

A Colonial Constitution



When the scheme regarding the future Constitution of India was worked out, the British government issued a document known as the 'White Paper' in March 1933. It stated that the basic idea of the new Indian Constitution would be diarchy at the centre and responsible government in the provinces. In April 1933, a Joint Select Committee of the British Parliament was appointed with Lord Linlithgow as its chairman, to examine and report on government proposals contained in the White Paper. The Committee submitted its report in December 1934. The fundamentals given in the White Paper were not changed but many changes in the structure of the federal and provincial legislatures and other matters were recommended. A bill was drafted on the basis of the recommendations in the report which was passed by both Houses of the British Parliament by July 1935 and received the Royal assent in August 1935.¹ It was called the Government of India Act, 1935.

The broad principles on which the Act was based were the autonomy of the provinces and the powers of their legislatures to make the legislatures almost wholly elective, to introduce the principles of a Cabinet system at the provincial level, and to enlarge participation of Indians in the government at the centre. Thus the foundation was laid on which a new Constitution could be built.

The Government of India Act, 1935

The Act was a comprehensive statute running into 321 sections and two schedules. It was a comprehensive written Constitution given to India by its colonial masters. The special features of the Act were:

- i. The polity of India was reconstituted on a federal basis, although the Constitution of India was unitary and the provincial governments derived their powers by devolution from the

central government and discharged their functions under the superintendence, direction, and control of the Governor-General and ultimately the Secretary of State for India. The Act thus created a federation.

- ii. Partial responsibility in the form of a diarchy at the centre was introduced.
- iii. The provinces were granted autonomy and responsible government.
- iv. The Governor-General of India and the Governors of the provinces were granted extensive powers by way of safeguards, reservations, special responsibilities, overriding powers, and so on.
- v. New institutions like the Federal Court, Federal Railway Authority, the Reserve Bank of India (the Central Bank), and the Public Service Commissions for the federation and the provinces were created under the Act.
- vi. Burma was separated from India.
- vii. The Act prescribed the method whereby a state could join the federation and also provided for the legal consequences which followed from such an accession. The ruler of a state desiring to federate could execute an instrument of accession on behalf of himself, his heirs, and his successors, defining therein matters in which the state agreed to federate and thereby accepting the jurisdiction of the federation in all such matters. The Crown could refuse to accept an Instrument of Accession if it was inconsistent with the scheme of the federation. But once a state had acceded to the federation and was approved by the Crown, it could not secede from the federation.
- viii. The area of federal jurisdiction extended to the whole of British India including the states that had acceded. In relation to the provinces, there was a three-fold division of functions and the subjects were divided into the federal, provincial,

and concurrent lists. The federal legislature alone had the power to make laws with respect to the matters enumerated in the federal list. The subjects enumerated in the provincial list were within the exclusive domain of the provincial legislatures. Both the federal and provincial legislatures were competent to make laws on subjects enumerated in the concurrent list. In case of conflict and inconsistency, the federal law prevailed and the law of the province or state was void to the extent of such repugnancy.²

The Federal Executive

The executive power and authority of the federation was vested in the Governor-General as he was the representative of the Crown. The Crown in turn issued an Instrument of Restrictions to the Governor-General which contained directions as to the way in which he could exercise the authority conferred upon him. The extent of the executive authority of the federation included:³

- (a) matters with respect to which the federal legislature had power to make laws;
- (b) raising in British India on behalf of the Crown naval, military, and air forces and the governance of the King's forces borne on the Indian establishment, and
- (c) exercise of such rights, authority, and jurisdiction as were exercisable by the Crown by treaty, grant, usage, sufferance, or otherwise in and in relation to the tribal areas.

However, the jurisdiction of the federal government was subject to two limitations. Firstly, the federal executive authority did not extend in any province to matters except those expressly provided in the Act with respect to which the provincial legislature had the power to make laws. Secondly, it extended to a federated state subject to such limitations as might be specified in its Instrument of Accession. The executive authority of the ruler of a federated state was, however, to continue to be exercisable in that state regarding matters with respect to which the federal legislature had the power to make laws, except in so far as it was excluded by virtue of a federal law.

The Governor-General, as head of the federal executive, had supreme command of the military, naval, and air forces in India. This command, however, was subject to the power of His Majesty to appoint a Commander-in-Chief, to exercise in relation to those forces such functions as might be assigned to him.

The federal government was not concerned with the powers connected with the exercise of the functions of the Crown in its relations with the Indian states. These were exercisable by His Majesty's representative appointed for the purpose, but His Majesty could appoint one person to fill both the offices of the Governor-General and Representative of the Crown in relation to Indian states.

