

- 5 (10) 3 Determination of the Salaries of the Ministers until settled by an Act of the Legislature.
- 6 (11) 1 (i) Departments of Defence (ii) Ecclesiastical Affairs, (iii) External Affairs and (iv) Tribal Areas.
- 7 (15) 4 Appointment of Financial adviser, dismissal and determination of salary and allowances, as also the numbers of his staff and their conditions of Service. (Proviso: He must consult the Ministers before making any appointment *after* the first appointment as to the person to be selected).
- 8 (17) 2 Making of Rules for authentication of the orders and instruments of the Government.
- 9 (17) 3 Rules for the convenient transaction of the Governmental business and distribution of work amongst Ministers; and
- 10 (17) 4 Special Rules for keeping Governor-General informed.
- 11 (19) 2 Summoning of the Chambers, their proroguing and dissolution of Federal Assembly.
- 12 (20) 1 Addressing Federal Legislature.
- 13 (20) 2 Sending messages to Federal Legislature regarding pending Bills.
- 14 (22) 3 Appointment of acting chairman for Council of State in the vacancy of President and Deputy President.
- 15 (26) 1 (e) The fixing of period for removal of disqualification due to sentence of transportation or imprisonment.
- 16 (26) 1 (f) Removal of disqualification due to failure to lodge Election expenses return.
- 17 (31) 1 Summoning of joint meetings of two Chambers.
& 2
- 18 (32) 1 Disallowance of Bills, assent to Bills, withholding assent, or reserving Bills for His Majesty's consideration.
- 19 (32) 1 Proviso: Return Bills with a message for reconsideration.

- 20 (33) 4 Decision on question whether any expenditure is chargeable on the revenues of the Federation or not.
- 21 (38) 1 Making of Rules of procedure for Federal Assembly and Council of State regarding business which involve Governor-General's discretion or individual judgment; secondly, timely completion of Financial business; thirdly, prohibition of discussion or questions regarding affairs in Indian States, also waiving of such prohibition; fourthly, prohibition of discussion or Questions regarding a Foreign State or Ruler; fifthly, discussion or Questions on matters connected with Tribal or excluded areas; sixthly, discussion or questions regarding Governor-General's discretionary action in relation to Provincial affairs, or discussion or questions regarding personal conduct of any Indian Ruler or member of any Ruling Family,—and consent to waive all these.
- 22 (38) 2 Making of rules for procedure at Joint sittings.
- 23 (38) 3 First Rules of Procedure.
- 24 (40) 2 Prohibition of further proceedings on any Bill or Amendment certified to affect his special Responsibility regarding any menace to peace and tranquillity.
- 25 (43) Making of Ordinances under Special Circumstances to enable Governor-General to discharge his discretionary functions, and those involving the exercise of his individual judgment, more satisfactorily.
- 26 (44) Enactments of Governor-General's Acts or sending message with draft Bill for the purpose under special circumstances affecting his functions under these two classes.
- 27 (45) Issuing of Emergency Proclamation, suspending constitution and assuming specified powers for himself.
- 28 (54) 1 Control over and issuing directions to Provincial Governors acting in *their* discretion or in their individual judgment.
- 29 (76) 1 Assenting to Provincial Bills reserved for Governor-General's assent, withholding

- assent, reserving same for His Majesty's pleasure, or directing return of such Bill to the Provincial Chamber with a message to reconsider the Bill or introduce certain amendments therein.
- 30 (88) 1 (b) Issuing instructions to Provincial Governors for promulgation of Ordinances.
- 31 (89) 5 Concurrence in issuing of Ordinances on certain subjects involving Governor's discretion or individual judgment; withdrawal of such Ordinances issued without such concurrence.
- 32 (90) 5 Concurrence in the enactment of the Governor's Acts.
- 33 (92) 2 Assenting to regulations made by the Governors regarding administration of Excluded or partially excluded areas.
- 34 (93) 5 Concurrence in the issue of Emergency Proclamations in the Provinces suspending Constitution.
- 35 (94) 3 Appointment of Chief-Commissioners.
- 36 (95) 1 Direction and control of the Administration of the British Baluchistan.
- 37 (95) 2 Directing that Acts of Federal Legislature shall apply to British Baluchistan, and making exceptions or modifications therein.
- 38 (95) 3 Making of regulations for the peace and good government of British Baluchistan.
- 39 (96) Making of regulations for the peace and good government of Andaman and Nicobar.
- 40 (98) Provisions as to Police rules regarding crimes of violence intended to overthrow Government.
- 41 (102) 1 Declaring that an Emergency exists for Federal Legislature to make laws for any province.
And giving previous sanction to introduction of such Bills.
- 42 (104) 1 Empowering either Federal Legislature or any Provincial Legislature to make laws on

