abstract to individuals of ardent imagination, there is appreciable risk of the new regime in India offering stone when the people have been crying for bread.

The ordinary newspaper has a limited circulation and resources, is usually handicapped very badly for finance as well as in respect of writers; and has very little organisation of its own to procure, judge, sift, or disseminate information. Reporting in India is scarcely born; and the institution of the Special Correspondent is a luxury open only to the select few. Foreign connection is rudimentary, and the domination of one or more capitalists often fatal to the independence as well as the integrity of the Press. Nevertheless, such as it is, it is doing considerable service in the cause of national awakening, and spreading political consciousness. For doing political education of the masses, the daily press is perhaps not so well suited as the periodical; but even that is in its infancy. The radio and the cinema, as efficient weapons of political education, have yet to be appreciated. Taking it all in all, the new India will have to evolve its own press, or methods of propaganda, if the task of a thorough political awakening among the masses, leading to an unbending resolve to win our birthright at any cost, is to be carried out satisfactorily.

CHAPTER IX

SECRETARY OF STATE FOR INDIA

The doctrine of the British Parliament as Trustee of the Indian people, responsible for the welfare and good government of India, is still maintained. The medium and vehicle for the enforcement of that responsibility, and the carrying out of that Trust, continues to be the Secretary of State for India. With the institution, however, of a measure of Responsibility to the elected representatives of the Indian people in the Provincial Legislatures, and also in the Federal Legislature when Federation becomes at last established, the necessity of retaining the full measure of control and authority in a member of the British Cabinet disappears,—at least in the theory of the new regime. In practice, of course, as we have already seen in part, the Secretary of State for India retains vast powers of the same essential type as those vested in him under the Government of India Acts right down to 1919. But the letter of the law has modified considerably the legal powers of the Secretary of State over the Provincial and the Federal administration, in part at any rate. The machinery, also, described under the system in force before the Act of 1935, is brought fully into operation, as the Council of India,—with the corporate entity called, the Secretary of State for India in Council,—has been altered and renamed; and the routine

functions entrusted to that entity modified in accordance with the Constitutional changes.*

Though the outward form and designation may have been altered, the substance of power and authority vested in the Secretary of State remain unaffected by the Act of 1935. To appreciate more accurately the significance of this constitutional camouflage, it is necessary to recall the powers that the Secretary of State, single or in Council, had under the system in vogue before the Act of 1935 altered it. Briefly stated, the powers of the Secretary of State are summarised in Section 2 of the Government of India Act, 1919, subsection (2) of which lays down:—

> "In particular, the Secretary of State may, subject to the provisions of this Act or rules made thereunder, superintend, direct and control all acts, operations and concerns which relate to the Government or Revenues of India, and all grants of salaries, gratuities and allowances, and all other payments and charges, out of or on the revenues of India".

Besides this general power and authority, Sections 2-19 of that Act, and those relating to the Property, Contracts, financial and other liabilities, the right to sue and be sued, gave the Secretary of State in Council power

(a) to dispose of real or personal estate vested in the Crown;

*Says the Joint Select Committee who scrutinised the Government of India Bill, 1935,

"We cannot doubt that under a system of responsible government in India the Secretary of State-in-Council could not continue on the present basis. It will no longer be necessary, with the transfer of responsibility for finance to Indian Ministers, that there should continue to be a body in the United Kingdom with a statutory control over the decisions of the Secretary of State in financial matters, nor ought the authority of the Secretary of State to extend to estimates submitted to an Indian Legislature on the advice of Indian Ministers. But in our opinion it is still desirable that the Secretary of State should have a small body of Advisers to whom he may turn for advice on financial or service matters and on matters which concern the Political Department."

(b) to raise money by way of mortgage, and make, vary or discharge contracts;

(c) to have the proceedings in any suit, to which the Government or any official in India or elsewhere was a party conducted in his corporate name;

(d) to raise loans in England for the Government of India;

(e) to conduct, through the Council of India, business in the United Kingdom in relation to the Government of India, and the correspondence with India.*

Matters which by law had to be decided by the Secretary of State in Council were usually disposed of by a simple majority of votes. But the Secretary of State was entitled to overrule the majority of his Council, except as regards

(i) grants or appropriations of any part of the Indian revenues;

(ii) sale or disposal of real or personal estate and the raising of money thereon by mortgage or otherwise;

(iii) making contracts including Instruments of Contract of civil offices in India;

(iv) application to the Government of India and any Local Government of authority to perform on behalf of the Secretary of State-in-Council of any of the obligations in (ii) and (iii) above;

(v) passing of any orders affecting the salaries of members of the Governor-General's Council;

*It is in connection with this power that the device arose of a Secret Committee of the Council, which conducted certain kinds of correspondance, —mainly on political matters,—which was not laid before the whole Council. Secret and Urgent Orders were issued through this Committee, in which the Secretary of State had always a decisive voice. Questions of War or Peace, relations with Indian States, and treatment of Political Agitation, might be handled by or through this Committee.

