Province even on exclusively provincial subjects; (y) as also in cases of emergency.

Federal Legislation for more than one Province, and in Emergencies

These two matters are provided for by Sections 102 and 103; while the assignment of yet undistributed powers of legislation,—the so-called Residuary Powers,—is made to either the Provincial or the Federal Legislature, under Section 104, under a notification of the Governor-General issued in his discretion.

Says Section 102:—

"(1) Notwithstanding anything in the preceding sections of this Chapter, the Federal Legislature shall, if the Governor-General has in his discretion declared by a proclamation (in this Act referred to as a "Proclamation of Emergency"), that a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List: Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency.

(2) Nothing in this section shall restrict the power of a Provincial Legislature to make any law which under this Act it has power to make, but if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legisture has under this section power to make, *the Federal law, whether passed before or after the*

Provincial law, shall prevail, and the Provincial law, to the extent of the repugnancy, but so long as the Federal law continues to have effect, be void.

(3) A Proclamation of emergency (a) may be revoked by a subsequent Proclamation; (b) shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament; and (c) shall cease to operate at the expiration of six months, unless before expiration of that period it has been approved by resolutions of both Houses of Parliament.

(4) A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

Proclamation in a National Emergency and that in a Constitutional Crisis

It must be noted that this Proclamation of Emergency is essentially different from that contemplated in *Section* 45, (or in Section 93) which the Governor-General (or the Governor) can issue on his own, in a situation, in which, in his opinion, the government of the country cannot be carried on in accordance with the provisions of this Act, while under the Proclamation of Emergency under *Section* 102 the situation is such that the Governor-General declares "a grave emergency exists whereby the security of India is endangered." The former (under Section 45) may simply be a political impasse, wherein the **Government**

of the **Federation cannot,** in the opinion of the Governor-General, **be carried on, in accordance with the** provisions of the Constitution; while the Emergency contemplated in Section 102 must be almost a national calamity, **which imperils the security of the whole country**. The same applies, *mutatis mutandis,* to the Proclamation issued by a Governor under Section 93.

It is an irony of politics, that whereas in a mere political impasse, the Governor-General (or the Governor) is empowered practically to suspend the entire Constitution, and arrogate to himself such functions as he in his discretion deems necessary to meet that particular difficulty, in a national emergency, endangering the security of the whole land, the powers given to the Federal Legislature are to legislate for a Province on a subject of exclusively provincial concern, as comprised in List II of Schedule VII. While Section 45 affects the power of the Governor-General and extends it substantially, Section 102 concerns the entire Federal Legislature, whose power to legislate on a Provincial subject in a national emergency is, if anything, closely circumscribed. Nothing shows up so clearly the angle of vision of those who drafted the Act of 1935,—nothing explains more fully the distrust of the Indian politician in the British politician's mind, —as this difference of treatment of a purely political difficulty and of a national emergency.

Safeguards

Even the safeguards provided,—the checks or balances—in respect of such extraordinary powers, are notably different, though in both cases the *Governor-General acts in his discretion.* (a) A Proclamation of

Emergency lasts *only for six months,* unless earlier revoked, or unless approved by specific resolutions by both Houses of Parliament. But the machinery of government created under a Governor-General's Proclamation under Section 45 *may endure for* 3 *years,* and *may even involve the abolition or abrogation of the entire Federal Structure of the Commonwealth of India.* (b) Again, while under the Proclamation issued in accordance with Section 45, the Governor-General may exercise almost any power, except suspending the Federal Court, under the Proclamation of Emergency, the Federal Legislature is only allowed to legislate on a Provincial subject, or for a Province. Further comment to emphasise the difference between these two types of emergency action by the Governor-General is superfluous.

Common Legislation for two or more Provinces

Section 103 provides:—

> "If it appears to the Legislatures of two or more Provinces to be desirable that any of the matters enumerated in the Provincial Legislative List should be regulated in those Provinces by Act of the Federal Legislature, and if resolutions to that effect are passed by all the Chambers of those Provincial Legislatures, it shall be lawful for the Federal Legislature to pass an Act for regulating that matter accordingly, but any Act so passed may, as respects any Province to which it applies be amended or repealed by an Act of the Legislature of that Province."