- subjects not included in their respective lists; but directing that the executive authority of the Federation or Province need not extend to the administration of such laws.
- 43 (107) 2 Giving previous sanction to Bills or amendments for making provision repugnant to existing Provincial Law which has received assent of Governor-General or His Majesty after having been reserved.
- 44 (108) 1 Giving previous sanction to seven classes of Bills in the Federal Legislature.
- 45 (108) 2 Giving previous sanction to Four Classes of Bills in the Provincial Legislatures.
- 46 (111) 3 Certifying that suspension of 111—(1) is necessary to prevent grave menace to peace and tranquillity of India or to combat crimes of violence.
- 47 (119) 1 Granting previous sanction to Bills or Amendments prescribing or permitting any authority to prescribe professional or technical qualifications, or imposing any disability, etc., for practising any profession, etc. (see also 2).
- 48 (123) Directing Governors to discharge certain functions as his agents.
- 49 (125) Making of agreements with rulers of Federated States for the exercise by the Ruler, etc., of the functions regarding the administration of any Federal Law applying therein.
- 50 (125) Inspection, etc., of such administration; and issue of directions to the Ruler in this behalf.
- 51 (126) 4 Issuing of *Orders* to Governors for carrying out certain *Directions* and also *Orders* as to the manner in which the Executive authority is to be exercised.
- 52 (128) 2 Issuing of *Directions* to the Rulers of Federated States regarding fulfilment of obligations, after considering representations made to the Governor-General.

- 53 (129) 5 Decision on dispute whether any condition imposed regarding Broadcasting on any Provincial Governor or Ruler is lawfully imposed, or refusal to comply with the same is unreasonable.
- 54 (131) Decision on complaints regarding the use of interprovincial or interstate-and-province water supplies.
- 55 (132) Decision on complaints regarding Chief Commissioners' Provinces.
- 56 (132) 2 B. (ii) Modifications of the refund of Income-tax to the Provinces in the second prescribed period.
- 57 (141) Previous sanction to Bills or Amendments (i) imposing or varying tax or duty in which provinces are interested; (ii) Varying meaning of "Agricultural income" for purposes of Indian income-tax; (iii) Affecting principles governing the distribution of monies to the provinces or Federated States. (iv) imposing Federal surcharges.
- 58 (152) (a) Appointment and removal of Governor and Deputy Governor of Reserve Bank, approval of their salaries and allowances, fixing of their terms of office; (b) Appointment of officiating Governor or Deputy Governor; (c) Supersession of Central Board; (d) Liquidation of the Bank.
- 59 (153) Previous sanction to Bill, etc., affecting coinage or currency, and constitution and functions of the Reserve Bank.
- 60 (163) 4 Decision on dispute regarding the refusal of Federal consent for Provincial borrowing or imposing of any condition.
- 61 (166) 3 Previous sanction to Bills regarding the duties and powers of the Auditor General regarding Federal or provincial accounts.
- 62 (170) Previous sanction to Bills regarding the duties and powers of the Auditor of the Indian Home accounts.
- 63 (175) 1 Concurrence for the sale of land or building used as official residence.

- 64 (182) 1 Appointment of 3/7 of the members of the Railway Authority and the President thereof.
- 65 (182) 2 Previous sanction to Bills affecting appointment, qualifications and conditions of Service of members of Railway Authority.
- 66 (183) 2 Decision on disputed questions regarding policy.
- 67 (183) 4 General discretion in regard to the Railway Authority.
- 68 (187) 1 Determination of the sums equivalent to the amount of monies provided out of the revenue of India for capital purposes regarding Railways in India.
- 69 (187) 3 Decision on disputes regarding expenses for police on Railway premises between a province or a State, and the Railway Authorities.
- 70 (189) 1 Determination of the rate of interest on the balances of certain Railway Funds if there is no agreement for the same.
- 71 (195) 1 Making of rules for requiring Railway Authorities and any Federal State to give notice on any proposal for constructing or altering a Railway or for deposit of plans.
- 72 (195) 3 Suspension of this section where reasons of Defence require that effect should or should not be given to such a proposal.
- 73 (196) 1 Appointment of a panel to form a Railway Tribunal and selection of persons to constitute one.
- 74 (196) 2 Appointment of President of Railway Tribunal from Judges of Federal Tribunal.
- 75 (196) 6 Approval of rules made by President of Railway Tribunal regarding practice and procedure before Railway Tribunal and charging of fees.
- 76 (196) 8 Determination of remuneration to members of Railway Tribunal.
- 77 (199) Appointment of Directors and Deputy Directors of Indian Railway Companies.

- 78 (206) 3 Previous sanction to Bill or amendment enlarging Appellate jurisdiction of Federal Court.
- 79 (213) 1 Referring questions of Law for opinion to the Federal Court.
- 80 (222) 1 Appointment of *temporary and additional* Judges of the High Courts, as also of the officiating Chief Justice of a High Court, and revocation of appointment of any temporary or additional Judge.
- 81 (226) 2 Previous sanction to Bill or amendment in the Federal Legislature for the Grant of jurisdiction in revenue matters.
- 82 (242) 4 (a) Appointment of persons not attached to a Court to any office connected with a Court after consultation with the Federal Public Services Commission.
- 83 (244) 4 Informing the Secretary of State regarding the operation of this section, and recommendation for its modification.
- 84 (251) Proviso: (a & b) Approval of the numbers, salaries, qualifications of the staff of the Auditor of the Indian Home accounts.
- 85 (265) 1 Appointment of Chairman and members of the Federal Public Service Commission;
- 86 (265) 2 Determination of number, tenure of office and conditions of Service, and provision re: the staff and their conditions of Service.
- 87 (265) 3 (c) Previous approval of appointment of members of Federal Public Service Commission to any other post under the Crown.
- 88 (266) 3 Making of regulations to make consultation with public Services Commission necessary re: posts in connection with the Federation.
- 89 (267) a Previous sanction to Bill or amendment regarding enlargement of functions of the Public Service Commission.
- 90 (270) 1 Consent to civil or criminal proceedings against the Public Servants for Acts done in their official capacity.
- 91 (271) 1 Previous sanction to Bill or amendment abolishing or restricting protection to cer-