(vi) making rules to regulate various matters connected with the Indian Public Services.

Opinion in India is not identical regarding the effective value of these powers vested in the Secretary of State-in-Council, singly or as a Corporation, with that in Britain, from the standpoint of the immediate interests of India. Speaking historically, it must be admitted that these powers were introduced as check upon the insatiate desire for expansion in the local Indian Bureaucracy, rather than with the set purpose of making the Secretary of State dominant in the actual administration of India.

Under the Act of 1935, there is nothing exactly corresponding to the authority called the Secretary-of-State-in-Council;* or even the Secretary of State only, as that authority was under the system existing till then. The Constitution, powers, and functions of the Secretary of State for India under the new Constitution are scattered over a number of Sections and Chapters. Many of them are only indirect or of implied powers; being clothed in legal terminology by some paraphrase, such as "His Majesty in Council, or "Orders in Councils". Let us consider the institution as it can be found in the specific provisions of the several sections, and the powers and functions as directly entrusted to that officer, or derived from the unavoidable implication of certain provisions of the Constitution.

The Secretary of State and His Advisers

Sections 278-284 provide for the institution of the Secretary of State to exercise such of the powers of

*Says Section 278 (8). "The Council of India as existing immediately before the commencement of Part III of this Act shall be dissolved."
But under the next following sub-section a person who was a member of the India Council immediately before its dissolution may be re-appointed as Adviser for any period less than 5 years.

supervision, direction and control that remain still vested in that officer, and other powers required for the proper exercise of duties and functions still required to be discharged on behalf of the Indian Government in Britain. Section 278 requires that there should be not less than 3 nor more than 6 persons, according as the Secretary of State may determine from time to time, to advise him "on any matter relating to India, on which he may desire their advice"* One half of these Advisers at least must be persons who had held office for at least ten years under the Crown in India, and had not retired from those official duties more than two years before the date of their appointment as Adviser.† This guarantees the preponderance of the Service element in the Advisers of the Secretary of State, who may be said to take the place of the Council of India existing until the Act of 1935 came into force. Though numerically reduced, these Advisers of the Secretary of State will, essentially speaking, be in no way different from the India Councillors whom they have replaced. The Service elements are notoriously unsympathetic to the Nationalist aspirations of India. And though the scope of their activity is considerably reduced by the new Constitution,—as will be seen more fully below,—the dominance of the Secretary of State in regard to the privileges of all the Superior and Organised Services is assured by this provision.

The tenure of office of these Advisers is reduced to 5 years, and the opportunity for reappointment is abolished.‡ The appointment, however, may be termi-

*Cp. Section 278 (1).
†Cp. 278 (2).
‡Cp. Section 278 (3).

nated earlier than 5 years, either by resignation in writing tendered to the Secretary of State, or by the Adviser becoming unfit for the office owing to some bodily or mental informity. In the last mentioned contingency, the Secretary of State is empowered by order to remove such an Adviser from his post.* Inasmuch as a majority of these Advisers would, presumably, be persons with a full term of service in India, the chances of such infirmities developing are by no means utterly unthinkable. The provision seems, therefore, a move in the right direction in contrast with the corresponding provision in the Act of 1919, which made the term of appointment capable of extension. The Councillors were more independent of the Secretary of State than the Advisers henceforward to be appointed. But that, by itself, will not make the Advisers necessarily subservient to the Secretary of State.

The disability imposed upon the old India Councillors regarding a seat in either House of Parliament† is maintained in regard to the new Advisers of the Secretary of State. Their powers and functions, however, are entirely dependent upon the discretion of the Secretary of State,—except in regard to Service matters. Says Section 278 (6):—

> "Except as otherwise expressly provided in this Act it shall be in the discretion of the Secretary of State whether or not he consults with his Adivsers on any matter, and, if so, whether he consults with them collectively or with one or more of them individually, and whether or not he acts in accordance with any advice given to him by them."

*No corresponding provision was to be found in the Act of 1919; nor is the provision of Section 3 (7),—which made the old India Councillors irremovable from their office, except by the King on an address by both Houses of Parliament.

