

one (Sir John Lawrence in 1863) to take up the Viceroyalty; one former Permanent Under-Secretary was appointed to the Council (Sir George Clerk in 1863). Without invidious discrimination it may be mentioned that the Members have included such distinguished soldiers as Lord Wolseley, Sir Henry Norman and Sir Donald Stewart, while amongst those best known to the world for achievements, practical or literary, outside the sphere of Indian administration, are Sir Henry Rawlinson, Sir Bartle Frere, Sir Henry Maine, Sir William Muir, and Sir Alfred Lyall.

Chapter IV

THE GOVERNMENT OF INDIA

A BOOK of this character will, it may be hoped, be acquitted of any pretensions to supplying a constitutional history of India if it includes some description of the growth and the present nature of the system with which the Secretary of State has to deal, any modification of which requires his approval, and the authorities with whom he corresponds. The work of the India Office cannot be understood unless some account is offered of the structure not only of the Supreme Government of India, but of the Provincial or Local Governments to whom most of the detailed administration is committed and under whom most Government officials serve.

The Provincial system was drastically altered by the Act of 1919, but the Executive Government of India to-day is in essence of the same nature as the first Secretary of State found it in 1858, and the model was established by the Regulating Act of 1773. The somewhat vague authority over Madras and Bombay then given to the Governor-General was progressively enhanced by later statutes, and Lord Cornwallis in 1786 obtained that power of overruling his Council which, in its present form, enables the Governor-General* on his own authority,

* The Governor-General is the King's Viceroy, having been so

to adopt, suspend, or reject, any measure (i.e. executive measure) whereby, in his judgment, "the safety, tranquillity or interests of British India, or of any part thereof," may be affected.

Warren Hastings was given an Executive Council of four Members, three of whom were sent out from England, but that experiment was not a success, and the Act of 1793 prescribed that three Members should be "senior merchants who had resided ten years in India in the Company's service." This is the origin of the "service qualification" still prescribed for three Members of the Supreme Executive Council, and for one in each Presidency or Provincial Executive Council. From the same Act date the provision, abrogated in 1919, that the Commander-in-Chief, if appointed to the Council (as he always is) should sit as an "Extraordinary Member," though he ranks next to the Governor-General and is styled "His Excellency," and also the power of over-ruling the majority of the Council in exceptional circumstances entrusted to a Presidency or Provincial Governor.

In 1834 the Governor-General of Bengal became Governor-General of India, and received an access

termed in Queen Victoria's Proclamation of 1858, and occupying a position the character of which is not exhaustively defined by the statutory powers of the Governor-General. But the term does not occur in any Act of Parliament. If he leaves India temporarily during his term of office, his *locum tenens*, while only an acting Governor-General, becomes the Viceroy, because the King must always be fully represented in his Indian Empire. The five years' term of office of the Governor-General, the Governors, and the Members of Executive Councils, is prescribed merely by custom, not by statute.

to his Council in the shape of a fourth Member, who was originally added merely for the purpose of making laws and regulations but was given in 1853 the same executive responsibility as his colleagues. One Member of the Supreme Council must still be a barrister of England or Ireland or an Advocate of Scotland (or, since 1919, a pleader of the Indian High Court) of at least ten—it was originally five—years' standing.

In 1861 power was taken to appoint a fifth ordinary member and in 1874 a sixth (at first specifically for Public Works). Since 1919 the number is such as His Majesty shall see fit to appoint; in 1869 the Crown resumed the right of nomination which had in 1858 been vested in the Secretary of State in Council. Lord Canning committed the several departments to individual Members, and instituted the practice, henceforth followed by all Viceroys, of retaining in his own hands Foreign and Political (i.e. Indian States) affairs. The occasional appointment of Finance Members from England (whence the Legal Member usually came) began just after the Mutiny when Mr. James Wilson was chosen to deal with the shaken finances, and marked his advent by introducing an income-tax. The Executive Council was long essentially a body of Indian civilians (except for the "ordinary" Military Member, a soldier, who until Lord Kitchener's time, was in charge of the Military Secretariat) reinforced by legal and sometimes by financial experts from outside the Service. But the introduction of one Indian Member in 1909, of a second in 1919, and of a third in 1920, has altered the

balance. Twenty years ago the Supreme Government (apart from the Viceroy and the Commander-in-Chief) consisted of six Englishmen, four Indian civilians, a military officer and a barrister; to-day it is composed of three Englishmen (two Indian civilians, and one Home Civil Servant*) and three Indians, one of whom possesses the legal, and one, though not a member of the Indian Civil Service, the "service" qualification. An important feature in the working of the Government of India is that the Secretary of each department, though of course subordinate to the Member, has the right of direct access to the Viceroy.

