exclusive jurisdiction in respect of allotted subjects. The Act of 1935 seeks to introduce the essential feature of provincial autonomy, although the limitations on autonomy are manifold. This limited nature of autonomy has resulted chiefly from the fact that the new federal constitution has to be carved out of a unitary form of government. The traditions of control by the Central Government could not be got over. The federation of India was not the union of sovereign States; it arose from the devolution of powers by the Central Government to the provinces. There was another complication. Indian opinion was divided with regard to the grant of residuary power to the Centre or to the provinces. Hindu India, it may be said, was in favour of maintaining the Centre in a dominant position; Moslem India wished to make the provinces strong. To bridge these two diametrically opposite points of view, the three legislative lists, viz., the federal list, the provincial list, and the concurrent list, were made as exhaustive as possible so that little or nothing was left for the residuary list. This has made the Indian Constitution unique, and Sir Samuel Hoare when Secretary of State for India agreed that "it means complications" and that "it also means the possibility of increased litigation".

The Act of 1935 divided British India into eleven provinces, viz., Assam, Bengal, Bihar, Bombay, Central Provinces, Madras, North-West Frontier, Orissa, Punjab, Sind, United Provinces. The provinces of Sind and Orissa were new; the creation of Sind affected the territory of Bombay Presidency, and the creation of Orissa touched on the old jurisdiction of Bihar and Madras. The Simon Commission commented that "the existing provincial boundaries in more than one case embrace areas and peoples of no natural affinity, and sometimes separate those who might under a different scheme be more naturally united." The case for readjustment of boundaries on scientific lines is very strong, as, to quote the Simon Commission, "the present provinces are not ideal areas for self-government."
Under Section 290, the readjustment of provincial boundaries is the concern of His Majesty, although the opinion of the Federal Government and provincial Governments will be taken thereon. From a statement made by the Under-Secretary of State for India in the House of Commons in 1938 it can be gathered that the British Government have no intention of readjusting the existing provincial boundaries.

Paragraph 20 of the Fifth Schedule to the Government of India Act 1935 states that the Governor, in his individual judgment, may make rules for carrying into effect certain provisions of the Fifth Schedule (regarding composition of provincial legislatures) and the provisions of the Sixth Schedule (regarding franchise) and securing the due constitution of the provincial legislature, especially with respect to the notification of vacancies, the nomination of candidates, the conduct of elections, the expenses of candidates at elections, corrupt practices and other offences in connection with elections, the decision of doubts and disputes arising out of elections. The Government of India Provincial Elections (Corrupt Practices and Election Petitions) Order 1936 provides that no election shall be called in question except by an election petition presented to the Governor who shall, in his individual judgment, appoint as Commissioners for the trial of the petition three persons who have been, or are eligible to be appointed, judges of a High Court. The tribunal has to decide the validity of elections, and its decision is intended to be final. The power of the High Court to issue a writ of certiorari where an election has been set aside by a tribunal acting wholly without jurisdiction remains. Elections to the Assembly can be declared void only by the Governor or a tribunal appointed by him.¹

¹ In B. S. Moorthev v. Eli Vadapalli and others, it was held that the District Magistrate had only power to inquire into primary elections, that is, elections to the panel of candidates (1937, 1 F.L.J. H.C. 4).
With the introduction of provincial autonomy in the British Indian provinces, the principle underlying the process of questions and answers in the House of Commons has undergone modification. A question is not put to a Minister in the House of Commons unless he is responsible for the subject matter and in a position to intervene to secure a particular line of action. At present, only those questions regarding provincial affairs are in order in the House of Commons where the action at issue has been taken by the Governor without consulting the Ministers or against their advice or in the alternative the Governor is in possession of power applicable to the case which he failed to exercise. So far as the Ministers are responsible to the provincial legislature for the government of the province, it would be inappropriate if the House of Commons were to call in question or criticise by questions and answers their policies and activities. So long as Part II of the Act of 1935 relating to Federation is not brought into force, there is no change in the relations between the Government of India and Parliament. The Central Government remains legally subject in respect of all its operations to the direction and control of the United Kingdom Government. Accordingly, there is no necessity for any change in the practice or policy regarding questions and answers in the House of Commons relating to the operations of the Government of India. The matter was explained by Mr. Neville Chamberlain, Prime Minister of Great Britain, in reply to a question by Mr. Churchill in the House of Commons on the 17th of June 1937.