†cp., Section 4 of the Act of 1919.

This marks the Advisers out sharply from the old Councillors, who were entrusted with certain statutory duties, in which the Secretary of State could not act except with their advice, or with a majority voting with him.* The reason is perfectly clear: Whereas the old India Council was intended not only to inform and advise, but also to be a check and a restraint upon a Secretary of State who may be influenced by British Party considerations, the new Advisers have no such functions entrusted to them. The Secretary of State is not bound even to make rules for the conduct of business which he himself decides to submit to his Advisers. Nor is there any need for him to be consistent or systematic in submitting any given class of business for the advice of these his statutory counsellors. A subject upon which he seeks their advice on one occasion may not be consulted about at all on another occasion; a matter on which on one occasion he seeks the advice of all Advisers may on another occasion be discussed with only one Adviser, or not discussed at all. In every respect the choice, or discretion, rests with the Secretary of State,—except, of course, as regards some Service matters, property, and contracts, which will be mentioned a little more in detail hereafter.

What then is the purpose of having these Advisers at all, and paying them so highly as laid down in Section 278 (5)†—except to squeeze as much out of India as could possibly be managed? The payments, it is true, are to be made "out of moneys provided

*cp., above p. 363.

†They are to be paid £1350 each p.a. out of the monies provided by Parliament, as against the £1200 p.a. paid to the old India Counsellors. An Overseas, or "subsistence" allowance to those domiciled in India at the date of their appointment of £600 p.a. remains the same as under the old Act.

by Parliament". But the provisions of Section 280 are not only ambiguous; they are misleading. Says that:

> 280.—(1) As from the commencement of Part III of this Act the salary of the Secretary of State and the expenses of his department, including the salaries and remuneration of the staff thereof, shall be paid out of moneys provided by Parliament.
>
> (2) Subject to the provisions of the next succeeding section with respect to the transfer of certain existing officers and servants, the Secretary of State may appoint such officers and servants as he, subject to the consent of the Treasury as to numbers, may think fit and there shall be paid to persons so appointed such salaries or remuneration as the Treasury may from time to time determine.
>
> (3) There shall be charged on and paid out of the revenues of the Federation into the Exchequer such periodical or other sums as may from time to time be agreed between the Governor-General and the Treasury in respect of so much of the expenses of the department of the Secretary of State as is attributable to the performance on behalf of the Federation of such functions as it may be agreed between the Secretary of State and the Governor-General that that department should so perform.

Arrangement will have to be made for fixing a sum which the Federal Government will have to pay to the British Exchequer for the remuneration for those services which the India Office, in addition to the High Commissioner, is supposed to discharge on behalf of India.* At the present moment that sum is in the neighbourhood of £150,000 per annum. But many of the functions which the India Office had to discharge, even after the institution of an India High Commissioner, would now disappear, or be at least considerably reduced. Hence, it is a matter for consideration what sum, if any, should be paid to the

*Under the Budget Estimates for 1937-38 the total cost of the India Office and the High Commissioner's Office to the Indian Exchequer is Rs. 40.75 lakhs, of which 17.42 is voted and 23.33 non-voted. Rs. 13.6 lakhs is stated, in the Detailed Estimates and Demands for Grants to be contribution on this account to H.M.'s Treasury.

Secretary of State for discharging functions, which either are no more, or which could well be entrusted to the High Commissioner, or the Trade Commissioner, or a branch of the Reserve Bank of India in Britain.

Assuming that the charges of the India Office, the Secretary of State and the Advisers to the Secretary of State,—together with such Parliamentary assistance as that officer might need,—are correctly a British charge, exclusively, it is difficult to see what functions could now be left with the Secretary of State which would demand such special remuneration from India. The grant of "Subsistence",—or, as it is known in India, Overseas,—Allowance to those Advisers, who, at the time of their appointment, were domiciled in India, is only an excuse for the much larger sum demanded from India on account of the Overseas Allowance to the British members of the Steel Frame. The entire institution of the Advisers is therefore, mischievous, wasteful, unnecessary, and ought to be accordingly abolished.*

All existing accounts in the name of the Secretary of State in Council are to be transferred to the name of the Secretary of State. But any order or instrument with reference to that stock or money, executed before the dissolution of the Council, either by the Secretary of State or any one else duly authorised for the purpose, would make a proper discharge for the Bank.† Similarly, all persons on the permanent establishment

*cp., Section 278 (7), which permits, even in cases where, under the Constitution the Secretary of State is enjoined to obtain the concurrence of his Advisers, the requirement of the law is supposed to be satisfied if the matter is disposed of at a meeting where at least half the number of Advisers were present, or where no objection had been raised by any Adviser after due notice of a proposed course of action, and opportunity for raising objection, if any had been provided.