The Government of India Act, 1935 established diarchy at the centre. Administrative functions with respect to defence, ecclesiastic affairs, foreign relations except relations between the federation and any part of His Majesty's dominions, and the tribal areas, were to be exercised by the Governor-General at his discretion. To assist him in the exercise of these functions, the Governor-General was empowered to appoint councillors not exceeding three in number. The salaries and conditions of service of the councillors were to be prescribed by His Majesty-in-Council. They were responsible to the Governor-General alone and were in no way responsible to the federal legislature for any act done by them in the exercise of their duties.

All other executive powers were to be exercised by the Governor-General with the help and advice of the Council of Ministers, subject to the exercise by the Governor-General of special powers and responsibilities. The number of ministers was not to exceed ten. Ministers were to be chosen by the Governor-General to hold office during his tenure. It was stipulated in the Act that ministers should be chosen from amongst the members of the federal legislature and that a minister who for a period of six consecutive months was not a member of either chamber of the federal legislature, should at the expiry of that period cease to be a minister. The ministers were to get such salaries as might be determined by an act of the legislature and in the absence of it as fixed by the Governor-General, provided that the salary of a minister was not to vary during his term of office. The Governor-General, at

his discretion, might preside at meetings of the Council of Ministers. The control of ministers over the administration of transferred departments was subject to the following limitations:

1. Ministers had no right to tender advice on matters in respect of which the Governor-General was required to act at his discretion;
2. In cases where the Governor-General was empowered to exercise his individual judgment; and
3. When the Governor-General acted in the exercise of powers entrusted to him in the discharge of his special responsibilities.

In all matters which involved his special responsibilities, the Governor-General was required to exercise his individual judgment as to the action to be taken. He could, however, seek ministerial advice, but he need not act thereupon.

The matters in which the Governor-General had a special responsibility were:⁴

- (a) the prevention of any grave menace to the peace or tranquility of India or any part thereof;
- (b) the safeguarding of the financial stability of the federal government;
- (c) the safeguarding of the legitimate interests of minorities;
- (d) the securing to, and to the dependants of, persons who were or had been members of the public services, any rights provided or preserved for them by or under the Act and the safeguarding of their legitimate interests;
- (e) the securing in the sphere of executive action of the purposes which the provision of Chapter III of Part V of the Act of 1935 (which dealt with commercial discrimination) were designed to secure in relation to legislation;
- (f) the prevention of actions which would subject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment;
- (g) the protection of the rights of any Indian state and the rights and dignity of the Ruler thereof; and
- (h) the securing of the due discharge of his functions with respect to matters in relation to

which he was by or under the Act of 1935 required to act at his discretion, or to exercise his individual judgment, was not prejudicial or impeded by any course of action taken with respect to any other matter.

All executive action of the federal government was expressed to be taken in the name of the Governor-General, who also made rules for the more convenient transaction of the business of the government and for the allocation of business among the ministers.

The Federal Legislature

The Federal Legislature was to be bicameral and it consisted of the King, represented by the Governor-General, and the two Chambers, the Council of State, and the House of Assembly.⁵ The Council of State was to consist of 156 representatives of British India, and not more than 104 representatives of the Indian states.⁶ Out of 156 seats to be filled by the representatives of British India, 150 seats were to be allocated to governors' provinces and chief commissioners' provinces. There were 75 general seats, 6 for scheduled castes, 4 in the Punjab for Sikhs, 49 Muslims, 6 women, 7 European, 2 Indian Christians and one Anglo-Indian. Six seats were to be filled by persons chosen by the Governor-General at his discretion. The Council of State was to be a permanent body, not subject to dissolution, but one-third of its members were to retire every third year.

The House of Assembly was to consist of 250 representatives of British India and not more than 125 representatives of the Indian states. The life of the House of Assembly was five years, unless sooner dissolved. The Governor-General could, at his discretion, from time to time summon, prorogue, and address the chambers or send messages or dissolve the House of Assembly provided that the chambers be summoned to meet at least once every year.

The Council of State and the House of Assembly were to choose from among their members respectively a President and a Speaker to preside over these chambers. A member holding office as President or as a Speaker was to vacate his office if he ceased to be a member of the chamber over which he presided. He could at any time resign his office and he might be removed from his office by a resolution of the

Council or Assembly, as the case might be, passed by a majority of all its then members.