- tain public servants under Section 197 of the Indian Code of Criminal Procedure, or Sections 80-82 of the Indian Code of Civil Procedure.
- 92 (286) 1 Use of His Majesty's forces in connection with the functions of the Crown in relation to Indian States.
- 93 (299) 3 Previous sanction to Bill or amendment for compulsory acquisition of any land, or any commercial or industrial undertaking, or any land or property of any commercial or industrial company subject to compensation.
- (305) Secretarial Staff.
- 94 (308) Report on proposals for amending certain portions of this Act, and Orders in Council, especially as affecting any minorities.

Critique of these Powers

It is impossible to comment at length upon each of these powers to be exercised by the Governor-General in his sole discretion. Not only can we not foresee to-day the exact reaction in each case of the exercise of any of these powers; we cannot, also, fully appreciate the modes and forms, the occasions and circumstances under which they may come to be exercised, and the consequences to the economic well-being and the political consciousness of the people of India. Past experience is no guide in such matters, simply because the basic idea of the Government India is altered. In place of an essentially non-responsible alien bureaucracy,—controlled, directed and supervised from Whitehall,—there is to be, when the Federation of India is an accomplished fact, a Responsible Ministry for the whole of India in all common concerns, or such as are agreed to be such. But, looking upon the letter of the law of these numerous powers, we cannot help observing that a very substantial portion of the normal

powers and duties falling to the share of Responsible Ministers in all parliamentary democracies has been taken away from the Responsible Ministers of the Federation of India; and that what remains will also be materially affected to the prejudice of the Ministers just because of these powers denied to them. The exercise of practically autocratic, exclusive powers by the head of the executive government,—himself a bird of passage,—overriding his Responsible Ministers, and often without any consultation with those Ministers, is bound to have repercussions of which we can predict nothing to-day when all experience of such exercise has yet to be. No analogy from the British or Dominions constitutional law or practice would, also, serve the turn; and so all we can offer by way of comment or criticism would be necessarily in the nature of a general summary of reflections unbacked by substantial documentation.

III—Governor-General's Powers in which he may Exercise his Individual Judgment.

List of the Sections conferring powers on the Governor-General to be exercised in his individual judgment

- 1 (9) 1 General.
- 2 (12) 1 Special responsibilities of the Governor-General, viz.;
- 3 (i) Prevention of grave menace to peace and tranquillity of India.
- 4 (ii) Safeguarding financial stability and credit of Federal Government.
- 5 (iii) Safeguarding legitimate interests of Minorities.
- 6 (iv) Safeguarding legitimate interests of Public Services.
- 7 (v) Securing by executive action enforcement of anti-discrimination provisions (Ss. 111-121).

- 7 (vi) Preventing discrimination against goods imported from United Kingdom or Burma.
- 8 (vii) Protection of the rights of the Indian States and rights and dignity of their Rulers.
- 9 (viii) Securing adequate funds for due discharge of these, and of functions to be discharged in his discretion.
- 10 (16) 1 Appointment, dismissal and remuneration of the Advocate General.
- 11 (25) 1 Making rules for regulating vacation by a member chosen for both Chambers his seat for one of them.
- 12 (28) 4 Proviso: Making of regulations for attendance before Committees of Inquiry of persons in Government Service, and safeguarding confidential information.
- 13 (42) 1 (a) Promulgation of Ordinances under special Emergencies.
- 14 (119) 3 Disallowance of regulations, etc., regarding technical qualifications.
- 15 (119) 4 Exercise of executive authority under a Federal law re: the proceeding.
- 16 (151) Making of rules for the custody of public money.
- 17 (152) 2 Nominating and removing Directors of the Reserve Bank.
- 18 (184) 1 Making of rules for convenient transaction of business between Federal Government and Railway Authorities.
- 19 (196) 8 Determination of the amount of expenses to be included as administrative expenses of Railway Tribunal to be laid before Federal Legislature.
- 20 (216) 2 Inclusion of the administration expenses of the Federal Court in estimates of expenditure laid before Federal Legislature.
- 21 (246) 2 Appointments and postings to Reserved posts in connection with the affairs of the Federation.

- 22 (247) 2 Making of orders for promotion or granting leave or suspending an officer from office—as regards certain classes of officers.
- 23 (247) 3 Reduction of remuneration of an officer suspended from Office.
- 24 (248) 1 Consideration of complaints by Civil officers and their remedy.
- 25 (248) 2 Order regarding punishment, censure, reduction of emoluments or of pension or deciding adversely any memorial from him.
- 26 (258) 1 (a) Abolition of any civil post in certain classes or Central and Railway Services;
- 27 (258) 2 Rules affecting adversely the pay, allowances or pension to officers as above.
- 28 (262) Declaration of eligibility of Rulers or subjects of particular Indian States not being Federated States to hold permanent or temporary civil posts under the Crown.
- 29 (271) 2 Exercise of powers under Section 197 to sanction prosecutions against public servants in connection with the affairs of the Federation.
- 30 (271) 3 Defraying of costs in the civil suits against such public servants from Federal revenues.
- 31 (300) 1 Protection of certain rights, privileges or & 2 pensions from land or grant of land revenue.
- 32 (302) 1 Appointment of High Commissioner for India, his salary, and conditions of service.