†cp., Section 279.

of the Secretary of State in Council, immediately before the coming into effect of Part III of the Act, are transferred to the establishment of the Secretary of State as reconstituted. All their rights to pension, etc., are carefully preserved.* The personnel thus transferred is specifically protected against any treatment less favourable than they were entitled to expect while they were on the staff of the Secretary of State in Council. The same treatment is secured, by Section 281 (4), even to the non-permanent staff employed by the Secretary of State in Council. Provision is made, by Section 282, for a *pro rata* charge upon the revenues of the Federation for such of the superannuation charge, as an Order in Council might consider to be due to service before the date of such transfer.† Any payments thus authorised to be made out of the Federal Revenues, would be charged upon those revenues, and as such non-votable by the Federal Legislature.‡

Under the Act of 1935, the powers of the Secretary of State are mainly concerned with

(a) The supervision, direction and control of the Governor-General, and of the Provincial Governors through the Governor-General, in so far as these officers are entrusted with powers and functions to be exercised in their discretion, or in which the exercise of their individual judgment is enjoined. This would comprise also the so-called excluded Departments of State;

(b) Recruitment, and protection of certain Services, and Posts;

(c) Issue of Orders-in-Council, or any act by His Majesty-in-Council,—an indirect power derived

*cp., Section 281.

†cp., Section 282 (1).

‡cp., Section 282 (3).

from the general principles of the British Constitution. This may include the exercise of the King's Statutory power, in respect of the Indian Constitution, to assent to, to withhold Assent, or to disallow Indian Legislation;

(d) Powers of the Crown in regard to Indian States, not coming within the provisions of the Federal Government's authority;

(e) Financial powers, with regard to borrowing in Britain on account of the Federal or Provincial Government; payment of certain pensions, interest, etc., on behalf of the Indian Government in Britain;

(f) Contracts and other Liabilities;

(h) Audit of Accounts,—or Auditor-General's Department;

(i) Emergency Powers, and those in regard to inter-provincial disputes in regard to water supplies; Trade Convention, etc.

(a) Powers of Supervision, Direction and Control

As regards the first group of powers, the most important, considerable, and general power is contained in Section 14 relating to the Governor-General, and Section 54 relating to the Governors.

Section 14 read:

*14.—(1) In so far as the Governor-General is by or under this Act required to act in his discretion or to exercise his individual judgment, **he shall be under the general**

*It is interesting to note that, in the Original Bill, there was only one clause in this section; and that the reference to the Instrument of Instructions was brought in directly by making his subordination to the Secretary of State specifically subject to the Instructions issued to him.

(2) The sub-section as it now stands gives the Instructions a wholly secondary place. The same is repeated in Section 54. The limitation on the controlling and directing power of the Secretary of State, imposed by this sub-section is a triumph of those vested interests and minorities, which have won themselves the privilege of being regarded as the Special Responsibility of the executive head which the Instructions require these officers particularly to protect.

control of, and comply with such particular directions, if any, **as may from time to time be given to him by the Secretary of India,** but 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 the provisions of this section.

(2) Before giving any directions under this section, the Secretary of State shall satisfy himself that nothing in the directions requires the Governor-General to act in any manner inconsistent with any Instrument of Instructions issued to him by His Majesty.

Practically the same language is adopted in Section 54, except that the controlling officer in this case is the Governor-General, and not the Secretary of State. Inasmuch, however, as, in all such matters, the Governor-General himself is under the controlling authority of the Secretary of State, the ultimate control of the British Minister, even over Provincial affairs, is thus assured, though in a somewhat roundabout manner. Had the Governor-General's directive or supervisory powers been made exercisable on the advice of the Federal Ministers, there might be something to be said for such a procedure, such a reserve of authority in the National Government. But Section 54 (1) distinctly says:

54.—(1) In so far as the Governor of a Province is by or under this Act required to act in his discretion or to exercise his individual judgment, he shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given to him by the Governor-General **in his discretion,** but the validity of anything done by a Governor shall not be called in question on the ground that it was done otherwise than in accordance with the provisions of this section.

(2) Before giving any directions under this section, the Governor-General shall satisfy himself that nothing in the directions requires the Governor to act in any manner inconsistent with any Instrument of Instructions issued to the Governor by His Majesty.

