

prescribes the salaries payable to the Governor-General, and lays down the general principles of other allowances. The Order in Council referred to in that Schedule has yet to be issued with regard to the Governor-General of the Federation of India. The aggregate cost of this exalted office to India is budgeted, in the Budget for 1937-38, at Rs. 15,54,000 distributed as follows:—

	Rs.
Salary .....	2,50,800
Sumptuary Allowance of the G.-G. ....	40,000
Expenditure from Contract Allowance ..	1,44,300
State Conveyance & Motor cars ..	43,000
Private Secretary & Department ..	2,63,800
Military Secretary & Department ..	3,22,400
Tour Expenses,—Special Trains etc. ....	4,70,700
<b>Total ..</b>	<b>15,54,000</b>

This, however, does not include the charges for the Band and Bodyguard, included in the Military Budget, and costing, in the Budget for 1937-38, an aggregate sum of Rs. 1,84,600. Nor does it provide for the cost of maintaining Viceregal residences, Leave allowance to the Governor-General,—which is now regularly taken once in the period of office; or Outfit and Equipment Allowance when first appointed of £5,000. If these were added, the annual average cost of the Governor-General, his office and its maintenance would be over Rs. 17,62,000. Compared to the pay and allowance granted to the other Chief Executives in the British Empire, or in other countries, like France or the U.S.A.,—and viewed particularly in correlation with the ability of the Indian people who have to bear such burdens,—this seems too excessive to be in any way defensible.

## CHAPTER V

### THE FEDERAL EXECUTIVE

The Federal Executive is composed of:

- (i) the Governor-General;
- (ii) the Council of Federal Ministers; and,
- (iii) if we include the Departmental heads, the administrative services. In this last category we might comprise all the Superior Services; but, as these have very little scope to determine the policy of Government; and as they are mainly Ministerial officers, it might not be strictly correct to include these in a description of the Indian Federal Executive. Similarly, it would be equally open to objection to include the special Counsellors to the Governor-General in the Reserved or Excluded Departments, since they have no executive responsibility placed upon them by the Constitution.

The Executive Government of a country must needs include Civil as well as Military branches. Though the Governor-General is in charge of the Department of Defence, it is nevertheless not so clearly brought within the constitutional ambit as to justify the belief that a description of the executive functions would necessarily include and exhaust and military side of the Indian Administration. A separate Chapter will, accordingly, be devoted to the consideration of the constitutional aspect of our national defence; including the consideration of the position of the various Arms of Defence, of the Commander-in-Chief, and of the Defence Services and problems in general.

The executive administration has also its financial aspect. There are sections in the Government of India Act, 1935, which closely regulate some portion of that administration. But though the Department of Finance is not excluded wholly from the constitutional activities of the Federal executive, the Governor-General is saddled with a Special Responsibility in this behalf; and has, besides, a special Adviser in this department, which necessitate a separate treatment of **Federal Finance** in its financial as well as constitutional aspect. The addition, moreover, of such special machinery as that provided by the Reserve Bank, has a considerable constitutional significance. Though we cannot include a detailed study of the Reserve Bank in this volume, even in so far as its constitutional or political importance is concerned, reference must nevertheless be made to it in the Chapter on Federal Finance, if only to make the study of the financial constitution of India more comprehensive.

The study of the Executive would thus include a consideration of:

- (i) the Governor-General;
- (ii) Federal Ministry;
- (iii) Federal Services;
- (iv) Federal Finances; and
- (v) Federal Defence.

#### **Governor-General as head of the Executive**

- (i) Let us begin with the Governor-General.

The powers of the Governor-General are generally described in Section 7 of the Act, which reads:—

#### **Functions of Governor-General**

7.—(1) Subject to the provisions of this Act, the executive authority of the Federation shall be exercised on behalf of His Majesty by the Governor-General, either directly or through officers subordinate to him, but nothing in this

section shall prevent the Federal Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor-General any functions conferred by any existing Indian Law on any court, judge or officer, or on any local or other authority.