Critique of Extraordinary Powers

Taken collectively, substantially the same criticism must be offered against this long list of the Discretionary powers given to the Governor-General,—nearly a hundred items in all,—as has been levelled, in the earlier part of this work on the system of Provincial Autonomy in India, against the corresponding powers of the Provincial Governors. Not only does it remove the most considerable part of govern-

mental routine from the hands of the Responsible, popular, Ministers; it denies them any initiative in some of the most important aspects of national administration, and takes away all sense of responsibility from them, even in such cases as require the executive head of government to consult his Ministers. Whether we consider the purely administrative routine;—the Rules and Regulations of public service; the promotion and postings of officers in certain specially favoured services; the inclusion of certain items of public expenditure in the list of those charged upon the revenues of the country; or we take into account the innumerable classes of Bills or amendments of existing laws, attempting to do away with certain impossible privileges, requiring previous sanction of the Governor-General *in his discretion* for being introduced or moved in the Federal Legislature; or think of the direct powers of legislation by way of Ordinances, or Governor-General's Acts, or giving and withholding assent to measures passed by the Federal Legislature, or recommending certain classes of Bills,—we find, at each step, a dead wall of distrust against the Indian element said to be introduced by or under this Act in the responsible councils of the Federation of India. The Ministers are liable, at every stage, to be kept out of their legitimate sphere of responsibility in all normal constitutions; to be thwarted and over-ridden; baffled and frustrated in their attempt to add to the prosperity and self-respect of the people.

The Governor-General is thus not only the supreme executive head of the Indian Government; he is also the dominating chief of the Ministry, and the controlling, directing, almost dictating factor in all

aspects of government,—legislative, executive, or even judicial.

There are no doubt certain concerns of the supreme Government in India,—*e.g.*, the functions of the Crown in its relations with the Indian States, particularly in regard to the so-called powers of Paramountcy,—which may need a certain exclusiveness, that cannot but impede the growth of collective responsibility for the entire governmental policy of the country. The Governor-General, even more than the Provincial Governors, is the representative of the British Crown in India. If ever he is to evolve into a perfect replica of the model set by the British Sovereign, these special and extraordinary powers of exclusive discretion cannot but go effectively counter to this intended transformation of the autocratic chief of an irresponsible Bureaucracy into the Constitutional head of a Responsible Government.

Special Responsibilities of the Governor-General

Let us here also comment in brief upon the Special Responsibilities placed upon the Governor-General by this Act Section 12, and those other analogous powers and functions which he is charged to exercise in his individual judgment, *i.e.*, without being obliged to follow in every case the advice of his Responsible Ministers. The genesis and essence of the doctrine of Special Responsibility has been already explained; and so we need not cover the same ground over again.* The list given above of these Special Responsibilities, is much wider than those of the Provincial Governors

**cp.* "Provincial Autonomy, ch. 3, pp.96, et seq.

though in all other respects the wording of the corresponding sections seems to be identical. The three added items are:—

- (i) The safeguarding of the financial stability and credit of the Federal Government; Section 12 (1) (b);
- (ii) The prevention of action which would subject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment; Section 12 (1) (f);
- (iii) The securing that the due discharge of his functions with respect to matters with respect to which he is by or under this Act required to act in his discretion, or to exercise his individual judgment, is not prejudiced or impeded by any cause of action taken with respect to any other matter; Section 12 (1) (h).

The inclusion of (i) above has been justified on the report of one of the Committees of the Round Table Conference, which held that "a fundamental condition of the success of the new Constitution that no room should be left for doubts as to the ability of India to maintain her financial stability and credit, both at home and abroad"

and that it is therefore necessary

"to reserve to the Governor-General in regard to budgetary arrangements and borrowing, such essential powers as would enable him to intervene if methods were being pursued which would in his opinion seriously prejudice the credit of India in the money markets of the world".

The Joint Select Committee of Parliament, therefore, recommended:

"In our opinion, though the expression 'budgetary arrangements and borrowing' indicates generally the

sphere in which it is desirable that the Governor-General should have power, if necessary to act, it would be unwise to attempt to describe this special responsibility in more precise terms than are proposed in the White Paper".*

Financial Responsibility

It is thus a deliberate act to leave this most serious concern of government undefined, so that the field of action reserved to the Governor-General, and that entrusted to the Responsible Ministers of the Federation, is obviously overlapping. The Act adopts the recommendation of the Joint Select Committee of Parliament in authorising the appointment of a Financial Adviser to the Governor-General.† His advice, however, would be available to the Ministers as much as to the Governor-General. But, inasmuch as the Financial Adviser would not be a member of the Ministry, he would be unable to appreciate the motives of National Policy leading a Ministry to propose measures which may not, immediately considered, appear