As the Governor-General acts, in this matter of supervising, directing, or controlling the Provincial

Governors entirely in his discretion; and as in all matters left to his **discretion,** or in which he is to exercise his **individual judgment,** he is himself under the direction and control of the Secretary of State, it is obvious that the ultimate authority of the Secretary of State over the Provinces is as strong as over the Governor-General, and Federal Government. The saving in regard to the Instrument of Instructions,—itself issued under Section 13 to the Governor-General, and Section 53 to the Governors,—is no real reservation in favour of the Instruction. For the Secretary of State, or the Governor-General is merely required by the sections quoted to " satisfy himself " that nothing in the directions he issues requires the Governor-General (or the Governor, as the case may be) to act in contravention of those Instructions. As to who shall be the judge, whether anything was in contravention of any such Instruction, nothing is said in the Act. Its terms leave the matter wholly within the discretion of the officer concerned, whose authority thus becomes practically paramount, and supersedes the Instructions for all practical purposes.

As to the subjects, or departments, comprised within this section, so far as the Governor-General is concerned, all the Reserved Departments of the Federal Government,—*e.g.*, Defence, External Relations, Government of Tribal or Excluded areas, and Ecclesiastical affairs,—are obviously under the controlling and directing authority of the Secretary of State. The expenses of these Departments, and the financial reaction of the same on the national Budget, are likewise brought under the controlling power of the Secretary of State. Dealings with the Indian Princes outside the Federation; questions of Paramountcy even with the

States who have federated; supervision over Provincial Governors; appointment, dismissal, distribution of work amongst the Federal Ministers, and certain extraordinary powers in regard to the Federal Legislature,—are all matters within the discretion of the Governor-General. And in these he would be* under the authority of the Secretary of State. Similarly, in the discharge of his so-called "Special Responsibilities", he is likewise subordinated to the Secretary of State. *Mutatis mutandis*, the same applies to the Provincial Governors, *vis-a-vis* the Governor-General, as regards matters left to their discretion, or those in which they are to exercise their individual judgment.†

Recalling the discussion, both in this volume and in the one devoted to a study of the Provincial Government, as regards the wide scope of these extraordinary powers of the Governor-General, and of the Provincial Governors, we cannot but realise that this margin of controlling or directive powers left to the Secretary of State will make of that officer a real, controlling, and even dictating force, in the most vital concerns of the Government of India. The belief, therefore, that the ultimate authority and control of the British Imperial Government has been relaxed under the new Constitution, or because of a transfer of power and responsibility to the chosen Ministers of the Indian people, is a figment of the imagination, rather than a reality of the situation.

In all Indian legislation, power is reserved to the King to disallow Acts duly passed by the Provincial or

*cp., ante, Ch. VI for a list of the Goveronr-General's Discretionary powers, and those in which he is to exercise his individual judgment.

†See for a list of these matters, Provincial Autonomy, Chapter III.

the Federal Governments.* If that power is ever exercised in practice, the Secretary of State would be the ordinary Constitutional Adviser of the British King in such matters. It is not merely a theoretical power reserved to the British King, and his constitutional adviser in Britain. In view of the stringent provisions in regard to the problem of commercial or financial discrimination against British interests in India; in view also of the serious possibility of the Indian requirements for intensive industrial and commercial development of the country coming into sharp conflict against the vested interests of these aliens in India, the powers reserved for disallowing Indian Legislation in this behalf may be of great practical help to the British interests. We may, accordingly, be certain the British Imperialist advisers of the Sovereign will not hesitate to advise active use of these powers, every time the vested interests of British capital, or of British members of the Indian Public Services, are alleged to be threatened.

Similarly, in all extraordinary legislative powers given to the Governors, or the Governor-General, regarding the passing of Ordinances, or the enactment of executive legislation,—styled Governor's Acts, or the Governor-General's Acts,—the Secretary of State has reserved powers to extend, repeal, or modify such extraordinary legislation, through the right to be informed of the same, and the duty to place the same before Parliament.†

Finally, the right to suspend the entire Constitution,—except the Federal Court, or the Provincial High

*cp., Sections 32 and 75 of the Government of India Act, 1935. Also ante, Ch. VIII, and Provincial Autonomy, Ch. VI.

†cp. Sections 43-4 and Sections 89-90 of the Government of India Act, 1935.

Courts,—vested in the Governor-General or the Governors,—is to be exercised subject to the general control of the Secretary of State.* The entire exercise of this power being *in the discretion* of the Governor-General, —and of the Governor,—these officers come, under the terms of Section 14 and 54, under the general control of the Secretary of State.