It is unnecessary in these pages to dwell on the structure of the Provincial executives, but the fact that Madras and Bombay have always enjoyed, and Bengal† when it was re-created in 1912 into a Presidency under a Governor in Council obtained, the right of direct correspondence with the Secretary of State, is of some importance in connection with the India Office. That right had not always

* Since 1908 four Home Civil Servants have been appointed to the Governor-General's Council; two Board of Trade officials in succession held the Commerce and Industry portfolio, while the War Office and the Treasury have each supplied a Finance Member.

† "Bengal" is as elusive a term in Anglo-Indian official nomenclature as Burgundy was in mediæval history. The old Presidency of 1773 consisted of Bengal proper, Bihar, and Orissa, but as British rule expanded in Northern India it came nominally to include all British territory from Rangoon to Peshawar. But in this sense it was never really an administrative unit. The Lieutenant-Governor's Province of Bengal included Bihar and Orissa from 1854 to 1912, but between 1905 and 1912 had lost the eastern districts of Bengal proper. The new Presidency of Bengal created in 1912 is far smaller than the old Lieutenant-Governor's Province; it has recovered Eastern Bengal but lost Bihar and Orissa.

been viewed with benevolent eyes by the Government of India, but restrictive rules and the modern standardisation of Indian administration, following on the amalgamation of the once separate Presidency Civil Services and Presidency Armies, prevent the danger of cross-purposes in the official correspondence. No other Provincial Government can correspond direct with the Secretary of State.

Provincial Governments in the past fall into three classes, administered respectively by Governors in Council, Lieutenant-Governors and Chief Commissioners. Little more need here be said about the Presidencies, whose constitutional structure followed that of the Supreme Government and whose Governors have generally been men drawn from public life in the United Kingdom. Lieutenant-Governors were invented when the Government of India recognised the impossibility of conducting the detailed administration of provinces while supervising the affairs of all British India and conducting relations with the Indian States and with India's independent neighbours. Thus the Lieutenant-Governor of the North-Western (now the United) Provinces dated from 1836, that of Bengal from 1854. The Punjab followed in 1859, Burma in 1897, the short-lived province of Eastern Bengal and Assam in 1905, and Bihar and Orissa in 1912. The essence of the Lieutenant-Governor system was personal administration by an official who knew the language and the people, and the creation of Executive Councils for two provinces (Bengal in 1909 and Bihar and Orissa in 1912), was due as much to the desire to give Indians the same

share in the higher Government as was being opened to them in Madras and Bombay as to any need on purely administrative grounds to put the local government into commission.

Chief Commissioners were appointed for newly annexed territories which it was thought necessary to retain more closely under control than the older and more developed provinces committed to Lieutenant-Governors. Constitutionally a Chief Commissioner's province is under the direct administration of the Government of India. The Punjab and Burma (as well as Oudh) passed through this stage. These non-regulation provinces, so termed as being outside the scope of the "Regulations" or laws enacted for the older provinces, drew upon military officers as well as civilians for their superior administrative service, known as "the Commission." The Central Provinces and Assam remained under Chief Commissioners until 1921, when under the Act of 1919, their heads were, with three Lieutenant-Governors, raised to the status of Governors and provided with Executive Councils. (This change was not made in Burma until 1923.) Thus there are now in India nine Governors in Council. The older system survives in frontier regions, in the enclave round the capital, and in certain small isolated patches of British territory.* It is worth noting that since the Crown assumed the Government of India the only fresh annexations have been Upper Burma with the Shan States, and part of Baluchistan, though

* The North-West Frontier Province, Delhi, British Baluchistan, Ajmer-Merwara, Coorg, and the Andamans and Nicobars, are still administered by Chief Commissioners.

political influence has been further extended on the North-West Frontier and some wild tracts on the Assam and Burma borders, nominally within the frontier line, have been actually brought under administration.