It is not clear what precise class of subjects are contemplated for action under this Section. But if interprovincial means of communications,—other than

the Railways or Airways, not exclusively in charge of the Federal authority,—need such agreed and common legislation, passed by the Federal Legislature at the instance of the Provincial Legislatures concerned, the Federal Legislation on the matter should have been given a greater validity and permanence than seems to be accorded by this Section. Provincial Legislatures desiring such common, Federal, legislation, ought to be stopped from rendering such legislation invalid by enacting subsequently their own particular legislation on the same subject. There is no mention, in the Section quoted, of any previous agreement on the subject, before one of the Provinces, agreed on such common legislation at the time of its enactment, subsequently proceeds to repeal or nullify it by its own separate legislation; and so the arrangement in this section does not seem to be as happy as it might have been.

Residuary Powers

Section 104 provides for the yet unprovided case of any subject remaining undistributed in the several lists given in the Schedule VII to the Act.

Section 104:—

> "(1) The Governor-General may by public notification empower either the Federal Legislature or Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act, including a law imposing a tax not mentioned in any such List, and the executive authority of the Federation or of a Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs.
>
> (2) In the discharge of his functions under this section the Governor-General shall act in his discretion."

This is not a very logical solution, though it may in practice prove more effective and acceptable than any other.

On the whole, any attempt to distribute the subjects for legislation, as between the Centre and the Provinces, is unlikely to prove wholly acceptable to ardent advocates of complete Provincial Autonomy. They would confine the Federal Legislature only to a definitely specified list of subjects, leaving all undistributed powers to the Provinces. Nor is it likely to please those ardent Nationalists who see in any prominence given to the Provincial sentiment an encouragement to those forces of disintegration of the Indian Nation, which they would strengthen and maintain at any cost. The supplementary powers given to the Governor-General; the presence of a Concurrent List; and the inevitable action of social evolution or scientific developments, must make this elaborate mechanism extremely complicated and difficult to operate.

Limitations on Indian Legislatures

Before we pass on to a scrutiny of the Lists of Subjects on which the Provincial Legislatures are entitled to legislate,—and in connection with which the executive authority of the Provincial Governments is to be exercised,*—let us consider the limitations or restrictions imposed by law on the legislative powers of the Indian Legislatures.

Reserved Powers of Parliament

By Section 110, the supreme power of Parliament to legislate for British India, or any part thereof, (and

*Cp. Section 49, ante p.78.

presumably on any subject), is expressly saved and reserved. Neither the Federal nor any Provincial Legislature is empowered to make any laws affecting the Sovereign or the Royal Family of the United Kingdom, or the Succession to the British Crown, or the suzerainty, sovereignty or dominion of the Crown in any part of India, (*i.e.*, in Indian States), or the following acts of Parliament: (i) the Law of British Nationality; (ii) the Army Act; the Air Force Act; the Naval Discipline Act. The substance of this last may be re-enacted by the Indian Federal Legislature, with such modifications, as regards the Indian Naval forces, as any existing Indian Act may have made, and as regards other naval forces under the authority of the Federal Government, by such Orders in Council as may have been passed under Section 66 of the Government of Indian Act, or (iii) the law of Prize or Prize Courts.

Two classes of exceptions are admitted to this general provision, *viz.*:—(a) in so far as any provision of this Act itself may permit an Indian Legislature to amend this Act, or any Order in Council made, thereunder, or Rules made by the Secretary of State under this Act (*e.g.* in regard to the conditions of service of persons directly appointed by him to certain Civil Services, or certain Civil Posts, in India), or by the Governor-General or Governor, acting in his discretion, or in the exercise of his individual judgment; and, *secondly*, (b) as regards the Prerogative right of His Majesty to grant special *leave to appeal from any Courts, which may be derogated from if expressly permitted under any provisions of the Act of* 1935.

Previous Sanction of the Governor-General or of the Governor.

Apart from these specific restrictions, on behalf of the sovereign authority of the British Parliament, there are the provisions of *Section* 108, which require previous sanction of the Governor-General to be given in his discretion, (*i.e.*, without necessarily any reference to his Ministers), for the introduction of certain classes of Bills in the Federal or the Provincial Legislatures; and of the Governor, similarly, regarding certain matters of provincial legislation. These matters are—

108 (1) Unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in, either Chamber of the Federal Legislature, any Bill or amendment which

(a) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India; or

(b) repeals, amends or is repugnant to any Governor-General's or Governor's Act, or any ordnance promulgated in his discretion by the Governor-General or a Governor; or

(c) affects matters as respects which the Governor-General is, by or under this Act, required to act in his discretion;

(d) or repeals, amends or affects any Act relating to any police force; or

(e) affects the procedure for criminal proceedings in which European British subjects are concerned; or

(f) subjects persons not resident in British India to greater taxation than persons resident in British India, or subjects companies not wholly controlled

and managed in British India to greater taxation than companies wholly controlled and managed therein; or

(g) affects the grant of relief from any Federal tax on income in respect of income taxed or taxable in the United Kingdom.