For this particular power, Section 45 (3) specifically provides:—

"A Proclamation issued under this section—

(a) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament;

(b) unless it is a Proclamation revoking a previous Proclamation, shall cease to operate at the expiration of six months.

Provided that, if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of twelve months from the date on which under this subsection it would otherwise have ceased to operate."

Section 93 (3) is in identical terms so far as a similar Proclamation relating to a Province is concerned. Parliament thus gets a right to watch over the suspended Constitution; and if it is so minded it may continue this non-constitutional regime in a Province, or over the entire Continent of India, for a further period of twelve months by a simple Resolution of both Houses of Parliament.

This supreme right of Parliament to make, suspend, and abrogate the Indian Constitution will really be exercised at the instance of the Secretary of State,

*cp., Sections 45 and 93, for the Federation and the Provinces respectively.

though theoretically the entire British Imperial Government would be responsible for such an action in India. So far as the Federation is concerned, this extraordinary power may affect even the Federated States, for at least two years, during which they may be governed,—so far as federal subjects are concerned,—under a regime of Proclamation suspending the Constitution. And even thereafter, there is nothing to guarantee that if, under the terms of Section 45 (4), Parliament deems fit to legislate for a new and radically different Constitution, the Federated States, or any of them, would necessarily be allowed to leave the Federation *ipso facto* the altered Constitution.

In the Provinces the Proclamation regime can continue for 3 years at most. But no provision is made, corresponding to that in Section 45 (4) for the Federation, for a new Constitution, even if in a Province the non-Constitutional regime of government by Proclamation has lasted for three years.* Responsible Government in the Provinces is claimed to be the greatest contribution for a constitutional advance under the Act of 1935. Yet, the entire Constitution is not only placed at the discretion of the Governor; no arrangement is made for the substitution of a more constitutional regime for one of frank autocracy of the Governor under the Proclamation,—not even such as is made for the Federation under Section 45 (4). The Secretary of

*Under Section 93 (3) it is distinctly stated:—

"No such Proclamation shall in any case remain in force for more than three years." By Section 93 (4) any law made by a Governor, under the power given to him by the Proclamation, "shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect." It is an interesting speculation as to what would happen to any particular Province where the Constitution remains suspended for more than 3 years under Section 93? Would Parliament legislate, and provide a separate Constitution on a different basis for such a Province? If so, that would be the reaction of such a suspension on other Provinces, and on the Federal Constitution?

State can, under such a system, continue to be the dictator of the Provincial Government through the Governor-General, where the Constitution is suspended for an indefinite length of time, if Parliament does not provide for an alternative constitution even after three years have elapsed; and the Proclamation itself has ceased to operate. There is nothing to prevent a new series of Proclamation regime being started, after a nominal Constitutional interval, in which the supreme Executive Authority is unable to co-operate with the leaders of the people's representatives; and which has, therefore, to be suspended on the same grounds, and by the same Proclamation, as led to the initial suspension of the Constitution.

Excluded Areas

The Secretary of State remains the supreme authority in regard to all those areas which have been specifically excluded from the regime of Constitutional Government. It is the Secretary of State who, under Section 91, prepares the draft of an Order in Council, which declares certain areas in India to be wholly or partially excluded from the benefits of Constitutional Government; it is the Secretary of State, who submits this Draft to Parliament, which has neither the time nor the knowledge to examine critically, and alter for the better, such a Draft; it is really the Secretary of State who rules these areas through the Governor, or the Governor-General, acting in his discretion. Says Section 92:—

92.—(1) The Executive Authority of a Province extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature shall apply to an excluded area or a partially excluded area, unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to any

Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(2) The Governor may make Regulations for the peace and good government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any Regulations so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature, or any existing Indian Law, which is for the time being applicable to the area in question.

Regulations made under this sub-section shall be submitted forthwith to the Governor-General and until assented to by him in his discretion shall have no effect, and the provisions of this Part of this Act with respect to the power of His Majesty to disallow Acts shall apply in relation to any such Regulations assented to by the Governor-General as they apply in relation to Acts of a Provincial Legislature assented to by him.

(3) The Governor shall, as respects any area in a Province which is for the time being an excluded area exercise his functions in his discretion.