**op. cit.* para 174.

†Says Section 15:—

- (1) The Governor-General may appoint a person to be his financial adviser.
- (2) It shall be the duty of the Governor-General's financial adviser to assist by his advice the Governor-General in the discharge of his special responsibility for safeguarding the financial stability and credit of the Federal Government, and also to give advice to the Federal Government upon any matter relating to finance with respect to which he may be consulted.
- (3) The Governor-General's financial adviser shall hold office during the pleasure of the Governor-General, and the salary and allowances of the financial adviser and the numbers of his staff and their conditions of service shall be such as the Governor-General may determine.
- (4) The powers of the Governor-General with respect to the appointment and dismissal of a financial adviser and with respect to the determination of his salary and allowances and the numbers of his staff and their conditions of service shall be exercised by him in his discretion:

Provided that if the Governor-General has determined to appoint a financial adviser, he shall, before making any appointment other than the first appointment, consult his ministers as to the person to be selected.

perfectly orthodox to an old-fashioned, conservative Financial Adviser. The latter might even view those measures with an amount of distrust which is really not their due. And because the Governor-General is vested with a Special Responsibility, over the entire field of finance and credit of the Federal Government, he may, on the advice of his Financial Adviser, override his Ministers, and defeat their policy.

This must needs be a matter of grave concern to those who would work the Constitution embodied in the Act of 1935. The fact that the Governor-General is entrusted with the administration, in his sole discretion, of some of the largest spending departments of Government,—whose expenditure results in no material addition to the wealth of the country; the fact, further, that, even apart from these excluded Departments of extravagant cost, the Governor-General is entrusted with innumerable powers of discretion, which may not only involve heavy outlay charged upon the revenues of the Federation* but which may interfere substantially with fundamental lines of policy; and, finally, the fact that, by subsection (1) (h) of this Section 12, the Governor-General is granted plenary powers to interfere with and override any line of policy pursued by his Ministers, if he considers them at all likely to come in the way of the due discharge of all his discretionary functions, and his powers to be exercised in his individual judgment, makes this arrangement fraught with the gravest menace to the growth of true constitutional practice in regard to finance, and even to the prevalence of sound finance, considered in the long run.

*See below, Chapter on the Federal Legislature, and Section 33, for explanation of this phrase: "charged upon the revenues of the Federation."

It would be interesting to add that this particular Special Responsibility is not imposed upon the Provincial Governors. But, in their case, not only is the danger not very considerable of Ministers following lines of policy that are calculated to endanger the financial stability and credit of the country; but even the Governor has ample powers to prevent any such untoward development in his Province. The financial responsibilities of the Federal Government are, however, deemed to be so considerable, that Parliament has thought it proper to make it a Special Responsibility of the Governor-General, and allow him an expert adviser for the purpose.

Special Responsibility for British Trade

The other Special Responsibility of the Governor-General, not paralleled in the list of the corresponding Responsibilities of his Provincial prototype, relates to treatment of British or Burmese goods imported into India. The *raison d'être* of this particular Responsibility, at least so far as the Burmese goods are concerned, is a little difficult to appreciate. Perhaps it was imagined that the relations between the Federation of India and Burma are likely, in the near future, to be so strained that Responsible Indian Ministers might be inclined to advise retaliatory measures affecting Burman imports into this country. So far as present indications go, this is, however, a very unlikely contingency. But, in regard to British goods imported into India, apart from a whole Chapter of the Constitution devoted to prevent unfair discrimination against British goods imported into India, this Special Responsibility is added to see that, even administratively, there is no unfair, penal, or invidious treatment accorded to British goods

imported into India. Except for the all too powerful impulse of British Imperialism,—and the memory of the treatment given to Indian goods, and Indian aspirants for acquiring industrial technique in British establishments,—there is no reason why this Special Responsibility should be so specifically added. India can use no weapon against British competitors, which the Governor-General cannot, in effect, stultify or veto, whether in the legislative or in administrative field.

We have already commented on the third of these additional Special Responsibilities not to be found in the corresponding list of the Governor's Responsibilities; and so need not comment at further length upon it here.

Instrument of Instructions to the Governor-General

Let us, at this stage, consider the Instructions given to the Governor-General for the conduct of the Executive Government of the Federation,—if and when it comes into being; for the interpretation of his Special Responsibilities, and for the exercise of his Discretionary powers and functions. Under Section 13 of the Act of 1935.

13.—(1) The Secretary of State shall lay before Parliament the draft of any Instrument of Instructions (including any Instrument amending or revoking an Instrument previously issued) which it is proposed to recommend His Majesty to issue to the Governor-General, and no further proceedings shall be taken in relation thereto except in pursuance of an address presented to His Majesty by both Houses of Parliament praying that the Instrument may be issued.

(2) The validity of anything done by the Governor-General shall not be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him.

Appendix I to this chapter gives the Draft Instrument of Instructions to the Governor-General to be enforced when the Federation is established.* Though these Instructions will be issued under an express provision of an Act of Parliament, they are unenforceable in any Court of Law. To guard against a possible litigation, the law actually lays down that actions of the Governor-General, even though in violation of his Instructions, cannot be questioned in any Court of law. The only sanction—wholly academic—upon the officer for the due observance of these Instructions is the power of the King-Emperor to recall him from office, or that of Parliament to impeach him,—out of use for over 150 years. These weapons, if they exist in the armoury Imperialist Governance, are rusted, obsolete, and utterly ineffective under modern conditions.