(2) References in this Act to the functions of the Governor-General shall be construed as references to his powers and duties in the exercise of the executive authority of the Federation and to any other powers and duties conferred or imposed on him as Governor-General by or under this Act, other than powers exercisable by him by reason that they have been assigned to him by His Majesty under Part I of this Act.

(3) The provisions of the Third Schedule to this Act shall have effect with respect to the salary and allowances of the Governor-General and the provision to be made for enabling him to discharge conveniently and with dignity the duties of his office.

Under Section 3 (1) (b), the Governor-General has such other powers of His Majesty as may be assigned specifically to him,—other than powers of the Sovereign in his relations with the Indian States. These last also are, as it happens, entrusted to the present Governor-General, as representative of the Crown; but may, in future, as already remarked, be kept separate and entrusted to another officer. Section 3 (1) (a) gives him all the powers which are conferred upon him by or under this Act. Hence he has (i) the powers conferred by or under this Act; (ii) special powers of His Majesty, specifically conferred by His Majesty; (iii) powers of His Majesty conferred upon him as representative of the Crown.

The extent of the Federal Executive authority is defined by Section 8, which says:—

8.—(1) Subject to the provisions of this Act, the executive authority of the Federation extends—

- (a) to the matters with respect to which the Federal Legislature has power to make laws;

- (b) to the raising in British India on behalf of His Majesty of naval, military and air forces and to the governance of His Majesty's forces borne on the Indian establishment;
- (c) to the exercise of such rights, authority and jurisdiction as are exercisable by His Majesty by treaty, grant, usage, sufferance, or otherwise in and in relation to the tribal areas:

Provided that—

- (i) the said authority does not, save as expressly provided in this Act, extend in any province to matters with respect to which the Provincial Legislature has powers to make laws;
- (ii) the said authority does not, save as expressly provided in this Act, extend in any Federated State save to matters with respect to which the Federal Legislature has power to make laws for that State, and the exercise thereof in each State shall be subject to such limitations, if any, as may be specified in the Instrument of Accession of the State;
- (iii) the said authority does not extend to the enlistment or enrolment in any forces raised in India of any person unless he is either a subject of His Majesty or a native of India or of territories adjacent to India; and
- (iv) commissions in any such force shall be granted by His Majesty save in so far as he may be pleased to delegate that power by virtue of the provisions of Part I of this Act or otherwise.

(2) The executive authority of the Ruler of a Federated States shall, notwithstanding anything in this section, continue to be exercisable in that State with respect to matters with respect to which the Federal Legislature has power to make laws for that State except in so far as the executive authority of the Federation becomes exercisable in the State to the exclusion of the executive authority of the Ruler by virtue of a Federal law.

#### Nature and Extent of Federal Executive Authority

The Executive authority of the Federation relates, generally speaking, to Federal affairs; and is exercisable subject to the provisions of this Act. Under this

Act, the Federal Executive authority does not extend:

- (a) to the Provinces with respect to those matters on which the Provincial Legislature is entitled to make laws,—i.e., under Schedule VII, List II;
- (b) to the Federated States, except as to matters with respect to which the Federal Legislature has power to make laws, under Schedule VII, List I,—and, then, too, subject to such limitations as may be laid down in that behalf in the Instrument of Accession of each State;
- (c) to the enlistment or enrolment of non-Indians in the defence forces of India.

The authority of the Ruler of a Federated State, in his State, is attempted to be specifically safe-guarded by sub-section (2); but it must be admitted the safe-guard is a very slender and illusory one.

#### The Governor-General: Fivefold Powers

Analysed into their proper categories, the several powers and functions of the Governor-General fall into 5 classes:—

- (i) Powers and Functions in regard to the Reserved Department;
- (ii) Powers and Functions exercised in his discretion;
- (iii) Powers and Functions exercised in his individual judgment;
- (iv) Powers and Functions exercised on the advice of his Council of Ministers;
- (v) Extraordinary Powers, (a) of Legislation; (b) of supervision over Provincial Governments; (c) and in relation to the States, Federated or non-Federated.