Large blocks of territory, and equally large chunks of population, have been excluded, under the Order in Council, issued under Section 91, wholly or partially, from the normal, constitutional regime. The general argument in support of this extraordinary treatment is that the population in these excluded regions is backward; and that, therefore, they would not be able to avail themselves of the mechanism of Constitutional Government established by the Act of 1935. But such an agreement has no justification in fact, for the simple reason that, by a proper grouping of the Constitution, coupled, where necessary, with the device of a special reservation of seats for the representatives of these classes,* this sort of exclusion of such areas and population could well have been avoided.

*In principle, the device of such reserved seats for special classes seems as objectionable as the separate Communal Representation. But, if Parliament had really intended to relax the doctrine of British Trusteeship for India, in the slightest degree, this device could well have been adopted to avoid making such needless breaches in the stronghold of Provincial Autonomy.

National Emergency

The same powers, practically, of supervision and control are vested in the Secretary of State, under Section 102, concerning a National Emergency, in which the very existence of the country is threatened by internal disorder or a war. As already noted in another Chapter,* the Federal Legislature is entitled, under this Section (102) to act in such an emergency But the Governor-General is vested with discretionary powers to permit any action by the Federal Legislature; and the Secretary of State is entitled to have communicated to him a Proclamation issued under this Section for submission to Parliament, which has the same right of extending the Proclamation regime by resolution, as under Section 45, and 93.

Disputes re: Watersupplies between Federated Units

The powers under Section 131 for the settlement of disputes between two or more Federated Units,—States or Provinces, regarding the use of common water-supplies, are indirect. The supreme appellate power, as it were, is exercised by His Majesty in Council; and the Secretary of State is the obvious constitutional adviser of the British King in all such matters.†

FINANCIAL POWERS

Though powers of borrowing on account of India have been taken away from the Secretary of State by Section 161, during the Transition Period, the Secretary of State has been given special authority to raise sterling loans under Section 315, if the necessary authority for the purpose is granted already by an East India

*Chapter VIII, ante p. 279.

†cp., Section 131.

Loans Act of Parliament; and provided that at a meeting of the Secretary of State and his Advisers, the borrowing is approved by a majority.* By Section 157, the Secretary of State is entitled to be kept in funds by the Federal as well as the Provincial Governments, in respect of all liabilities on account of India to be met in Britain, as also in regard to the Pensions payable by the Secretary of State on account of the Indian or Provincial Governments.

Audit of Indian Accounts

The appointment of an Auditor-General, for the proper audit of Indian Accounts is provided for under Section 166, empowering His Majesty to make that appointment. This means, in practice, the Secretary of State, who also, under the disguise of the same Sovereign authority, would determine the conditions of service for the Auditor-General. His duties and functions would be prescribed to the Auditor-General by an Order in Council, in the first instance; and by an Act of the Federal Legislature subsequently, provided that no Bill can be introduced in the Federal Legislature for the purpose without the previous sanction of the Governor-General in his discretion. Those only who can appreciate the immense (though invisible) rôle played by an efficient Auditor-General in the national economy can understand the effective power retained by the Secretary of State, or the British Imperial Government, to dominate India's national economy; to prevent any orientation of

*cp., Section 315 (2). By Section 314, the control of the Secretary of State over the Government of India during the transition period is specifically provided for. But that officer is required, under Section 314 (2), to have the concurrence of a majority of his Advisers in any matter touching a grant or appropriation from the revenues of India in order to give directions to the Governor-General-in-Council on such matters. During the transition period the number of his Advisers is to be not less than 8, nor more than 12, Section 314 (3).

it which could in the least suggest a risk to the vested interests for which Britain constitutes herself a Trustee.*

Contracts, etc.

By Section 175 (4) personal liability of the Secretary of State in respect of any contract or assurance made or executed is avoided; and instead the Federal and the Provincial Governments are made liable in their corporate capacity.

Inasmuch as the Judges of the Federal Court as well as of the Provincial High Courts are appointed by His Majesty, under the Royal Sign Manual, the Secretary of State will have considerable indirect influence in the choice of the highest judiciary in India, their conditions of service, etc.†

Protection of Public Services

The most considerable function, however, of the Secretary of State is in connection with the protection of the Public Servants, particularly those recruited by himself. A number of sections provide for the varying aspects of this extraordinary power of the Secretary of State.

The entire department of India's National Defence being in the sole discretion of the Governor-General, the Secretary of State has practically unlimited authority in settling the numbers and prescribing the pay,

*Section 168 gives authority to the Auditor-General to determine the form in which the accounts of the Federation are to be kept. He may also lay down the principles or methods according to which Provincial accounts may be kept. This power is exercisable subject to the approval of the Governor-General.