Legislation* until 1853 was entirely in the hands of the Executive Governments, though for the last twenty years of that period the Governor-General in Council was aided in making laws by a specially appointed legal expert. The appointment of this Legal Member in 1833 was accompanied by the withdrawal from the Madras and Bombay Governments—until 1861—of the powers of local legislation which they had obtained in 1807. It was in 1853 that an Indian legislature was established, but the method adopted was to appoint six "Additional Members" to the Council for the purpose of making laws. These were all Crown servants, two being Judges and four officials selected from the provincial administration, but, encouraged perhaps by the admission of the public to their sessions, they

* Queen Elizabeth's Charter enabled the Company to make "laws" and "ordinances" for its servants, but these, as Sir C. Ilbert has pointed out, were really of the nature of by-laws. The first delegation to authorities in India of the power of real legislation was made by the Act of 1773, which empowered the Governor-General in Council to make "rules, ordinances and regulations"; provided that these were not "repugnant" to the laws of the Realm. They were to be registered with the newly established Supreme Court of Calcutta, a process somewhat repugnant to the Executive Government, which gradually obtained wider powers. But it was not until 1833 that laws made in India became "Acts of the Governor-General in Council." A few of the older "Regulations" are still in force, notably the State Prisoners Regulations of Bengal, Madras and Bombay.

proceeded to inaugurate a reproduction in miniature of Parliamentary life. They asked questions and insisted on discussing executive policy.* One of the first measures of the Crown Government was to remodel the Indian legislature; by the Indian Councils Act of 1861 it was enlarged, but the Judges were sent back to their Benches, and the Additional Members were forbidden to transact any business not strictly relevant to proposed legislature. The Act is a landmark in Indian constitutional history.† It gave non-officials a voice in making laws, and it fixed for the next sixty years the actual scope of Indian legislation, though by subsequent Statutes the size of the Legislative Council was progressively enlarged and it was given deliberative and critical functions. Saving the general authority of Parliament, the sovereignty of the Crown, and the allegiance of the subject, the Indian legislature now obtained very wide powers, even including, with certain exceptions, the amendment of Acts of Parliament, though it required the permission of the Governor-General for the introduction of measures affecting the public revenues, religion, or foreign or military affairs. The Act also, while restoring powers of local legislation to Madras and Bombay, established a legislative Council under

* See correspondence between Sir Charles Wood, the Secretary of State, and Sir Bartle Frere, then Member of the Executive Council, printed in Martineau's "Sir Bartle Frere," Vol. I, pp. 331-342.

† A full account of this important Act is given in Sir C. Ilbert's "Government of India," 3rd ed., 1915, pp. 100-103. The maximum of Additional Members was raised to twelve, and it was provided that half must (while more might) be non-officials

the Lieutenant-Governor of Bengal, and enabled similar councils to be created in any Lieutenant-Governor's province.* Provincial Acts could be disallowed by the Governor or Lieutenant-Governor, and required the further approval of the Governor-General (not the Governor-General in Council) and the Secretary of State in Council on behalf of the Crown. Indian Acts could be disallowed by the Governor-General, but if he assented, required the approval of the Crown.† Thus all Indian laws come before the Secretary of State in Council, who, if he sees no reason to advise disallowance, informs the Government of India that the Act will be left to its operation. Under the Act of 1919 the Governor-General (and a Governor of a Province) may "reserve" a Bill for consideration by higher authority instead of himself assenting or disallowing.

The Act of 1861 empowered the Governor-General, on his sole authority, to enact Ordinances, valid for six months only, for the peace and good government of British India or any part thereof, subject to disallowance by the Crown. This power of emergency legislation in exceptional circumstances survives. It was used by Lord Hardinge in 1914 to

* The North-Western (now United) Provinces were given a legislative council in 1886, the Punjab and Burma in 1897, Eastern Bengal and Assam in 1905, and Bihar and Orissa in 1912. The Act of 1912 enabled legislative councils to be created in provinces under Chief Commissioners, a measure adopted in Assam and the Central Provinces. Until a province obtained a legislative council, all laws affecting it, however local and limited their application, had to be made by the Governor-General's Legislative Council.