These, it will be noted, do not include the Powers and Functions exercised by this officer as Representative of the Crown, in the latter's relations with the Indian States and in regard to Paramountcy,—so long as the Governor-General and the Viceroy (representative of the Crown) continue to be one and the same person. They do not include, also, the special Prerogative Powers of the Crown entrusted to him specifically.

### Reserved Departments

Under Section 11, there are four main Reserved Departments of the Federal Government, which are taken to be excluded wholly from the scope of the Governor-General's Constitutional Advisers. These Departments are:—

- (a) Defence,—the problems and the constitutional aspect of which is considered in another Chapter separately;
- (b) Ecclesiastical Affairs;
- (c) External Affairs; but not relations with the Dominions;
- (d) Excluded Areas.

### (b) Ecclesiastical Affairs

(b) Under Section 11 (2), the Governor-General is empowered to appoint at most 3 Counsellors to advise him in the administration of these Departments. Let us begin this portion of our study by taking up first the Department of Ecclesiastical Affairs. These concern only the Christian Church,—and mainly the Protestant Church of England, maintained in India at the expense of the Indian tax-payer to afford spiritual ministrations

to the Christian Public Servants of the Crown in India. A few stipends are also allowed to Chaplains of the Christian Catholic Church, and to the Ministers of the Church of Scotland, under the terms of Section 269. In the main, however, this Department provides the spiritual ministration for only a microscopic minority of the people in India. By Section 33 (3) (e), the expenditure on this Department is not to exceed Rs. 42 lakhs a year, exclusive of pensions.

### Provisions as to Chaplains

269.—(1) There may, as heretofore, be an establishment of chaplains to minister in India to be appointed by the Secretary of State and the provisions of chapter II of this Part of this Act shall, with any necessary modifications, apply in relation to that establishment and to persons appointed as chaplains by the Secretary of State or by the Secretary of State in Council, as they apply in relation to the civil services to which appointments are to be made by the Secretary of State and to persons appointed to a civil service under the Crown in India by the Secretary of State or by the Secretary of State in Council, and for the purposes of the provisions of chapter II relating to persons who retired before the commencement of Part III of this Act, the said establishment shall be deemed to be an All-India service.

(2) So long as an establishment of chaplains is maintained in the Province of Bengal, two members of that establishment in the Province must always be ministers of the Church of Scotland and shall be entitled to have out of the revenues of the Federation such salary as is from time to time allotted to the military chaplains in that Province.

This sub-section applies to the Province of Madras and to the Province of Bombay as it applies to the Province of Bengal.

(3) The ministers of the Church of Scotland so appointed chaplains must be ordained and inducted by the Presbytery of Edinburgh according to the forms and solemnities used in the Church of Scotland, and shall be subject to the spiritual and ecclesiastical jurisdiction in all things of the Presbytery of Edinburgh, whose judgments shall be subject to dissent, protest and appeal to the Provincial synod of Lothian and Tweeddale and to the General Assembly of the Church of Scotland.

The justice of this charge being thrown upon the Indian tax-payer has been always open to serious question, especially as, apart from this connection with spiritual affairs, the State in India professes to be wholly a secular organisation. For the vast majority of the children of the soil, and for any religious ministrations to them, the Government of India have always professed an attitude of neutrality. This they would not disturb even for the purpose of effecting most overdue social reforms, which are inextricably interconnected with the religious beliefs of the people. The desire to keep this department outside party politics in India is understandable; but the justice of making this expenditure wholly non-votable, or even non-discussable, is impossible to realise. The people directly benefited by such ministrations could, if they really value such services, make their own contributions; and so obtain a solace or an opiate without being an unjustifiable burden upon the Indian people. The parallel alternative of active interest by the State in the local religions of the peoples of the country is not only not advisable under present conditions of India; it is positively dangerous and objectionable. The Communal tangle, bad enough as it is, will become seriously complicated, if the State becomes financially involved in the maintenance of mosques and temples, shrines and durgahs. In their own country, the precedent of the Disestablishment of the Protestant Church in Ireland, long before the Irish demand for national independence had become anything like a reality, is sufficient warrant, even if there were not unanswerable arguments in the intrinsic weakness of the Ecclesiastical Department maintained by the Indian Government as a charge upon the revenues of India, to demand an

immediate disestablishment of this charge. And the proportion of the Irish people following this particular brand of the Christian religion was much larger, in comparison with the population of that country in the aggregate, than is at all the case of the Christian people in proportion to the rest of this country.

