freedom of negotiations; and that opinion is commonly shared also in the Dominions. Each of the Dominions, India, as well as the United Kingdom, have, moreover, particular customers, with whom they would specially desire to have special arrangements. Accordingly, this plan of bilateral agreements seems to be generally accepted in preference to an all-round agreement for Imperial Preference.

(f) Professional and Technical Qualifications

Apart from these general provisions, in regard to prohibiting discrimination against British subjects of the United Kingdom, in respect of taxation, settlement, movement, holding of property, etc., special provision is made for professional and technical work and qualifications to protect British technicians and professional men working in India. By Section 119 (1), the Governor-General's sanction, in his discretion, is necessary, before any bill could be introduced in either chamber of the Federal Legislature, which prescribes (or em-

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to which provision is made in the preceding sections of this chapter, His Majesty may if he is satisfied that all necessary legislation has been enacted both in the United Kingdom and in India for the purpose of giving effect to the convention, by Order-in-Council declare that the purposes of those sections are to such extent as may be specified in the Order sufficiently fulfilled by that convention and legislation, and while any such Order is in force, the operation of those sections shall to that extent be suspended.

An Order in Council under this section shall cease to have effect if and when the convention to which it relates expires or is terminated by either party thereto."

powers any other body to prescribe) the professional and technical qualifications necessary in British India to carry on any given profession. The Governor-General is enjoined by sub-section (2) of this section, not to give this sanction, if in his opinion the effect of the proposed legislation would be to impose a disability, liability, restriction, or condition upon any one who was practising a given profession or business before the passing of such a law or continuing the same. The section, however, allows the ground of public interest, it seems, to create such a bar by legislation; but it is next to impossible to say what public interest would be so recognised by a British Governor-General. This rule also applies as regards holding any office in British India, and carrying on any trade or business.

Such Restrictions not in Indian States

Note, however, that this provision applies only to British India, and not to the whole of the Federation. This may be intended to provide relatively a free field in the Indian States. But, the Indian States cannot be presumed to have either so much independence, or so much strength, as to pay special attention and give direct encouragement to their own subjects, or to their British Indian brethren, in preference to Britishers or other non-Indians carrying on any business, profession, or trade within the State, or holding any office. If any of the States do not accede to the Federation for such purposes, then, a theoretical freedom would be reserved to such of them for this purpose. But, even so, the overwhelming might of the Supreme Government of India, however it is constituted, may make it practically impossible for any State, however powerful, to resort to any such discriminatory treatment, in favour either of its own citizens, or of British Indians.

The sub-section, it may also be added, is silent, as regards those who may come hereafter in the same field. Presumably, the Indian legislatures would not be bound to afford equal treatment, or be restrained from imposing any discriminatory treatment for the future upon non-Indian entrants into such professions, trades, or holding such office, in favour of native or permanently domiciled Indians.

All these restrictions, it may be added, proposed by any Federal or Provincial law, or regulations in this behalf, must be published at least four months before they are intended to be brought into effect, in such manner as the Governor-General or the Governor may direct. The purpose of such publication is that any party, feeling adversely affected by such provisions, may complain, if so deemed proper, to the Governor or Governor-General. Sub-section (3) of Section 119 empowers the Governor or the Governor-General, if, within two months of any such publication, complaint is received that any of the regulations would operate unfairly against any class of persons affected thereby, to disallow those regulations any time before they are declared to come into effect, if he is satisfied that the complaint is well-founded. The Governor-General, however, in this matter, is required to exercise his individual judgment. He must, therefore consult his Ministers. If, however, he considers the advice of the Ministers not just or appropriate in any given case, he would be entitled to disregard that advice.*

*This exercise of the Governor-General's individual judgment is extended by public notification to direct that the provision of this law may also apply to any existing law, as regards sub-section (3) already mentioned.

(g) Medical Profession

The most important section of this Chapter, however, relates to medical qualifications. The General Medical Council of the United Kingdom has been very severe in the last ten years in dealing with Indian Medical qualifications; and there has, in consequence, been a current of resentment in Indian circles affected. A solution, in part at any rate, has been found by the Institution of an Indian Medical Council under the Act of 1934-35. This, however, cannot undo the privileged position accorded to the British officers serving in the Indian Medical service, or other medical practitioners holding British University Degrees, or quailfications registered in the United Kingdom. Section 120 requires that a British subject, domiciled in the United Kingdom or in India, who is entitled to practice or be registered in the United Kingdom as qualified medical practitioner, by virtue of the Diploma granted to him to that effect in the United Kingdom, shall not be excluded from practising medicine, surgery or mid-wifery in British India, by any of the existing Indian laws, or any legislation of the Federal or Provincial Legislature in the future, either in British India or in any other part thereof. Nor can such a person be debarred from being registered as qualified to practice medicine, etc., on any other ground, except that the diploma held by him does not furnish a sufficient guarantee of the requisite knowledge and skill for the practice of his profession. Even this last mentioned exclusion can only be made on the ground of a law to that effect being passed by the Federal or the Provincial Legislature. Such a law must provide that no proposal for excluding the holders of any particular diploma from practice or registration should become operative until twelve months have elapsed after notice thereof has been given to the Governor-General, the Universities, or any other body granting that diploma. The power of the Privy Council practically to annul such legislation is specifically reserved by Section 120 (1). That body, on appeal made to them, is entitled to decide that the diploma in question ought to be recognised, despite the Indian legislation, as furnishing the necessary and sufficient guarantee of knowledge and skill required. Such power to decide on the merits of technical qualifications, vested in the judicial committee of the Privy Council seems an usurpation of the legitimate authority of the Indian Legislatures. But as such usurpation or denial all round is the basic theory of this Constitution, and necessarily arises out of distrust or contempt for the Indian sense of justice and fair-dealing, no further comment is necessary on that point.

The application to the Privy Council mentioned above should be made by a University or other body in the United Kingdom, which grants the medical diploma. In the alternative, it may be made by a person holding such a diploma, and considering himself aggrieved by the proposal to exclude holders of such diploma from practice or registration in India. The Privy Council when any such complaint is received, must give to the authorities and the persons concerned, in India as well as in the United Kingdom, opportunities for tendering evidence or submitting representations in writing on either side of the case. When they have heard all these pleas, they may decide whether the diploma in question does or does not furnish the re-