Bills other than financial bills could originate in either chamber. In general, a bill was not to be deemed to have been passed by the chambers of the legislature unless it had been agreed to by both chambers.⁷ If a Bill passed by one chamber was rejected by the other, or it did not agree to the amendments made in the Bill, or more than six months had elapsed from the date of the reception of the Bill by the other chamber and it had not been passed by that chamber, the Governor-General could summon a joint sitting of both the chambers for the purpose of deliberating and voting on the Bill. But in case of a Finance Bill or a Bill which affected the discharge of his functions in so far as he was required to act at his discretion or to exercise his individual judgment, he could summon a joint sitting, even though the above conditions had not been fulfilled.

After the Bill had been passed by both the chambers, it was presented to the Governor-General, who: might give his assent in the name of His Majesty; withhold his assent; reserve the Bill for the signification of the King's pleasure; return it to the chambers with a message to reconsider the Bill or any specified provision, or to move any such amendment to the Bill as indicated therein.

A Bill reserved for the signification of the King's pleasure could not become an Act unless and until, within twelve months from the day on which it was presented to the Governor-General, the Governor-General had known by notification that the King had assented thereto. Power was reserved by the Crown to disallow any Act assented to by the Governor-General.

At the start of every financial year, the Governor-General was to put before both chambers an 'annual financial statement' giving the estimated receipts and expenditure of the federation for that year.⁸ The estimates of expenditure embodied in the annual financial statement to show separately (a) the sums required to meet expenditure charged upon the revenues of the federation, and (b) the sums required to meet other expenditure proposed to be made from the revenues of the federation. The following items were charged on the revenues of the federation:

1. the salary and allowances of the Governor-General and other expenditure relating to his office for which provision was required to be made by order in Council;
2. debt charges for which the federation was liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service of redemption of debt;
3. the salaries and allowances of Ministers, Councillors, the Financial Adviser, the Advocate-General, Chief Commissioners, and the staff of the Financial Adviser;
4. the salaries, allowances, and pensions payable to the Judges of the Federal Court, and the pensions payable to the Judges of High Courts;
5. expenditure for the purpose of the discharge by the Governor-General of his functions with respect to reserved subjects;
6. expenditure on the discharge of the functions of the Crown in its relations with Indian states;
7. any grants connected with the administration of any areas in a province which were for the time being excluded areas;
8. any sums required to satisfy any judgment, decree, or award of any court or arbitral tribunal; and
9. any expenditure declared by an Act of Parliament or any Act of the Federal Legislature to be so charged.

Any question on whether any proposed expenditure fell within a class of charges on the revenue of the federation was to be decided at the Governor-General's discretion. The items of expenditure so charged upon the revenues of the federation were not to be submitted to the vote of the legislature.

The Act placed a number of restrictions on the legislative powers of the Federal Legislature. These restrictions were set out in section 108 which provided: 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 ordinance promulgated at his discretion by the Governor-General or a Governor; or
- (c) affects matters in respect of which the Governor-General is by or under the Act, required to act at his discretion; or
- (d) repeals, amends, or affects any Act relating to any police force; or
- (e) affects the procedure for criminal proceedings in which European and 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 or managed in British India to greater taxation than companies wholly controlled or managed therein; or
- (g) affects the grant of relief from any federal tax or income in respect of income taxed or taxable in the United Kingdom.

The Federal Legislature had no power (a) to make any law affecting the sovereign or the Royal family, or the succession to the Crown, or the sovereignty, dominion, or suzerainty of the Crown in any part of India, or the law of British nationality, or the Army Act, the Air Force Act, or the Naval Discipline Act, or the Law of Prize or Prize courts; or (b) except in so far as was expressly permitted by any subsequent provisions of the Act of 1935, to make any law amending any provision of this Act, or any Order in Council made thereunder, or any rules made under this Act by the Secretary of State, or by the Governor-General or a Governor in his discretion, or in the exercise of his individual judgment; or (c) except in so far as was expressly permitted by the Government of India Act to make any law derogating from any prerogative right of the King to grant special leave to appeal from any court.⁹

No federal law was valid which contravened the provision made in the Government of India Act against discriminatory legislation. Restrictions were also imposed on the authority of both the Federal and

Provincial Legislatures to pass discriminatory legislation in certain matters against British subjects domiciled, British trading companies incorporated, and ships registered, in the United Kingdom. If the Governor-General using his discretion certified that the discussion of a Bill, clause, or amendment would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquility of India, he might at his discretion direct that no further proceedings should be taken in relation to it.