The Provincial Legislatures

There is a single Legislative Assembly in the Punjab, the Central Provinces, the North-West Frontier Province, Sind and Orissa, but there are two Chambers in Madras, Bombay, Bengal, the United Provinces, Bihar and Assam. The franchise has been widened, but it is far short of adult franchise; the composition of the lower House is
determined by the Communal Award of August 4, 1932, modified by the Poona Pact of September 25, 1932. Territorial constituencies are formed to fill seats for seven groups, viz., General (that is, Hindus including Scheduled Castes), Muhammadans, Europeans, Anglo-Indians, Indian Christians, Sikhs, and Women. There are representations of special interests such as landlords, labour, commerce, university. In the Upper House there is no arrangement for representation of special interests by election, but the inequalities of representation resulting from election are to be redressed by nomination. All the members of the Upper House except the nominated ones are, in the case of the provinces other than Bengal and Bihar, directly elected by territorial constituencies, but in Bengal and Bihar a substantial number of members of the Legislative Council (27 in Bengal and 12 in Bihar) are elected by the Legislative Assembly in accordance with the system of proportional representation by means of the single transferable vote. The limited franchise and the communal composition of the legislature show the undemocratic character of the provincial constitution, apart from the Governor's special responsibilities and other discretionary powers. The room for the expansion of self-government in the provinces is thus narrow, and many good effects of the new Constitution have been neutralised by the emphasis on communal considerations, conceived and planned by the Communal Award of 1932. No person may be a member of both Chambers. Rules of procedure may be made by either Chamber.

The composition of the provincial legislatures may be studied from the following allocation of seats.

**Bengal Legislative Assembly**—78 General seats (including 30 for scheduled castes); 117 Muhammadan seats; 3 Anglo-Indian seats; 11 European seats; 2 Indian Christian seats; 19 Commerce seats; 5 Landholders seats; 2 University seats; 8 Labour seats; 5 seats for women (2 for General,
2 for Muhammadan and 1 for Anglo-Indian seats); Total seats 250.

**Bengal Legislative Council**—10 General seats; 17 Muhammadan seats; 3 European seats; 27 seats to be filed by the Legislative Assembly; and 6 to 8 nominated seats.

**Madras Legislative Assembly**—146 General seats (including 30 for Scheduled castes); 1 seat for backward areas and tribes; 28 Muhammadan seats; 2 Anglo-Indian Seats; 8 Indian Christian seats; 3 European seats; 6 Commerce seats; 6 Landholders seats; 1 University seat; 6 Labour seats; 8 seats for women (6 General, 1 Muhammadan and 1 Indian Christian seats); Total seats 215.

**Madras Legislative Council**—35 General seats; 7 Muhammadan seats; 1 European seat; 3 Indian Christian seats; 8 to 10 nominated seats.

**Bombay Legislative Assembly**—114 General seats (including 15 for scheduled castes); 1 seat reserved for backward areas and tribes; 29 Muhammadan seats; 2 Anglo-Indian seats; 3 European seats; 3 Indian Christian seats; 7 Commerce seats; 2 Landholders seats; 1 University seat; 7 Labour seats; 6 seats for Women (5 General and 1 Muhammadan seats); Total seats 175.

**Bombay Legislative Council**—20 General seats; 5 Muhammadan seats; 1 European seat; 3 to 4 nominated seats.

**The United Provinces Legislative Assembly**—140 General seats (including 20 for Scheduled castes); 64 Muhammadan seats; 1 Anglo-Indian seat; 2 European seats; 2 Indian Christian seats, 3 Commerce seats; 6 Landholders seats; 1 University seat; 3 Labour seats; 6 seats for women (4 General and 2 Muhammadan seats); Total seats 228.

**The United Provinces Legislative Council**—34 General seats; 17 Muhammadan seats; 1 European seat; 6 to 8 nominated seats.

**Bihar Legislative Assembly**—86 General seats (including 15 for Scheduled castes); 7 seats reserved for backward
areas and tribes; 39 Muhammadan seats; 1 Anglo-Indian seat; 2 European seats; 1 Indian Christian seat; 4 Commerce seats; 4 Landholders’ seats; 1 University seat; 3 Labour seats; 4 seats for women (3 General and 1 Muhammadan seats); Total seats 152.

Bihar Legislative Council—9 General seats; 4 Muhammadan seats; 1 European seat; 12 seats to be filled by the Legislative Assembly; 3 to 4 nominated seats.

Assam Legislative Assembly—47 General seats (including 7 for Scheduled Castes), 9 seats for backward areas and tribes; 34 Muhammadan seats; 1 European seat; 1 Indian Christian seat; 11 Commerce seats; 4 Labour seats; 1 seat for women. Total seats 108.

Assam Legislative Council—10 General seats; 6 Muhammadan seats; 2 European seats; 3 to 4 nominated seats.

The Punjab Legislative Assembly—42 General seats (including 8 for Scheduled Castes); 31 Sikh seats; 84 Muhammadan seats; 1 Anglo-Indian seat; 1 European seat; 2 Indian Christian seats; 1 Commerce seat; 5 Landholders seats; 1 University seat; 3 Labour seats; 4 seats for women (1 General, 1 Sikh and 2 Muhammadan seats); Total seats 175.