† Under the Act of 1833 the Directors of the Company could disallow laws made by the Governor-General in Council.

enact a Defence of India Ordinance on the lines of the United Kingdom Defence of the Realm Act, a step endorsed by the Indian Legislative Council, which at its next session converted the temporary measure into the Defence of India Act, 1915. Those provisions of the Act of 1870 which enable the Governor-General in Council to legislate specially for backward tracts should be mentioned here, because the Secretary of State in Council is a party to the process, but no important alteration in the legislative system was made until 1892.

A notable result of the Act of 1861 was the first appearance of non-official Indian members in all the legislatures, three—one a Ruling Prince—being nominated to the Governor-General's Council and four in Bombay. In 1892 the participation of non-official Indians in the legislature was greatly extended, and they were for the first time given a voice in the discussion of financial and administrative affairs. In fact, though not in name, the election of members to the Legislative Councils was then introduced, and the Councils were enabled to discuss (though not to vote upon) the annual budgets, and to ask questions on matters not connected with legislation. In strict law the Governor-General (or the Governor or Lieutenant-Governor) continued to nominate Additional Members, but the number of these was raised to sixteen (in Madras, Bombay and Bengal, twenty), half of whom must be non-officials, and the non-officials who were nominated had been "recommended" for nomination by what were in fact constituencies, though constituencies of a limited

character.* Official control, it is true, was not relaxed, but Bills were now discussed by Indian members who sat as representatives owing their seats to the votes of their fellow-countrymen, and matters of general policy came under their scrutiny.

So matters rested until the Morley-Minto Reforms attempted to meet the growing political aspirations of India by introducing (as already set out) Indians into the Executive Councils, by greatly enlarging the numbers and the powers of Indian legislatures, and by avowedly establishing the principle of election, though, for the most part, indirect election. As the authors of the Montagu-Chelmsford Report put it:† "The Morley-Minto changes . . . admitted the need for increased representation, while reiterating the impossibility of basing it generally on a direct or general franchise. They admitted the desirability of generally securing non-official approbation to the Government legislation, though they trusted in an emergency to the support of the nominated members, to the division of interests between different classes of elected members, and in the last resort to overriding legislation in the Indian legislative Council, where an official majority was retained. Frankly abandoning the old conception of the councils as a mere legislative committee of the Government, they did much to make them serve the purpose of an inquest into the doings of Government by conceding the very important

* Chapter III of the "Montagu-Chelmsford Report" (Cmd. 9109 of 1918) gives the best account of the "Growth of the Legislative Councils."

† *Op. cit.*, p. 67.

rights of discussing administrative matters and of cross-examining Government on its replies to questions." The proposed changes were very carefully discussed by committees in India and at the India Office before 1909. In deference to the apprehensions of Muhammadans, the much debated principle of "communal representation" was now introduced. The Muhammadans, while numbering some seventy millions, do not form the majority of the population in any large area except the Punjab and the eastern districts of Bengal, and they contended that they could not be properly represented except by members of their own community returned by the votes of co-religionists only. The principle, once accepted, has been extended to other minorities, such as Sikhs in the Punjab and Indian Christians in Madras.

The Morley-Minto constitution has received so much criticism that it is only fair to point out how largely it transformed the system of Indian Government.* Because the plan adopted in 1919 was framed on new lines, there is danger of forgetting the real character of the constitution of 1909, which Mr. Gokhale described as giving Indians "responsible association with the Government." The consent of the Council was not required for expenditure, and the old powers of veto were retained. But members were given the right of moving resolutions on the budget, and thus though "supply" could not be refused, financial demands could be debated. It was made impossible to carry in any Provincial Council a Bill which non-official members unanimously

* The whole scheme is set out in Appendix I to the 3rd edition of Sir C. Ilbert's "Government of India," 1915.

opposed, and it would have been, in practice, difficult and invidious to impose on any province a measure of purely local application by using the official majority in the Imperial Council to pass an overriding Act.