The Governor-General was invested with extraordinary powers of legislation and could issue ordinances having the same force and effect as an Act of the Federal Legislature assented to by the Governor-General. The Act made a distinction between functions in the discharge of which the Governor-General was required by the law to act at his discretion or to exercise his individual judgment, and other functions. In respect to the former, the Governor-General could at any time, at his discretion, promulgate such ordinance as in his opinion the circumstances of the case would require subject to the following conditions:

1. The maximum period for which an ordinance could remain in force was six months. But it could be extended, by a subsequent ordinance, for a further period not exceeding six months.
2. When the operation of an ordinance was extended for a further period, it was to be communicated forthwith to the Secretary of State for India and it was to be laid by him before each House of Parliament.
3. The ordinance, like the Act of the Federal Legislature, was subject to disallowance by the King.
4. In respect of their subject matter, ordinances were governed by the same limitations as applied to Acts of the Federal Legislature. If and so far as an ordinance made a provision which the Federal Legislature would not be competent to enact, it was void.

The Governor-General was also empowered to promulgate ordinances during the recess of the legislature. It was provided that if at any time when the Federal Legislature was not in session and the Governor-General was satisfied that circumstances

existed which rendered it necessary for him to take immediate action, he could promulgate such ordinances as the circumstances appeared to him to require. An ordinance promulgated under such circumstances was to be laid before the Federal Legislature and it ceased to operate at the expiry of six weeks from the re-assembly of the legislature, or, if before the expiry of that period resolutions disapproving of it were passed by both chambers, upon the passing of the second of those resolutions.¹⁰

The Governor-General was also empowered to make laws in the form of Governor-General's Acts at his discretion in matters relating to functions in which he was required to act at his discretion or to exercise his individual judgment. The exercise of this power was subject to the following limitations:

- (a) The Governor-General was required to explain by message to both the chambers the circumstances which in his opinion rendered legislation essential. He could either enact forthwith, as a Governor-General's Act, a Bill containing such provisions as he considered necessary, or attach to his message a draft of the Bill which he considered necessary. When he attached a draft to his message, he might at any time after the expiry of one month enact, as the Governor-General's Act, the Bill proposed by him to the chambers either in the form of the draft communicated to them or with such amendments as he deemed necessary. But before so doing, he was to consider any address which might have been presented to him by either chamber with reference to the Bill or to any suggested amendment.
- (b) The Act was to be communicated forthwith to the Secretary of State and it was to be laid by him before each House of Parliament.
- (c) It was subject to disallowance by the Crown.

The Act contained special provisions enabling the Governor-General to act promptly in the event of a breakdown in the constitutional machinery. If at any time the Governor-General felt that a situation had arisen in which the government of the federation could not be carried on in accordance with the provisions of the Act, he could using his discretionary powers, issue a Proclamation declaring that his functions now be extended to all or any of the powers

vested in or exercisable by any federal body or authority, other than the Federal Court. Such a proclamation was to be communicated to the Secretary of State for India and laid by him before each House of Parliament. The proclamation was to cease to operate at the expiry of six months unless before the expiry of that period it had been approved by a resolution of both Houses of Parliament in which case it continued in force for a further period of twelve months from the date on which it would otherwise have ceased to operate. If, at any time, the government of the federation had for a period of three years been carried on under such a proclamation, then, at the expiry of such a period, the proclamation would cease to have effect and the government of the federation was to be carried on in accordance with the provisions of the Act of 1935. If the Governor-General by a proclamation assumed to himself any power of the federal legislature to make laws, any law made by him in the exercise of that power would continue to have effect until two years had elapsed from the date on which the proclamation ceased to have effect, unless sooner repealed or re-enacted by the Act of the appropriate legislature.¹¹

The Federal Court

Under the Government of India Act, 1935, a Federal Court was to be established.¹² It was to be the interpreter and guardian of the Constitution and a tribunal for determination of disputes between the constituent units of the federation.

The Federal Court was to consist of a Chief Justice and not more than six puisne judges who were to be appointed by the King to remain in office till the age of sixty-five. The King could increase the number of judges on presentation of an address by the Federal Legislature to the Governor-General for submission to the King. For appointment as a judge, one had to be either a judge of a High Court in British India or in a federated state for at least five years, a Barrister of England or Northern Ireland of at least ten years' standing, a member of the Faculty of Advocates in Scotland of at least ten years' standing, or had to be for at least ten years a pleader of a High Court in British India, or in a federated state or of two or more such courts in succession. For appointment as Chief Justice of India, it was necessary that one should be a

Barrister or Pleader of at least fifteen years' standing. A judge could be removed from his office by His Majesty on the ground of misbehaviour or infirmity of mind or body, if the Judicial Committee of the Privy Council, on a reference made to them by His Majesty, recommended his removal.

The court's jurisdiction was three-fold: original jurisdiction, appellate jurisdiction in appeals from High Courts in British India, and advisory jurisdiction. The court exercised original jurisdiction in any dispute between any two or more of the following parties; the federation, any of the provinces, or any of the federated states, if and in so far as the dispute involved any question (whether of law or fact) on which the existence or extent of a legal right depended, provided that the said jurisdiction did not extend to a dispute to which the state was a party.