The principal features of the Instructions to the Governor-General of the Federation of India is the clarification of the conduct to be pursued in the appointment of the Council of Ministers, infusion in them of a spirit and tradition of collective responsibility, and the amplification of what is meant and intended by the Special Responsibilities imposed by the Act upon the Governor-General. In so far, however, as the Special Responsibilities come in the way of the full sense of Ministerial Responsibility; or in so far as the rigorous discharge, in the traditional

*The Gazette of India Extraordinary, dated April 1, 1937, contains the Letters Patent constituting the office of the Governor-General of India; the Commission under the Royal Sign Manual appointing Lord Linlithgow as the Governor-General and Viceroy, investing him with the power to exercise the Royal Prerogative of Mercy, as also to issue Commissions to officers in the Indian Army, Navy and the Air Force, and to exercise the rights of Paramountcy, as representing the King-Emperor, in relation to the Indian States. It also contains Instructions which are valid during Transition period till the Proclamation of Federation. The Instructions contained in the appendix apply when the Federation comes into being.

channels of these Special Responsibilities of the Governor-General impede the economic development of India, or the fruition of Nationalist ambitions, the Instructions do not remove the Nationalist objections. In fact, they explain the real intention of the framers of the Constitution, and stress in a somewhat reactionary direction what the exigencies of legal draftsmanship have necessarily left vague and undefined in the body of the Act.

The Governor-General of India is instructed, for example to

"avoid action which would affect the competence of his Government and of the Federal Legislature to develop their own fiscal and economic policy, or would restrict their freedom to negotiate Trade Agreements whether with the United Kingdom or with other countries for securing mutual tariff concessions; and he should intervene in tariff policy or in the negotiations of tariff agreements only if in his opinion the main intention of the policy contemplated is by trade restrictions to injure the interests of the United Kingdom rather than to further the economic interests of India".*

Stated in ordinary language, this should mean that, unless the Governor-General is satisfied that the intention of a **Tariff Policy, or of a proposed Trade Agreement** with a foreign country is to hurt British Trade interests in India, he is to leave absolute freedom of action to his Constitutional Advisers in taking economic and fiscal steps, which are calculated to promote the economic interests of India. But, in practice, this would be extremely difficult always to achieve. Given the atmosphere of distrust and conflict of interest, sharp differences are inevitable between a strong-willed Governor-General, and an equally determined Council of Ministers, as to whether or not a given line of economic policy or trade treaty is primarily in the interests

*Vide Article XIV of the Draft Instructions.

of India, or rather intended to injure the interests of Britain, whether or not Indian interests are promoted thereby. The Ministers might well urge, that if the substantial result of a projected measure or a Treaty is to promote the interests of India, even though, incidentally, the interests of Britain might conceivably be affected thereby, the Governor-General is not entitled to intervene. The Governor-General, on his part, might equally pertinently point out that the original, determining consideration in the minds of his Ministers,—the intention,—of their proposal was rather to injure the interests of Britain,—possibly by that means to attain some other political object,—than really, directly to further the economic interests of India; and, as such, he was bound by his Instructions to intervene. As the Instructions are not open to a judicial interpretation, this debatable land is likely to be productive of constant conflict, irritation, and lack of harmony.

This illustration has been deliberately selected because the department of External Affairs is in the sole charge of the Governor-General, and to be administered under his discretion. Only when Treaties require legislation to implemented that the Federal Ministers would get a *locus standi* to put in a word. Under his specific Instructions, however, the Governor-General is asked, not only to give them freedom to shape the country's economic policy as they think fit and proper. They seem also entitled to conduct the negotiations for trade treaties with the United Kingdom as well as with foreign countries. The conflict is, therefore, much more likely in such a case of overlapping authority and conflict of powers,—especially in view of the known cleavage of economic interests between Britain and India.

Under Articles XVII—XIX relating to Defence,—another reserved or excluded department of State to be administered by the Governor-General in his discretion,—

“Our Governor-General shall encourage the practice of joint consultation between himself, his Counsellors and his Ministers. And seeing that the Defence of India must to an increasing extent be the concern of the Indian people, it is our will in especial that our Governor-General should have regard to this instruction in his administration of the Department of Defence; and notably that he shall bear in mind desirability of ascertaining the views of his Ministers when he shall have occasion to consider matters relating to the general policy of appointing Indian Officers to Our Indian Forces, or the employment of Our Indian Forces on Service outside India”.

If this analogy of joint consultation between Ministers and Counsellors of the Governor-General on questions affecting a Reserved Department is adopted, the Ministers should be able to acquire knowledge and experience relating to this branch of the administration; and even influence the policy concerning that administration. The same may also happen in the Department of External Affairs,—more particularly in regard to the conduct of negotiations for Trade Treaties, even though, under the strict letter of the law, the Council of Federal Ministers would have no right to intrude in such matters. So long, however, as there prevails an atmosphere of mutual distrust; so long as the Governor-General regards himself, not as the constitutional head of a great country, but as primarily the trustee of foreign vested interests, which are presumed to be endangered by every growth of Nationalist sentiment in this country, there can be no hope of such Instructions modifying the rigour of the Constitutional law in the right direction.