By 1917 the political equilibrium of India had been altered by the two unexpected decisions announced without warning at the Coronation Durbar in 1911: the transfer of the capital of India from Calcutta to Delhi, and the undoing of Lord Curzon's partition of Bengal. The outbreak of war in 1914 produced a general wave of loyalty throughout India, but, for various reasons which cannot be discussed here, the Indian political atmosphere soon became clouded. The scheme set forth in the Report of Mr. Montagu and Lord Chelmsford was accepted in principle by the Government of India and the Council in London, but certain of its leading features were trenchantly criticised by some of the Provincial Governments, and others were denounced in Indian political circles. The Bill to implement the Report was, on some important points, re-modelled by a Joint Parliamentary Committee, but its essential features were preserved in the Government of India Act, 1919, and the new constitution came into being in 1921 for a country whose political spokesmen were still angrily discussing the suppression of the Punjab disturbance of two years before, whose Muhammadan population was sore and suspicious over British policy towards Turkey, and whose "dumb masses" were dangerously swayed by a leader of remarkable character, who founded on a combination of quietism, home-made cotton cloth, and passive disobedience to the law, a gospel of personal

righteousness and political independence. The omens were not altogether propitious when H.R.H. the Duke of Connaught opened the new legislature in 1921.

The literature of the Montagu-Chelmsford Reforms is too copious to need any supplement here, but a description of the work of the India Office entails a short explanation of the system that they established in India. The most drastic changes occurred in the Provinces, where, and where alone, what is called "Dyarchy" exists.

Certain functions of government in the Provinces, known as "Transferred subjects," are placed under the control of the local legislatures, and are administered by Ministers whom the Governor chooses from among their Members. The remaining, or "Reserved" functions, the Governor with the Members of his Executive Council continues to administer, subject to the control of the Government of India. The list of Transferred subjects may be enlarged, and if the machinery of Government with Ministers breaks down, the Governor in Council can resume charge of Transferred subjects, as has happened in Bengal and the Central Provinces, where the local legislatures refused to vote the Ministers' salaries. The nature of the distribution of functions can be seen from the fact that the Governor in Council reserves the maintenance of law and order and the land revenue system, while education, sanitation, and the management of public works (other than railways and irrigation) have been transferred to Ministers. The two sides of the Government consult on more important matters of policy (the degree of approach to a single Cabinet

has varied greatly in different provinces), and the provincial finances are held in a "joint purse." The Ministers have no constitutional responsibility for and are not required to assent to or to defend the action of the Reserved side of the Government.

The legislative councils have been greatly enlarged—to a number of over 100 in the larger provinces—and officials, though necessarily retained to be spokesmen of Government policy, are confined to one-fifth of the total number of seats. A few non-officials are still nominated to represent classes or interests, or minorities for which no electoral arrangements have been devised. The great majority of the elected members are returned by direct election from territorial constituencies, urban or rural, under a somewhat high franchise.* Some of the constituencies are "communal," but the majority general in composition.

The councils have very wide powers of legislation and the annual provincial budgets are submitted to them. In Transferred subjects they possess the power of the purse, but the Governor may restore grants for purposes of the Reserved side of the administration if he considers it essential to the discharge of his responsibility that money refused by the Council should be provided. He can disallow an Act or reserve it for the Governor-General's consideration, and has the exceptional right to enact on his own authority a measure (provided that it deals with a Reserved subject only) the passage of which he certifies to be essential to the discharge

* Of the 247 millions of British India, about 7½ millions possess the electoral franchise.

of his responsibility. This special power has hitherto been exercised only once, in Bengal.

The Reserved side of the Provincial Government is partly, and the Transferred side entirely, in Indian hands, for Indians sit not only as Ministers chosen by the Governor from the elected members of the legislature, but as Members of the Executive Council. The lines between (Indian) Imperial and Provincial finance, and between Imperial and Provincial functions* have been strictly defined.

"Dyarchy" has not been introduced into the Supreme Government, but in place of a Legislative Council with an official majority whose elected members could criticise but not control expenditure, and could not prevent the passage of any Act, there is now a large bicameral legislature predominantly elective. The present Legislative Assembly of 143 members contains only 25 officials—including Members of the Executive Council—as against 14 nominated non-officials and 104 elected members. The constituencies are of the same character as those for Provincial legislatures, but the franchise is higher. The second Chamber, the Council of State, is composed of sixteen official and ten nominated as against thirty-three elected members, who are returned by direct election on a more restricted franchise.