### (c) External Affairs

The second of the excluded Departments concern the Foreign Affairs of India,—relations with the neighbouring States.

#### (i) Relations with Britain and the Dominions

Relations with the Dominions are expressly excluded from this term "External Affairs." These relations with the Dominions,—and, presumably, also the relations with the Colonies, like Ceylon,—are to be conducted by the Governor-General in the usual constitutional manner, *i.e.*, on the advice of the Federal Ministers.

The relations with the British Government proper are comprised in neither of these classes. Their conduct is in the hands of a number of authorities, beginning with the Secretary of State for India, the Governor-General and his Council of Ministers, and ending with the High Commissioner for India, who may be trusted to see to it that British interests in India do not suffer in the least because of the growth of Constitutional Government responsible to the people in India. A whole chapter of the Act of 1935 is devoted to prohibiting Indian Legislatures or Indian Governments of any degree from taxing, legislating or treating in any manner invidiously British traders and professional men settled in India;\* while another still

\**cp.*, Part V, *cp.* III, Sections 111-121. See Chapter XIII below.

longer portion of the Act is devoted to devising innumerable safeguards for protecting the interests of British public servants, civil as well as military, stationed in India. There is, therefore, no reason to provide still further in this behalf additional safeguards.

For years to come India's relations with the British Government and with the Dominions must constitute the gravest and most complicated block of her foreign affairs. They would concern not only the constitutional status of India, but also her foreign trade and credit, and even her contacts of all kinds with other European and American peoples. It may, therefore, seem satisfactory to find the conduct of these relations placed within the scope of Ministerial Responsibility, if and when the Federation of India is established. There is, however, no hope of a radical change resulting from this new constitutional arrangement.

Such conventions as are said to have been established already under the Act of 1919,—e.g., the Fiscal Autonomy of India,—that is to say, freedom from British Imperial dictation when the Government of India and the Indian Legislature agree on issues of fiscal policy,—may materially influence the trend of policy hereafter. The possibility, however, of India's prompt and effective retaliation against such of the British Dominions as injuriously affect the status of Indians within their jurisdiction, or their rights to settlement, trade, or acquisition of real or personal property, seems still rather remote, even after the advent of Responsible Ministries at the Centre.

#### **Relations with other countries**

The possibility of adding to the economic strength of India by a proper conduct of her External Relations

is very remote, however, because of the withdrawal of the rest of the External Affairs from the purview of Ministerial Responsibility. The Governor-General is entitled to appoint special Counsellors to advise him on these subjects; and these will be in no way responsible or subordinate to the people's representatives in the Federal Legislature. Even their salaries and conditions of service are, under Section 11, to be prescribed by His Majesty by an Order-in-Council. Hence, even the Governor-General would not have such control over them as to prevent them from acting as watchdogs of British vested interests rather than Indian Public Servants, acting primarily and entirely in the interests of those who pay them. The Governor-General, for instance, cannot recommend the removal, much less himself remove any of these Counsellors from his post, even if he found such a Counsellor acting—not in the best interests of India. Needless to add these salaries, etc., are, under Section 33 (3) (c), placed outside the vote of the Legislative Assembly, being charged on the revenues of the Federation. The persons likely to be appointed to these posts, as also to the post of the Financial Adviser to the Governor-General, under Section 15, will be, most probably, non-Indians, with, perhaps, a strong bias against Indian ideals and aspirations, Indian demands and requirements, in such matters. Being appointed by an outside authority and irremovable by any authority in India, no matter how gross may be their dereliction of duty; with the salaries and allowances, determined in the first instance by an outside authority and beyond the vote of the Indian Legislature; with their training and temperament, traditions and environment being unsympathetic, if not antagonistic, to India, it may be



easily realised how these functionaries may work against India, and put the clock of her material advance substantially backwards.