The appellate jurisdiction of the Federal Court extended to appeals from any judgment or decree or final order of a High Court in British India, if the High Court certified that the case involved a substantial question of law as to the interpretation of the Act of 1935, or any Order in Council made thereunder.¹³ An appeal also rested in the Federal Court from a High Court in a federated state on the ground that a question of law had been wrongly decided, being a question which concerned the interpretation of the Act of 1935, or of an Order in Council made thereunder or the extent of the legislative or executive authority vested in the federation by virtue of the Instrument of Accession of that state, or arose under an agreement made under Part VI (the administrative relations between federation and states) in relation to the administration in that state of a law of the federal legislature.¹⁴

The appellate jurisdiction of the Federal Court was extended to some civil cases also by an Act of the Federal Legislature provided that no appeal lay unless the amount of the claim or subject matter in dispute was not less than 50,000 rupees or such other sum not less than 15,000 rupees as was specified in the Act, or special leave of the Federal Court had been obtained.¹⁵

The Federal Court was also invested with advisory jurisdiction. The Governor-General could, at his discretion, refer to the Federal Court any question of

law of special public importance for consideration and report.

An appeal could be brought to the Privy Council (His Majesty-in-Council) from a decision of the Federal Court:¹⁶

- (a) given in the exercise of its original jurisdiction any dispute which concerned the interpretation of the Act of 1935, or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the federation by virtue of the Instrument of Accession of any state, or arose under an agreement made under Part VI (Administrative relations between federation, provinces, and states) of the Act of 1935, in relation to the administration in any state of a law of the Federal Legislature, without leave, and
- (b) in any case, by leave of the Federal Court or of His Majesty-in-Council.

Provincial Governments

With the separation of Orissa from Bihar and Sindh from Bombay, and the severance of Burma from British India, there were eleven Governor's provinces, namely: Madras, Bombay, Bengal, the United Provinces, the Punjab, Bihar, the Central Provinces and Berar, Assam, the North-West Frontier Province, Orissa, and Sindh. Section 290 provided that the Crown by Order in Council might create a new province, increase the area of any province, diminish the area of any province, and alter the boundaries of any province. It was, however, provided that before the draft of any such Order was laid before Parliament, the Secretary of State would take steps for ascertaining the views of the Federal Legislature as also of the government and the legislature of the province which was to be affected by such an order. These preliminary consultations were to be directed towards both the proposal to make the Order and the provisions to be inserted therein.

In form, the executive authority of a province was similar to that at the centre and it was to be exercised on behalf of the Crown by a Governor. The Governor received his appointment from the King by a commission under the Royal Sign Manual and was constitutionally responsible to the Governor-General.

An Instrument of Instructions was issued to each Governor on the assumption of office.

Subject to the provisions of the Act of 1935, the executive authority of each province extended to matters with respect to which the legislature of the province had power to make laws. The administration of the province might, for purposes of convenience, be grouped under three heads:

- (a) functions in the discharge of which the Governor was required to act on the advice of the Council of Ministers;
- (b) functions in the discharge of which he was required to exercise his individual judgment; or
- (c) functions in respect of which he was required to act at his discretion.

Where a question arose regarding whether a given matter fell in one category or another, the decision of the Governor was final and the validity of anything done by the Governor could not be called into question on the ground that he ought or ought not to have acted at his discretion.

It was provided that even though the Governor could act at his discretion, he should exercise his functions with the help and on the advice of a Council of Ministers.¹⁷ The ministers were chosen and summoned by the Governor and they held office at his pleasure. The Act provided that if a person appointed minister was for a period of six months not a member of the Provincial Legislature, he ceased to be a minister at the expiry of that period. The salaries of the ministers were determined by an Act of the provincial legislature and until then fixed by the Governor, provided that the salary of a minister was not to vary during his term of office. The Governor could, if he so wished, preside at the meetings of the Council of Ministers.

In the exercise of the functions left to his discretion or to his individual judgment, the Governor was required to act in accordance with the directions given to him by the Governor-General. But the validity of anything done by him could not be called into question on the ground that it was contrary to the directions so issued. Before giving his directions, the Governor-General was required to satisfy himself that nothing in the directions required the Governor to act in any manner inconsistent with the Instrument

of Instructions issued to him by His Majesty with the approval of both the Houses of Parliament.