The Central Provinces Legislative Assembly—84 General seats (including 20 for Scheduled Castes); 1 seat for backward areas and tribes; 14 Muhammadan seats; 1 Anglo-Indian seat; 1 European seat; 2 Commerce seats; 3 Landholders seats; 1 University seat; 2 Labour seats; 3 General seats for women.

Orissa Legislative Assembly—44 General seats (including 6 for Scheduled Castes); 5 seats reserved for backward areas and tribes; 4 Muhammadan seats; 1 Indian Christian seat; 1 Commerce seat; 2 Landholders seats; 1 Labour seat; 2 General seats for women; Total seats 60.

Sind Legislative Assembly—18 General seats; 33 Muhammadan seats; 2 European seats; 2 Commerce seats;
2 Landholders seats; 1 Labour seat; 2 seats for women (1 General and 1 Muhammadan seat); Total seats 60.

The N.W.F. Province Legislative Assembly—9 General seats; 3 Sikh seats; 36 Muhammadan seats; 2 Landholders seats; Total seats 50.

The franchise qualifications are generally dependent on taxation, property and literacy; they vary from province to province. Mr. Butler explaining Schedule VI to the Act of 1935 (which incorporates provisions as to the franchise) stated in the House of Commons: “The percentage of the total electorate to the total population is just under 14 per cent, and the percentage of the total electorate to the total adult population is 27 per cent. The percentage of total male electorate to the total adult male population will be about 43 per cent.” Schedule VI relates solely to the franchise for territorial constituencies; it does not include the franchise for provincial Upper Houses, or for electoral colleges or for special interests. The general findings of the Franchise Committee were included in the schedule. The franchise qualifications for the Upper House are higher than those for the Legislative Assemblies.

The second Chamber in Assam acted as a bar to the smooth passing of the Assam Agricultural Income-Tax Act; the second Chambers in Bihar and the United Provinces helped the compromise on the tenancy questions of the respective provinces. The Upper House thus has acted as a helpful agency of conservative feeling. But the second Chamber in Bengal showed no conservative instinct in dealing with forward legislation; rather it tried in its own way to champion the cause of the people to the detriment of vested interests. It is significant that the Bengal Legislative Council deleted a whole chapter on the speedy realisation of rents, inserted by the Select Committee on the Bengal Tenancy Amendment Bill 1938 apparently with the tacit consent of the Ministry. With regard to the Calcutta Municipal Amendment Bill reducing
the strength of the Hindu members, the Bengal Legislative Council once refused to accept certain amendments of the Lower House, but the situation was righted later, and the Upper House did not attempt to vindicate its position as a revising Chamber.

The rights of non-member Ministers in the Upper House were co-extensive with those of its members barring the right of voting. Sections 64, 66 (2), 84 and 87 of the Act of 1935 read together make it quite clear that a Minister who does not happen to be a member of the Legislative Council has the right to initiate proceedings in the Upper House. But a non-member Minister should not function as the leader of the Upper House. Mr. S. C. Mitter, President of the Bengal Legislative Council, ruled that a leader of the Council must be a member of it.

The Bengal Legislative Council vindicated its position by bringing forward a motion drawing the attention of the Governor to the fact that his Ministers (who were then all members of the Legislative Assembly) by persistently abstaining from attending the meetings of the Legislative Council had committed a breach of the privilege of the House. Leaders of all groups including the Ministerial Coalition Party unreservedly showed their resentment at what they regarded as disrespect to the House. On the Ministers giving an assurance that they would thenceforth attend the House regularly the motion was withdrawn.

India—A Economic Unit

If we analyse the conditions of economic prosperity in a country, we must accept two principles of far-reaching importance viz., no nation can remain in complete isolation and attain economic self-sufficiency, and national economic policies and international economic co-operation interact. The potentialities of India's internal market are great; but its real purchasing power has made it a relatively small
market. India cannot lose the foreign markets for her exportable surplus in jute, cotton, oil-seeds, tea, hides etc.; the masses will be seriously affected by the world price-levels for their products; India’s internal development in regard to the building up of production and standards of living is bound up with her public finance, communications, and exchange and tariff policies. Sir George Schuster rightly points out that “by industrial development alone it will be impossible to lift the whole level of Indian standards adequately and indeed there can be no sure foundation for industrial progress itself unless the condition and purchasing power of the agricultural population are concurrently improved.”¹ The reciprocity between agricultural and industrial improvement is pronounced. If the countryside remains backward in the standard of living, the wages and manner of life of the urban worker can hardly be improved. It is the peasant who in the last resort must support the industrial apparatus of India, and, to quote Sir Frank Noyce, “the most striking element in the movement of labour in India is not the villager’s willingness to leave his village to seek his fortune but his anxiety to get back to it.” But he can be made to suffer by a high protective policy resulting in diminished foreign demand for his agricultural products, by artificial tariffs and increased cost of production in industries enhancing the price of industrial goods, by subsidy to bankrupt industries occasioning extra taxation. It is the balance of progress between industry and agriculture that should be the economic goal of India, and the policy to be pursued must take stock of the potentialities of the country on both the counts. Provincial autonomy has earmarked land and agriculture as exclusive provincial subjects, but currency, banking, customs duties, railways, development of industries have fallen under the list of federal subjects. In short, agriculture and agriculturists are the concern of the provincial Government whereas urban