### Legislature and External Affairs

Item 3 in List I, under Schedule VII, detailing the subjects on which the Federal Legislature would be entitled to make laws, is worded as under:—

"External Affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's Dominions outside India".

This is,—as indeed all these Lists are,—an extremely clumsily worded item. All that we can glean clearly from it is that while extradition as between Dominions is particularly mentioned, all other aspects of our relations with the British Dominions are not specified at all. Those aspects of the Foreign Relations, which require to be legislated for in order to be given effect to, are, perhaps, included in this item. If not, all "External Affairs" could be necessarily the subject matter of legislation. Treaty-making is, undoubtedly, an executive prerogative; and so, also, the appointment or accrediting of envoys, ambassadors, ministers, or counsels to Foreign Governments. India has, so far, no right to employ her own diplomatic or consular agents,—except, perhaps, the High Commissioner in England and in some of the Dominions, and Trade Commissioners in Britain, Germany, Italy, or Japan. It may be doubted if these officials could be rightly classed as diplomatic or consular agents. Such as they are, they come within the scope of the Executive Government, and as such may be within the power of the Governor-General to appoint and control. Nego-

tiations for treaties of all kinds,—trade treaties, political engagements, financial pacts,—are to be conducted by the Governor-General, in so far as that officer has the right to conduct negotiations and conclude Treaties with India's immediate neighbours, or farther afield in Asia, Africa, Europe, or America.

Needless to add that relations with Indian States, within the Federation or outside, are not included under this term "External Affairs"; but that they will be, in so far as not included in the Federal Government, within the purview of the Representative of the Crown; and, as such, outside the scope of Ministerial Responsibility.

### Critique of exclusion of External Affairs

The exclusion from the purview of responsible Ministers of the Federation of all our Foreign Relations weakens enormously the effective authority of those Ministers, and effectually undermines their power to do any real good to the people whom they represent. No other proof is necessary, in the face of this exclusion, that this Constitution is designed to keep India for ever within the leading strings of British Imperialism; that her Foreign Policy,—and, as a strong, indispensable prop of that policy, her provision for national defence,—is kept entirely and exclusively under the control of the supreme agent of that Imperialism, the Governor-General. To any one who understands in the least the most intimate connection between the Foreign Policy of a modern nation and its economic well-being, it is unnecessary to emphasise further evidence of the first charge made above. And to those who realise the close dependence of Britain herself on the foreign trade as a means of maintaining

her own prosperity and pre-eminence in the nations of the world; to those who know the part the effective control of India's foreign policy in British hands plays for securing Britain's economic prosperity, this device of excluding the Foreign Affairs as a mark of distrust of Indian Nationalist statesmen, as an engine of rivetting Britain's economic drain from India, and her domination over all material concerns of this country, would require no further proof.

### Dyarchy in the Federation

The Governor-General's powers are, under the Act of 1935, more extensive than those of the Provincial Governors. This is so not only because, in the ultimate analysis, he is the final boss of all provincial administrations,—and, for the matter of that, of the government even in the Indian States,—but also because important departments of Government are summarily excluded from the scope of the Federal Government altogether. These exclusions are, under the proposed regime, essentially different from the so-called Reserved Departments in the Provinces in the days of the Dyarchy. For, whereas in the latter, all departmental chiefs—Ministers and Executive Councillors,—worked together in a common Cabinet in each Province, and so obtained inevitably the benefits of constant exchange of views under the proposed Federation there need be no such exchange of views, between those in charge of the Excluded Departments, and those responsible for the conduct of the administration in the other departments. The Governor-General is, of course, nominally, in sole charge of the excluded Departments. He is to be assisted by special Counsellors, under Section 11 (2) already referred to; and, apart from the Instrument of Instruc-

tions specially issued to the Governor-General, there is nothing to show that there will be a constant contact between the Reserved and the Responsible Department.\* We shall comment upon the Instructions to the Governor-General in another section of this Chapter; and point out there how far a real unity, or even a co-ordination of national policy in the principal departments of State in India, is likely at all to be evolved.