Similarly, by subsection (2) of the same section, the previous sanction, granted in his discretion, of the Governor-General is made requisite for the introduction or moving of any Bill or amendment, in any Chamber of a Provincial Legislature, which—

(i) repeals, amends or is repugnant to an Act of Parliament extending to British India;

(ii) repeals, amends, or is repugnant to any Governor-General's Act, or any ordnance promulgated in his discretion by the Governor-General;

(iii) or affects the discretionary powers or functions of the Governor-General;

(iv) or affects the procedure in criminal proceedings in which European British subjects are concerned.

The Provincial Legislatures are likewise enjoined to obtain the previous sanction of the Governor, granted in his discretion for the introduction or moving of any Bill or Amendment in any Chamber of the Provincial Legislature, which (x) repeals, amends or is repugnant to a Governor's Act, or an Ordinance promulgated by the Governor in his discretion; or (y) repeals or amends or affects any Act relating to a Police Force.*

*See also sections 226, 267, 271 under which certain classes of Bills or amendments require previous sanction of the Governor. cp. Supra, pp. 93—94. See also the Instrument of Instructions, Articles XVI & XVII ante pp. 116—117.

The previous sanction required for some of these measures is a matter only of Procedure. That is to say, the Governor or the Governor-General is not precluded, merely because he has given the prior sanction to the introduction of a Bill, or to the moving of an amendment thereon, from afterwards vetoing the same Bill or amendment, or for reserving it for the assent of the Governor-General, or for consideration by the King-Emperor.* Conversely, no Bill or amendment, to which the required previous sanction was not given, is to be invalid, if Assent to that Act is given by the Governor, the Governor-General, or the King-Emperor in the case of the provincial legislation. These provisions make the position of the executive chief of the government dominating, while the Legislatures are, in effect, only the registry offices for the wishes of the executive head of the Government.

The Governor's Assent, &c.

We have already noticed the provisions of Section 75 which empowers the Governor, in his discretion, to assent to a bill duly passed by the entire Legislature, or reserve it for consideration by the Governor-

*Cp. 109.—(1) Where under any provisions of this Act the previous sanction or recommendation of the Governor-General or of a Governor is required to the introduction or passing of a Bill or the moving of an amendment, **the giving of the sanction or recommendation shall not be construed as precluding him from exercising subsequently in regard to the Bill in question any powers conferred upon him by this Act** with respect to the withholding of assent to, or the reservation of Bills.

(2) No Act of the Federal Legislature or a Provincial Legislature and no provision in any such Act, shall be invalid by reason only that some previous sanction or recommendation was not given, if assent to that Act was given—

(a) Where the previous sanction or recommendation required was that of the Governor, either by the Governor, by the Governor-General, or by His Majesty;

(b) Where the previous sanction or recommendation required was that of the Governor-General, either by the Governor-General or by His Majesty.

General. The Governor's assent, given in the name of His Majesty, is, under the Indian constitution, not likely to be a mere formality. Judging from the powers of reservation and reconsideration, provided for in the same section (75),* as well as bearing in mind the express authority to the Governor to "withhold assent," it is likely to be an active check on too great a forward *elan* of the Provincial Legislatures, or their leaders, the progressive, or radical, politicians of India.†

The Governor has, under the same Section, the right to "*return*" a Bill, duly passed by the entire Provincial Legislature, "with a message requesting that the Chamber or Chambers will reconsider the Bill or any specified provisions thereof, and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message; and, when a Bill is so returned, the Chamber or Chambers shall consider it accordingly." (75, Proviso). It is not quite clear what would happen to a Bill which has thus been *returned* with specific recommendations

*75. A "Bill which has been passed by the Provincial Legislative Assembly or, in the case of a Province having a Legislative Council, has been passed by both Chambers of the Provincial Legislature, shall be presented to the Governor, and the Governor in his discretion shall declare either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reserves the Bill for the consideration of the Governor-General:

Provided that the Governor may in his discretion return the Bill together with a message requesting that the Chamber or Chambers will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendment as he may recommend in his message and, when a Bill is so returned, the Chamber or Chambers shall reconsider it accordingly."