The same must be said of the injunction that the Federal Ministry,—and, more particularly, the Federal Finance Minister,—should be consulted before estimates for the Defence Department are settled and laid before the Federal Legislature, as also that the Federal Finance Minister should be kept in close touch of the expenditure on that department. Mere consultation with the Ministry and information to the Finance Minister will not avert the mischief of complete absence of any legal authority to shape the defence policy or regulate such expenditure.

IV. Powers exercised on the Advice of his Ministers

If we deduct the two large classes of powers and functions, which the Governor-General is entitled by law to exercise in his sole discretion, or in his individual judgment, the field of real power and effective authority open to the Council of Ministers is necessarily extremely limited. As we have already seen, Section 7 gives the extent of the executive authority of the Federation vested in the Governor-General. This is much wider than that of his Constitutional Advisers, the extent as well limitations of whose powers and authority are indicated in Section 9.

9.—(1) There shall be a council of Ministers, not exceeding ten in number, to aid and advise the Governor-General in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion:

Provided that nothing in this sub-section shall be construed as preventing the Governor-General from exercising his individual judgment in any case where by or under this Act he is required so to do.

(2) The Governor-General in his discretion may preside at meetings of the council of Ministers.

(3) If any question arises whether any matter is or is not a matter as respects which the Governor-General is by or under this Act required to act in his discretion or to

exercise his individual judgment, the decision of the Governor-General in his discretion shall be final, and the validity of anything done by the Governor-General shall not be called in question on the ground that he ought or ought not to have acted in his discretion, or ought or ought not to have exercised his individual judgment.

The Ministers have no legal right to be consulted in Departments specifically excluded from the purview of Ministerial Responsibility, nor in such matters as are placed in the sole discretion of the Executive head of the Federal Government. Even in powers and functions of government, in which the Governor-General is enjoined to exercise his individual judgment, that officer is not necessarily bound to follow the advice of his Ministers. The only portion, therefore, in which the executive authority of the Federal Government is exercised by the Governor-General exclusively on the advice of his Ministers is in regard to matters on which the Federal Legislature is competent to legislate, provided that any other section of the Constitution Act does not place a specific limitation upon the Ministers' powers in that behalf.

Even in the field assigned to the Legislature, the Governor-General has a vast margin of extraordinary powers which may cripple the independence of the Legislature considerably.

Governor-General's Powers over the Legislature, and in regard to Legislation

These powers of the Governor-General may be enumerated under the following heads:—

- (i) Power to summon the Legislature, and address the two Chambers, and order the attendance of the members for the purpose.
- (ii) Power to make Rules of Procedure for regulating the business before either House of the

Legislature; introducing certain reserve powers for forbidding the asking of Questions on certain subjects, or permitting those Questions, as also discussion on the same; authorise certain officers to address the Assembly;

(iii) Power to accord previous sanction to the introduction of any Bill or Amendment in either Chamber of the Legislature, regarding certain subjects affecting his Discretionary powers, or those functions which he is enjoined to exercise in his individual judgment;

(iv) Power to recommend certain classes of Bills to the Legislature;

(v) Power to send Messages suggesting certain changes, or modifications, in a proposed measure which must be considered and adopted by the Legislature;

(vi) Power to order Joint Sitzings of the two Chambers of the Legislature on certain occasions, and under certain conditions;

(vii) Power to assent to, withhold assent, or reserve certain Bills, passed by the Legislature for the signification of the King's pleasure,—who may disallow these measures after as much as a year since their enactment;

(viii) Power to pass Ordinances, either on the advice of his Ministers, or in his discretion;

(ix) Power to enact Governor-General's Acts;

(x) Power to suspend the Constitution, and govern under powers assumed to himself under a Proclamation of Emergency.

Summoning, etc. Legislature

(i) Summoning the Legislature to meet, ordering joint sittings, addressing the Chambers, and a margin

of reserve powers to make rules regarding certain qualifications, or rather disqualifications of members,* are not unparalleled in the Constitutional usages of the Governor-General's controlling powers over the Legislature. Unless the entire Constitution is suspended under Section 45, the Governor-General must call at least one session every year; and he must not allow twelve months to elapse without calling a meeting. Sections 19 and 20 give powers, which, on their face, are not unparalleled in the Constitutional usages of Britain.

Rule-making Powers

(ii) The power to make Rules of Procedure for either Chamber of the Legislature, and, through that device, to influence materially the course of business in the Legislature, is contained in Section 38.

Procedure generally

38.—(1) Each Chamber of the Federal Legislature may make rules for regulating, subject to the provisions of this Act, their procedure and the conduct of their business:

Provided that as regards each Chamber the Governor-General shall in his discretion, after consultation with the President or the Speaker, as the case may be, make rules—

(a) for regulating the procedure of, and the conduct of business in, the Chamber in relation to any matter which affects the discharge of his functions in so far as he is by or under this Act required to act in his discretion or to exercise his individual judgment;

(b) for securing the timely completion of financial business;

(c) for prohibiting the discussion of, or the asking of questions on, any matter connected with any Indian State, other than a matter with respect to which the Federal Legislature has power to make laws for that State, unless the Governor-

*cp. Section 26 (1) (e) and (f).