The Governor was entrusted with the following special responsibilities, in the exercise of which he acted in his individual judgment:

- i. the prevention of any grave menace to the peace or tranquility of the province or any part thereof;
- ii. the safeguarding of the legitimate interests of minorities;
- iii. the securing to, and to the dependants of, persons who were or had been members of the public services, any rights provided or preserved for them by or under the Act, and the safeguarding of their legitimate interests;
- iv. the securing in the sphere of executive action of the purposes which the provisions of Chapter III of Part V of the Act (which dealt with discrimination) were designed to secure in relation to legislation;
- v. the securing of the peace and good government of areas which by or under the provisions of the Act were declared to be partially excluded areas;
- vi. the protection of the rights of any Indian state and the rights and dignity of the Ruler thereof; and
- vii. the securing of the execution of orders or directions lawfully issued to him under Part VI of the Act (which dealt with administrative relations) by the Governor-General at his discretion.¹⁸

The following were the more important functions in the exercise of which the Governor was required to act at his discretion: appointment and dismissal of ministers, determination of their salaries (unless fixed by an Act of the legislature), allocation of business among ministers, presiding at meetings of the Council of Ministers, and the making of rules for the transaction of the business of the provincial government.

Provincial Legislatures

In every province, there was to be a legislature which was to consist of the King, represented by the Governor and one or two chambers. The provinces of

Madras, Bombay, Bengal, the United Provinces, Bihar, and Assam had **bicameral legislatures**, whereas the remaining five provinces had **unicameral legislatures**. Where there were two chambers of the provincial legislature, one was known as the Legislative Council and the other as the Legislative Assembly, and where there was only one chamber, it was known as the Legislative Assembly. The composition of the chamber or chambers of the legislature of a province was such as was specified in relation to that province.¹⁹

Representation in the Legislative Assembly of each province was based mainly on the allocation of seats to various communities and to specified interests. There were separate electorates for Muslims, Sikhs, Indian Christians, Anglo-Indians, and Europeans. The details of the distribution of seats were based upon the Communal Award, with such modifications as had been rendered necessary, first by the later proposal to create a new province of Orissa, and, secondly, by the Poona Pact.

The Communal Award did not contain proposals for the composition of Legislative Councils. The composition of Legislative Councils was, however, based upon the same principles as the Communal Award. As these were to be much smaller bodies than the Legislative Assemblies it was, therefore, not possible to provide in them for the exact equivalence of all the interests represented in the Legislative Assemblies. But the Act provided for the inclusion of a certain number of seats to be filled by nomination by the Governor at his discretion with a view to redressing any possible inequality or for securing some representation for women.

The Legislative Council was a permanent body, one-third of its members retiring once in every three years. It was not subject to dissolution. The Legislative Assembly, unless sooner dissolved, continued for five years. Membership of both the federal legislature and the provincial legislature at the same time was prohibited. If a person was chosen a member of both legislatures then, at the expiration of such period as might have been specified in rules made by the Governor of the Province, that person's seat in the provincial legislature was to become vacant, unless he or she had previously resigned his or her seat in the federal legislature.

A Bill passed by the Legislative Assembly, in provinces with unicameral legislatures and by both the chambers in provinces with bicameral legislatures, was presented to the Governor who was empowered to use his discretion either to give his assent to it in the name of the King, or to withhold assent, or to reserve it for the consideration of the Governor-General. A Bill reserved for the consideration of the Governor-General might be assented to by him in the name of the King or he might withhold his assent or reserve it for the signification of the King's pleasure.

Even when a Bill had received the assent of the Governor or the Governor-General, it could be disallowed by the King within twelve months from the date of such assent. A measure thus disallowed was to be duly notified by the Governor concerned.

No discussion could take place in the provincial legislature with respect to the conduct of any Judge of the Federal Court or of a High Court in British India or in a federal state in the discharge of his duties. If the Governor certified that discussion of a Bill introduced or proposed to be introduced, or any specified clause or a Bill, or of any amendment moved or proposed to be moved to a Bill, would affect the discharge of his special responsibility for the prevention of a grave menace to the peace and tranquility of the province, or any part thereof, he could at his discretion direct that no proceedings or no further proceedings should be taken in relation to the Bill, clause, or amendment and effect would be given to that direction.

Limitation on the Legislative Power of the Provincial Legislatures

Provincial legislature had the power to make laws for the province or for any part thereof in respect of any of the matters enumerated in List II (Provincial) or List III (Concurrent). It had no power to make any law affecting the sovereignty or dominion of the Crown over any part of India, or amending any provision of the Government of India Act, 1935, or derogating from the prerogative right of the King to grant special leave to appeal to any court. It had, moreover, no power to pass any law of a discriminatory nature against any British subject or company carrying on business in the province. The prior sanction of the Governor-General, using his

discretion, was required for the introduction into the legislature of any Bill or amendment which:

- (a) Repealed, amended, or was repugnant to any provisions of any Act of Parliament extending to British India; or
- (b) repealed, amended, or was repugnant to any Governor-General's Act, or any ordinance promulgated at his discretion by the Governor-General, or
- (c) affected matters in respect of which the Governor-General was by or under the Government of India Act, required to act at his discretion; or
- (d) affected the procedure for criminal proceedings in which European British subjects were concerned.