†Note that under section 75 the Governor reserves a Bill to which he neither assents nor withholds assent for consideration by Governor-General. It is the Governor-General, who, under the authority given to him by Section 76(1), may in his discretion declare "that he reserves the Bill for the significance of His Majesty's pleasure thereon." The King would, in assenting to or disallowing any measure so reserved by the Governor-General, naturally act on the advice of the Secretary of State: and that officer is outside the scope of any Ministerial responsibility to the Indian Legislature. In such cases, therefore, the idea of Provincial autonomy, in the form of responsible Parliamentary Government, would be nullified.

by the Governor, if the Legislature continues to be obdurate and refuses to make the Amendments desired by the Governor. There is, of course, the expedient of a Joint Sitting of the two Chambers;* and there the reserve powers of the Governor, as also the latter's right to dissolve a recalcitrant legislature.† But whether, by all or any of such means, the Governor will be able to force a Bill upon the Legislature, in the form he wants, is a little doubtful.

The Governor-General's Assent, &c.

The same powers, practically speaking, of assenting to, withholding assent, or reserving a Provincial Bill for consideration by the King are reserved, by Section 76, to the Governor-General, in regard to Bills reserved by the Governor of a Province for consideration by the Governor-General.‡ Likewise, the Governor-General has the right to *return* a Bill with specific recommendation for its amendment to the Governor, and the Bill so returned and recommended must be considered by the Provincial Legislature concerned.

*Cp. Section 74.

†Cp. Sections 61 and 62.

‡76.—(1) When a Bill is reserved by a Governor for the consideration of the Governor-General, the Governor-General shall in his discretion declare, either that he assents in His Majesty's name to the Bill or that he withholds assent therefrom or that he reserves the Bill for the signification of His Majesty's pleasure thereon.

Provided that the Governor-General may, if he in his discretion thinks fit, direct the Governor to return the Bill to the Chamber, or, as the case may be, to the Chambers, of the Provincial Legislature together with such a message as is mentioned in the proviso to the last preceding section, and when a Bill is so returned, **the Chamber or Chambers shall reconsider it accordingly,** and if it is again passed by them with or without amendment, it shall be presented again to the Governor-General for his consideration.

(2) A Bill reserved for the signification of His Majesty's pleasure shall not become an Act of the Provincial Legislature unless and until, within twelve months from the day on which it was presented to the Governor, the Governor makes known by public notification that His Majesty has assented thereto.

Whether passed with or without amendment by the Provincial Legislature, the Bill must be resubmitted to the Governor - General for his consideration. [76 (1)]. Here also the same doubt remains as to what would happen if the Provincial Legislature concerned remains obdurate, and refuses to pass the Bill in the form recommended by the Governor-General, or in any other form, except the one in which it was originally passed by them.

Powers of the King-Emperor.

Over and above these two dignitaries in India,—the Governor and the Governor-General,—there is the power of the King-Emperor to disallow a Bill reserved for *his* consideration by the Governor-General. Unless within a year after the Bill, on presentment to the Governor for his assent, had been reserved for the signification of His Majesty's pleasure thereon, the Governor publicly notifies that the King has given his assent, no such Bill can become an Act of the Provincial Legislature. [76 (2)]. **Not only is the indirect Royal Veto thus revived, so far as the Acts of the Indian legislatures are concerned; but the veto is made exercisable on the advice of a Minister who owes no responsibility to the Indian people.**

When, since the Statute of Westminster, 1930, the King acts in any constitutional matter in any of his Dominions beyond the seas, he acts on the advice of his Dominion Ministers, even though that advice might be in opposition to the advice of his Ministers in the United Kingdom. True, no actual cases have arisen in which the King was placed in the embarrassing position of having to act, with regard to a Dominion,

on the advice of his Ministers in that Dominion, and in opposition to the advice of his Ministers in the United Kingdom. But the fact remains that, while in all Dominion affairs, the proper constitutional advisers of the British Sovereign are the Dominion Ministers,—even in opposition, if it should so happen, to the British Ministers proper,—in regard to India, which is alleged to be given a Responsible Government under this Constitution, the proper constitutional adviser of the King-Emperor ought to be the Indian Ministers, and not the Secretary of State for India.