†cp., Section 176. Under Section 178 (3) deduction is forbidden from any payment of Principal or Interest on Sterling Loans raised by the Secretary of State under any existing or future Indian, Federal, or Provincial Legislation. The same immunity is granted by Section 315 (4) for Sterling Loans contracted in the transition period.

pensions, allowances and other conditions of the Defence Services.* Even though the actual orders may be made by the Governor-General in his discretion, the Secretary of State has the final right of approval and sanction of the rules and regulations made; and, in so far as the Indian Defence Forces are still virtually an integral part of the Imperial Defence organisation, this right of approval or sanction has the utmost significance.

In the Civil Services, he makes the initial appointments to the Indian Civil Service, the civil branch of the Indian Medical Service, and the Indian Police Service, pending other arrangements made by a Parliamentary Statute.† Similarly, to all the civil posts or services, instituted to aid the Governor-General in the discharge of his functions which he is to exercise in his discretion, it is the Secretary of State who would make the first appointments and determine the respective strength of such services.‡ He also makes rules regarding the number and character of the civil posts, which are to be reserved for persons appointed by him to a civil Service under the Crown in India.§ Under Section 247, the conditions of service of all such officers appointed in the first place by the Secretary of State, —as regards their pay, leave and pensions, and medical attendance,—are prescribed by the Secretary of State under rules made for that purpose. For all other matters rules made by the Governor-General as

*Section 235 provides that the Secretary of State may from time to time, with the concurrence of a majority of his Advisers, specify what rules, regulations and orders affecting the conditions of service of His Majesty's Forces in India shall be made only with his previous approval.

†cp. Section 244 (1).

‡cp., Section 24 (2)and (3). Also Irrigation Engineers under Section 245.

§cp., Section 246.

regards posts under the Federation, and by the Governors as regards posts in the Provinces,—in cases where the Secretary of State has not made the necessary Rules, —would provide Rights of appeal and complaint are reserved from these officers to the Secretary of State (Section 248); while Section 249 secures adequate compensation being paid, at the instance of the Secretary of State, if the conditions of service of any officer appointed by him are adversely affected by anything done under this Act. The powers of the Secretary of State in these matters are to be exercised with the concurrence of a majority of his Advisers.*

Powers of the Representative of the Crown in Relation to Indian States

The constitutional position regarding relations with Indian States outside the Federation,—and even with those who have federated, in so far as what are called Paramountcy powers are concerned,—is by no means clear. The fundamental maxim of the British Constitutional Law, *viz.*, that the King can only act on the advice of a Minister, if applied, would bring these concerns also within the orbit of the Secretary of State. Sections 285-7, dealing with "Crown and the Indian States", specifically exclude those relations,—except in so far as the Instrument of Accession authorises the application of any provision of this Act,—from the scope of this Constitution.† That means the only adviser of the King,—and, therefore, the only control over the representative of the Crown,—in its dealings with the Indian States outside the Federal Constitution, is the Secretary of State. The Governor-General, likewise, acts "in his discretion"* in meeting the expenses of the representative of the Crown in its relations with Indian States. By Section 33 (3) (f):—

> "The sums payable to His Majesty under this Act out of the revenues of the Federation in respect of the expenses incurred in discharging the functions of the Crown in its relations with Indian States."

are included among the expenditure charged upon the revenues of the Federation, *i.e.*, non-votable by the Federal Legislature. Several sums may be payable to the Indian States under Sections 147-9 particularly to the Federating States, or some of them; and these must be made good to the Viceroy by the Governor-General out of the Federal Revenues, acting in his discretion, *i.e.*, without reference to his Ministers; and therefore responsible only to the Secretary of State. Similarly, expenses of the armed forces in the Indian States, or for due discharge of the Crown's obligations in respect of these States, must

> "be deemed to be expenses of His Majesty incurred in discharging the said functions of the Crown."

Considerable indirect, or imperceptible, influence would also be exercised by the Secretary of State in the nomination of the Federated States' representatives in the Federal Legislature, which, however, would be extra-constitutional activity; and as such need not be emphasised here.

Miscellaneous Powers of the Secretary of State

Of the miscellaneous powers of the Secretary of State, the most considerable may be found in his right to grant leave, under the Instrument of Instructions, to the Governor, or the Governor-General during the

*Section 261.

†cp., Section 285.

*cp., Section 286 (2).

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

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

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

CHAPTER X

FEDERAL JUDICIARY

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

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

*Cp., Section 200.

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