The Indian legislature, subject to the preservation of the powers of Parliament, has power to make laws "for all persons, for all courts, and for all places and things, within British India," for British officials and subjects in Indian States, for "native Indian

* Thus the Provinces have no control over the Army, Railways, Customs and all other "All India" matters.

subjects of His Majesty" beyond British India, and for officers, soldiers and followers of the Indian Army wherever serving. But it requires the sanction of the Governor-General for the introduction of measures affecting the public debt or revenues, religion, military discipline and foreign relations, or for measures treating on matters relegated to provincial governments. The Governor-General may assent, or withhold assent, to any Act, or reserve it for His Majesty's Pleasure, and the Crown may disallow any Act. Of course the power of veto, important as it is, gives only a very limited control over the process of legislation, and the elimination of an official majority made it necessary to consider fresh means of ensuring that, so long as the supreme authority was expressly vested in the Secretary of State in Council as responsible to Imperial Parliament for the security of India, legislation considered absolutely necessary should continue to be possible. After prolonged discussion in 1918, this heavy responsibility was placed on the shoulders of the Governor-General, acting in his personal capacity. If he certifies that the passage of a bill "is essential for the safety, tranquillity, or interests of British India or any part thereof," he can pass the Bill into law with consent of only one Chamber, or, in the last resort, without the consent of either. But any such Act requires Parliamentary approval (except that in case of emergency the Governor-General may put the Act into force at once subject to disallowance by His Majesty in Council). The Governor-General retains his old emergency power of passing Ordinances of temporary duration, and

the Indian legislature may not repeal, or amend, any Act or Ordinance which he has made under his special powers. The Legislative Assembly in the first five years of its life has on four occasions refused to pass an "essential" Act, but in each case the Council of State has enacted it when the Governor-General gave the necessary certificate.

The power of the purse has been very largely entrusted to the Legislative Assembly, as will be explained in a later chapter. The annual budget is laid before both Chambers, and the consent of the Legislative Assembly is sought for the grants required in most matters, though certain heads of expenditure are classed as "non-votable."

The Parliamentary Joint Committee of 1918* declared definitely that the powers of restoration of grants for essential needs conferred on the Governor-General and Governors were meant to be used as part of the ordinary constitution. It is to Parliament that the Government of India and the Reserved sides of the Provincial Governments are responsible, and the Act intends that they shall be provided with funds necessary to discharge their responsibilities.

The constitution that came into force in 1921 must be examined by a Statutory Royal Commission "at the expiration of ten years after the passing of the Government of India Act 1919" which shall report "whether and to what extent it is desirable to establish the principle of responsible government, or to extend, modify, or restrict the degree of responsible government then existing in

* See p. 57. Since the passing of the Act of 1919 a Parliamentary Joint Committee on Indian affairs has been appointed in each Session.

British India." A committee appointed by the on Government of India in 1924 has recently reported the actual working of "Dyarchy" in the Provinces.

It will be recognised that the Government of British India presents features markedly dissimilar from those familiar here. Powers of concurrent legislation are to some extent possessed by three bodies—Imperial Parliament, the Indian legislature, and the Provincial Legislative Councils. The constitution is largely a written constitution, but cannot be classed as such, for some powers of the Governor-General are based on the Royal prerogative, and even within the four corners of the Government of India Act some room has been left for the growth of constitutional convention. Lastly, while in some points resembling federal constitutions the system of British India is not a federal one. There has been an increase of provincial autonomy, but the powers of the provincial governments are created by delegation from the central authority, which has not divested itself of control.

An Act of 1924 now makes it possible for the Governor-General, the Commander-in-Chief, and Governors, to come home on leave, and for Members of Executive Councils to do so without a medical certificate. Previously the highest officers of the Crown in India had, like their predecessors in the Company's service, vacated their offices if they left India with the intention of returning to Europe. A special Act had been needed to allow H.R.H. the Duke of Connaught, when Commander-in-Chief in Bombay, to attend the London Jubilee celebration in 1887.