Without the previous sanction of the Governor, no Bill or amendment could be introduced or moved which:

1. Repealed or amended or was repugnant to any Governor's Act, or any ordinance promulgated at his discretion; or
2. repealed or amended or affected any Act relating to any police force.

Special Provisions Relating to Financial Bills

No Financial Bill could be moved or introduced except on the recommendation of the Governor nor could it be introduced in the Legislative Council. A Financial Bill, as defined in the Act, was a Bill:

- (a) for imposing or increasing any tax; or
- (b) for regulating the borrowing of money or the giving of any guarantee by the province or for amending the law with respect to any financial obligations undertaken or to be undertaken by the province; or
- (c) for declaring any expenditure to be expenditure charged on the revenues of the province or for increasing the amount of such expenditure.

The annual financial statement or Budget was laid before the chamber or chambers for discussion. Voting was done only in the Assembly and for that purpose distinction was made between the items relating to expenditure charged on the revenues of

the province and other expenditure. The following items of expenditure were declared by the Act²⁰ to be expenditure on the revenues of India and expenditure so charged was not submitted to the vote of the Assembly, though it could be discussed, except in case of expenditure under the following clauses:

- (a) The salary and allowances of the Governor and other expenditure relating to his office for which provision was required to be made by order in Council;
- (b) debt charges, including interest, sinking fund charges, and redemption charges;
- (c) the salaries and allowances of Ministers, the Advocate-General, and the Judges of the High Court;
- (d) expenditure for excluded areas;
- (e) sums required to satisfy any judgment, decree, or award of any court or arbitral tribunal;
- (f) any other expenditure so charged by this Act or any Act of the provincial legislature.

Where any question arose whether a proposed expenditure did or did not fall within any of the above clauses, it was to be decided by the Governor, whose decision was final.

The expenditure not charged on the revenues of the province was submitted in the form of demands for grant to the Legislative Assembly. It was expressly laid down in the Act that no demand for grant could be made except on the recommendation of the Governor. The Assembly had the power to assent to, or refuse, or reduce the amount specified in any demand but the Governor was empowered to restore and treat as sanctioned any such proposed expenditure in whole or in part if in the opinion of the Governor the same was necessary for the due discharge of his special responsibilities.

The Governor, like the Governor-General, possessed the power to promulgate ordinances during the recess of the legislature. He could promulgate ordinances at any time in any matter using his discretion or individual judgment to make laws in the form of Governor's Act. An ordinance issued by the Governor or a Governor's Act, had the same force and effect as an Act of the provincial legislature. The Governor was also given special powers to make regulations for territories declared by the King as 'excluded areas' or

'partially excluded area'. The administration of excluded areas was carried on by the Governor at his discretion. No Act made by the federal legislature or a provincial legislature applied to an excluded area unless the Governor had so decided, with such exceptions and modifications as he considered necessary. The Governor could also make regulations for the peace and good government of such an area which might repeal or amend any federal or provincial act or any existing Indian law applicable to it. Such regulations were required to be submitted forthwith to the Governor-General and had no effect until assented to by him. These were subject to disallowance by the King like an Act of the provincial legislature.²¹

The Governor was also given special powers in case of the failure of the constitutional machinery in the province. If, at any time, the Governor believed that a situation had arisen in which the government of the province could not be carried on in accordance with the provisions of the Government of India Act, 1935 he could, using his discretion by Proclamation, declare that he had assumed upon himself all or any of the powers vested in or exercisable by any provincial body or authority other than a High Court, subject to the following conditions:²²

1. No Proclamation declaring the failure of the constitutional machinery could be issued without the concurrence of the Governor-General.
2. The Proclamation was to be forthwith communicated to the Secretary of State and it was to be laid by him before both Houses of Parliament.
3. The Proclamation ceased to operate on the expiry of six months unless its continuance had been approved by resolution of both Houses of Parliament, but no such Proclamation could in any case remain in force for more than three years.
4. Any law made by the Governor when the Proclamation was in force continued to have effect for a period of two years after the expiry of the Proclamation, unless sooner repealed or enacted by an Act of the appropriate legislature.