The actual position as laid down in the Constitution is quite the reverse. The King has not only the right to withhold assent from a Bill duly passed by an Indian Legislature, but, by a mere silence for more than a year after that measure had been reserved by the Governor (or Governor-General) when presented for his assent, he can make such a measure cease to be, he has the *still more extraordinary right*, in connection with the measures passed by the Indian Legislatures, *to disallow Acts duly passed by the Legislature* and assented to by the Governor or the Governor-General, as the case may be, within 12 months of the date of such assent (77).* This is the direct Veto of the Crown over Indian Legislation. When an Act is so disallowed by the King-Emperor,

> "the *Governor* shall forthwith make the disallowance known by public notification, *and as from the date of the notification the Act shall become void.*" (Italics ours.)

*Any Act assented to by the Governor or the Governor-General, may be disallowed by His Majesty within twelve months from the date of the Assent, and where any Act is so disallowed the Governor shall forthwith make the disallowance known by public notification, and as from the date of the notification the Act shall become void.

Cp. Section 32 for the similar disallowance of the Federal legislation.

It is difficult to appreciate the significance, or the necessity, of such an extraordinary and unprecedented power to the King-Emperor in the working Constitution of India. The Governor's and the Governor-General's power to withhold assent is bad enough, being a direct veto authorised by the Constitution Act. But that is not all. The King's power to disllow an Indian law, duly passed, is wholly new, both in the Indian and in the British Constitution. The Royal Veto in England has been dead, for all practical purposes, since the days of Charles II, or 250 years. But even when it was in active use, it consisted in a mere negation of a legislation proposed; and not the positive disallowance of an Act duly passed by the Legislature, after as long as 12 months. It is impossible to conceive of any instance, in which, within 12 months of the due passage of an Act of an Indian Legislature, circumstances arise or peculiarities are discovered in the Act as passed, which might necessitate such an unusual course as this. It may legitimately be doubted, if, under the letter or the spirit of the British Constitution, the King has any such prerogative right of disallowance of a properly passed Act of the British Parliament, or of any Dominion Legislature. It is impossible to conceive of circumstances under which all the safeguards against hasty ill-considered, or unfriendly legislation by an Indian Legislation, including the rights reserved to the Governor and to the Governor-General, would fail so completely, that recourse would have to be had to this extraordinary,—and to our mind, extra-constitutional,—power of the British King to rectify a mischief, presumably, done by such an Act of an Indian Legislature.

Even granting the possibility of such mischief, in the midst of all the safeguards, limitations, restrictions or reservations, is it not possible to undo that mischief by a simple Act of Repeal of the given measure, rather than upset the entire constitution in its basic spirit by such a device? Whatever the rôle of the Ministers, the King in Britain never takes such a direct part in the governing of the United Kingdom. Frankly, it is beyond any mortal intelligence to understand the necessity, or justice, of such a provision, let alone its wisdom or propriety.*

*It is interesting to point out that the Report of the Select Committee of Parliament on this Bill is entirely silent regarding this extraordinary power given to the British sovereign to disallow, after a year, a duly passed Act of an Indian Legislature. Para 143 of the Report says:

"The proposals with regard to the Governor's assent to Bills are in standard constitutional form. They provide that the Governor may at his discretion either assent to a Bill, or refuse his assent, or may reserve the Bills for the consideration of the Governor-General, who may in his turn either assent or withhold assent or reserve the Bill for the signification of His Majesty's pleasure: **We regard this discretionary power as a real one to be used whenever necessary.** (Black ours). We note a proposal whereby the Governor would be empowered to return a Bill to the Legislature for reconsideration in whole or in part, together with such amendment, if any, as he may recommend. A provision of this kind (which has Dominion as well as Indian precedent in its favour), may, we think, prove extremely useful for the purpose of avoiding or mitigating a conflict between the Governor, or perhaps the Governor and his ministers, and the Legislature, and will afford opportunities for compromise which would not otherwise be available."

There is not a word in this of the King's right to disallow an Act of an Indian Legislature, duly passed, as late as a year after its passage; and it is impossible to find either British or Dominion precedent for such a departure from the spirit of any constitutional reform. The declaration by the Federal Court of an Act to be **ultra vires** or otherwise invalid is, of course, quite a normal constitutional provision; but totally different from this power given to the King-Emperor to disallow an Act of the Legislature.

The remarks of the Joint Select Comimittee of Parliament in connection with a proposal to require the previous consent of the Governor for the introduction of any Bill, or amendment, in a provincial legislature, which is alleged to affect the religion or the religious usages of any given community, are interesting to read and contrast in this connection.

Cp. Para 141 of the Report.