General in his discretion is satisfied that the matter affects Federal interests or affects a British subject, and has given his consent to the matter being discussed or the question being asked;

(d) for prohibiting, save with the consent of the Governor-General in his discretion,—

(i) the discussion of, or the asking of questions on, any matter connected with relations between His Majesty or the Governor-General and any foreign State or Prince; or

(ii) the discussion, except in relation to estimates of expenditure, of, or the asking of questions on, any matter connected with the tribal areas, or the administration of any excluded area; or

(iii) the discussion of, or the asking of questions on, any action taken in his discretion by the Governor-General in relation to the affairs of a Province; or

(iv) the discussion of, or the asking of questions on, the personal conduct of the Ruler of any Indian State or of a member of the Ruling family thereof;

and, if and in so far as any rule so made by the Governor-General is inconsistent with any rule made by a Chamber, the rule made by the Governor-General shall prevail.

(2) The Governor-General, after consultation with the President of the Council of State and the Speaker of the Legislative Assembly, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Chambers.

The said rules shall make such provision for the purposes specified in the proviso to the preceding sub-section as the Governor-General in his discretion may think fit.

(3) Until rules are made under this section the rules of procedure and standing orders in force immediately before the establishment of the Federation with respect to the Indian Legislature shall have effect in relation to the Federal Legislature subject to such modifications and adaptations as may be made therein by the Governor-General in his discretion.

(4) At a joint sitting of the two Chambers the President of the Council of State, or in his absence such person

as may be determined by rules of procedure made under this section, shall preside.

This power, it is needless to add, is unprecedented in the British model. The rationale of this reservation in the hands of the Governor-General lies in the diplomatic necessity to prevent questions or discussions in the Legislature, which may complicate the relations with the neighbouring powers, or embarrass the dealings of the Crown Representative with the Indian Princes. So far as the former are concerned, since the department of External Affairs is wholly excluded from the scope of the authority of Responsible Ministers of the Federation of India,—except in so far as any Treaty needs legislation in India to be implemented,—there may be a justification for excluding any inconvenient matters being discussed in the Legislature, or Questions asked thereon. Those, however, who can appreciate the utility of such Questions or discussions in the popular Legislature of a country, as aids to negotiations in Trade or other Treaties, will not need much argument to demonstrate the impolicy of keeping out such matters from the scope of the Parliamentary interrogations or discussions. Even if the Indian people, and their chosen representatives, are deemed yet too unfamiliar with the niceties of Foreign Relations,—or too unworthy to be trusted entirely with the care of those relations in so far as they might affect the deeper economic interests of British Imperialism,—the limitation on discussion or interpellation in the Legislature might have been more fittingly, or less offensively, made by Standing Orders of the House itself, vesting such powers of disallowing Questions of a given type in the presiding officer; or even in the

Government as a whole, and not in the Executive head personally, acting throughout in his discretion.

The logic and policy of excluding Questions or discussions regarding Indian Princes, or any member of these Ruling Families, are still more difficult to appreciate,—especially after the advent of the Federation of India, in which, sooner or later, all Indian Princes may be expected to join. Unwritten rules of public decorum might, perhaps, dictate the exclusion of legislative interpellations regarding the private lives or personal vagaries of actual Rulers,—though even there, given the average standard of conduct among these relics of ancient India, it is open to question if the interests of India in the long run would benefit by such privilege. The Indian Ruling Princes have no dread nor restraint upon any indulgence in follies or vices, save, perhaps, the frown of the Paramount Power, which may be stimulated by such timely enquiries in the Legislature of the country. If that door is also to be closed, on the pretence of public propriety or political courtesy, the plight of the people in those unfortunate areas will become even more intolerable than it is to-day. And, even if considerations of courtesy or public propriety are allowed to extend a measure of indulgence to the Ruling Princes proper, there is no reason why similar indulgence should be extended to the members of their families. This criticism has always been urged in British India against the doings of particular Princes, even when they could justly claim a privileged position as being not partners in a Commonwealth. Now, however, that the Federation of India is likely to be established, by or under the Act of 1935, what little reason there ever was for such

special treatment will cease to be. The power given to the Governor-General cannot, therefore, but appear to be a needless impediment to the full growth of the National Legislature.

Powers of Previous sanction to Legislative Measures

(iii) We have already detailed the various sections and sub-sections of the Act, relating to the discretionary powers of the Governor-General, or those involving the exercise of his individual judgment, under which the previous sanction of the Governor-General is necessary before a Bill or Amendment of certain existing laws could be introduced in the Legislature. Inasmuch as these are almost all Bills or Amendments of the existing laws which affect vested interests of the Public Services and similar bodies fattening at the expense of India, the reservation of this power to the Governor-General, and the possibility thereby of his blocking any improvement in these matters in the interests of India, indicate the true origin and the real purpose of such powers. Determined Ministers, conscious not only of the public behind them in this country, but also of the sterling justice of their cause, might not be deterred, merely because the Governor-General has such powers initially to block any such legislation, from attempting the reforms necessitated by such vested interests. A strong-willed Governor-General, on the other hand might equally conceive it to be his bounden duty, under the law, not to sanction the introduction of such measures which may endanger the special interests he is intended to protect and safeguard. A Constitutional conflict would then become unavoidable. An appeal to the country by a dissolution of the Legislature will not help matters, as the