Formation of Ministries in the Provinces

The federal part of the Constitution was not largely put into operation but the provincial part came into force on 1 April 1937. In the provincial elections, the Congress Party had won the majority of the seats in eight provinces. Initially, the Congress refused to form the governments. However, later on, when an assurance was given that the Governors would not use their special powers, the Congress formed ministries in the provinces where the Party was returned in majority. The Muslim League did not do well in these elections and secured only 51 out of a total of 482 seats reserved for Muslims. The Muslim League offered to join the Congress ministries, but on honourable terms. This was not acceptable to the Congress who demanded that the Muslim League should cease to function as a separate group in the legislature and should come under the control of the Congress high command. The Muslim League refused such humiliating terms offered by a power drunk party.

The Congress ministries functioned from July 1937 to October 1939. In September 1939, the Second World War broke out and Britain declared war on Germany. The Governor-General declared India a belligerent country on the side of Britain and the Allies. Neither the central legislature nor the provincial governments were consulted over this. The Congress was in a dilemma and as a protest asked its ministers in the provincial governments to resign in protest. Provincial autonomy thus came to an end all of a sudden. No other group could form the ministries consequently, the Governors suspended the Constitution in the eight provinces where Congress had been in office. Section 93 of the Act came into operation and the Governors carried on the entire work of administration with the help of their advisers. Parliamentary government came to an end and the rule of the Governors began which lasted till the end of the war. This was done by amending the Act because the Governor's Proclamations of Emergency could not last longer than six months under the Act of 1935. The Defence of India Rules was in force throughout India during the Second World War. It restricted the powers of the ministers in other provinces where. Governors began to force their will

upon the ministers in the day-to-day administration. Mr Allah Bux, the Chief Minister of Sindh, was dismissed from the office of premiership although he enjoyed the confidence of the legislature. This was an act of great constitutional impropriety. The resignation of Mr Fazlul Haq, prime minister of Bengal, was also obtained under similar circumstances.

Conclusion

It cannot be denied that the Government of India Act, 1935 was not a perfect piece of legislation. It fell far short of the aspirations and demands of the people of India. Some of its shortcomings and defects were:

1. Indians were not given control over the government of their country. They could not change or amend their Constitution. This was a serious drawback and a large number of states did not join the federation.
2. Indian states were given a privileged position under the Constitution. The representation given to them both in the Council of State and the Federal Assembly was more than what was due to them on the basis of their territory, population, and the contributions made by them to the revenues of the federal government. While the members from British India were to be elected by the people, the Indian princes were allowed to nominate their quota. Critics pointed out that as the Indian princes were under the control of the political department of the Government of India and did what they were directed to do, their representatives were obviously under the control of the British government. They could not dare to vote against their masters. The nominees from the Indian states could be used by the British government in India to serve their own interest and stop the progress of the country.
3. It was against the canons of democracy to have indirect elections to the federal assembly.
4. Indians resented the control which exercised by the Secretary of State for India over the Indian

Civil Service, the Indian Police Service, and other All-India Services.

5. Even though the Indian Army got the lion's share of the Indian budget, Indians were given absolutely no control over it, as defence was a reserved subject.
6. The discretionary powers of the Governors reduced provincial autonomy to a farce. Those powers and responsibilities frustrated the powers and functions of the provincial legislature and the executive. The Governor was made the sole judge to decide whether any particular matter fell within his discretionary scheme or affected any of his special responsibilities. The Governor could become a virtual dictator of the province within the letter of the law.
7. The powers of the provincial legislatures were very restricted. The upper chambers were deliberately made reactionary bodies.

Notes

1. Bokhari, Abrar Husain, *Constitutional History of Indo-Pakistan*, 1964, M. Mohammad Suleman Qureshi & Sons, Lahore, pp. 96-7.
2. *The Government of India Act 1935*, Seventh Schedule and Sections 99, 100, 101, 102, 103 and 107.
3. *Government of India Act 1935*, Section 8.
4. *Ibid.*, Section 12.
5. *Ibid.*, Section 18.
6. *Ibid.*, Schedule I.
7. *Ibid.*, Section 30, 31.
8. *Ibid.*, Section 33 to 37.
9. *Ibid.*, Section 110.
10. *Ibid.*, Section 42.
11. *Ibid.*, Section 45.
12. *Ibid.*, Section 200.
13. *Ibid.*, Section 205.
14. *Ibid.*, Section 207.
15. *Ibid.*, Section 206.
16. *Ibid.*, Section 208.
17. *Ibid.*, Section 50.
18. *Ibid.*, Section 52.
19. *Ibid.*, Fifth Schedule.
20. *Ibid.*, Section 78.
21. *Ibid.*, Section 88.
22. *Ibid.*, Section 45.