### II—Governor-General's Discretionary Powers

Besides the Departments of Government formally and expressly excluded from the scope of Ministerial responsibility,—and in which he is vested with sole discretion for all executive and administrative purposes,—the Governor-General is endowed, by the Act of 1935, with innumerable powers and functions to be exercised "in his discretion". The term discretion is nowhere defined in this Act. But the contrast it offers to the powers and functions to be exercised, under the same Act, "in his individual judgment", especially as made clear by Section 9 (1) of the Act, shows, that while the purely discretionary powers and functions are those in which the Governor-General need not even consult his Ministers, if he so chooses, in these in which is authorised "to exercise his individual judgment", he must, presumably, consult his Ministers, though he need not necessarily follow their advice; and that, if he does not accept their advice in these matters, his action would not be rendered invalid simply because it is not in accordance with the advice of the Ministers. By section 10 (4):

"The question whether any and, if so, what advice was tendered by Ministers to the Governor-General shall not be enquired into in any Court".

\*cp. Article VIII of the Instrument of Instructions to the Governor-General.



The result would be that such matters would never be capable of being judicially decided, and the Constitution in this respect being legally interpreted by competent tribunals.\* The vagueness, ambiguity, uncertainty, would accordingly remain uncorrected even though occasions should arise for a proper determination of what is meant by exercising powers in the Governor-General's sole discretion; and exercising them in his individual judgment.

It must be noted, however, that neither in the list of Discretionary powers, nor in those permitting the exercise of individual judgment, there is anything which makes it necessarily impossible for the Governor-General to consult his Ministers, even in these fields, and to abide by their advice. In no section of the Act is it anywhere laid down that in any given case, the Governor-General shall **not** ask, or shall not follow, the advice of his Ministers. Conversely, in more than one section giving him sole discretion, it is expressly provided that he must exercise those powers "after consultation" with named authorities, e.g., the Minister, in making rules of business for his government, or the Speaker or the President in the Legislature for making certain rules of procedure. The ordinary, dictionary, meaning of "Discretion" makes it equivalent with the sole right of choice or decision, whether or not to do a thing,—especially if that thing is not expressly prohibited by law. If the Governor-General chooses to exercise his discretion, so as to seek the advice of his responsible Ministers, and even to follow it when given,—even in those matters in

\*The law, note, does not say that no Court is competent to entertain such matters, or that no Court has jurisdiction, either originally or in appeal, in such matters; it only says such matters shall not be enquired into in any Court. The difference in wording is significant and suggestive.

which he is not bound to seek such advice, or to adopt it when obtained,—there is nothing in the Act to render such action of his unconstitutional. For instance, the Governor-General is authorised, by Section 9(2) "in his discretion" to preside at meetings of the Council of Ministers. If, however, following the practice of the King in Britain herself, and of the Governors-General in the Dominions, as also out of consideration of the fact that Ministers would never be free in their deliberations if at those deliberations the executive head of the Government is personally present, and comes to know their internal differences, if any, he uses his "discretion" so as ordinarily **not** to be present at such meetings at all, he would not be violating the Constitution in any regard. In fact, he would be following the best precedents already existing, and exalting the spirit of the Act above the mere letter thereof. He might even safeguard his position still further by being present and presiding, at times, when the Council meets for some purely formal function, e.g., the announcement of the demise of a King, so that the right to preside at meetings of the Ministers should not fall completely into disuse, and so be regarded as unconstitutional by convention.

The following are Sections giving most of the "discretion" to the Governor-General:—

- |   |      |    |  |
|---|------|----|--|
| 1 | (9)  | 1  | General Authority.   |
| 2 | (9)  | 2  | Presiding at the meetings of the Council of Ministers.   |
| 3 | (9)  | 3  | Deciding questions in dispute as to whether a particular matter was a matter for the Governor-General's discretion or individual judgment. |
| 4 | (10) | 10 | Choosing, summoning, and dismissal of Ministers.   |