¹ Part II of “India and Democracy”, 1941.
industries and workers are to be looked after by the Federal Government. But the need is a co-ordinated policy, and unless there is healthy co-operation between the Centre and provincial units, the fashioning of any progressive economic policy will be rendered impossible. Accordingly, in actual working the augmentation of the Central power in respect of economic issues becomes inevitable, and to that extent provincial autonomy should be made to suffer. Such an eventuality is disconcerting to those who insist on the utmost extension of provincial autonomy. The emergency situation arising out of the War has revealed the need for an all-India policy in economic spheres, and even with regard to food policy the dominance of the Central Government has grown and expanded beyond measure, although agricultural production is an exclusively provincial matter.

Under the Constitution Act of 1935 British India is taken as one economic unit, notwithstanding provincial autonomy. Section 297 aims at the promotion of free trade in British India and the removal of internal trade barriers. The provincial legislatures and provincial Governments are forbidden to restrict inter-provincial trade. The free circulation of trade in India is secured. Section 297 (1) (a) of the Constitution Act only refers to legislation with respect to entry No. 27 and entry No. 29 in the provincial legislative list; it does not restrict the provinces in regard to excise and health questions. The province can take measures under items 30 and 40 of the provincial legislative list, even if they lead to the contravention of the principle of free trade. The Canadian and Australian Acts provide for free trade amongst the different units. In the Indian Act there is no legal prohibition against discrimination between the provinces or units by the Federal Government, but the Commonwealth of Australia contains specific instructions not to give any preference to one State or part thereof over another State or part thereof. There is no specific power, under the Indian Act, in the federal legislature or Government to
regulate inter-provincial trade and commerce, as “inter-provincial trade” is not enumerated at all in the legislative lists. It can, therefore, be argued that “the power to regulate inter-provincial trade in so far as it could be validly regulated must be obtained by piecing together powers under several enumerated heads which are assigned to the federal or concurrent lists. If there is any gap in the power to regulate inter-provincial trade, it must be taken that the gap is deliberate, and if inconvenience should be felt from the absence of power, recourse should be had to the powers of the Governor-General under Section 104 to allocate that power to the appropriate legislative organ.” By reason of the absence of “inter-provincial trade” from the federal list, such regulation must of necessity be indirect. The regulation of inter-provincial trade without affecting trade and commerce within a province (No. 27 of the provincial legislative list) is extremely difficult.

**Provincial Finance**

In the scheme of Dyarchy under the Act of 1919 which partitioned the domain of provincial Government into two fields, it was contemplated that “each side of the Government will advise and assist the other; neither will control or impede the other.” The scheme foundered chiefly on inadequate provincial revenues; the principle followed was the allocation of the major proportion of the revenues to the reserved subjects. The suggestion that certain sources of provincial revenues should be earmarked for the transferred subjects was discounted from the beginning. Ministers could not thus make out more revenues for the nation-building activities by new taxes as the greater portion of provincial receipts was swallowed up by the reserved department. Taxation proposals required that both parts

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1 The Joint Select Committee of Parliament on the Government of India Bill 1919 did not endorse the suggestion; they recommended that two-thirds should be allocated to the reserved subjects.
of Government should agree. The rule that Members of the Executive Council and Ministers should not oppose each other by speech or vote undermined the position of Ministers. The "sins" of the reserved department affected the Ministers as they were treated as common partners. It was not uncommon, especially in Bengal, that the new taxation proposals were introduced and enacted to meet the increasing expenditure of police and other reserved subjects. The Ministers shared the blame, and they were unable to resist such proposals for governmental needs. Responsibility mellowed the Ministers; unpopular Government measures prejudiced their position; inadequate revenues blocked the execution of any bold scheme of nation-building welfare. In this way, the dyarchical arrangement failed, partly for inherent reasons and partly because of the unfavourable atmosphere wherein the scheme had to be worked. The peculiar financial difficulties of Bengal under the Meston Award attracted attention from the start.

The success of provincial autonomy is intimately related to the quantum of revenues available for the provinces. The Government of India Act of 1919 started with the settlement made by the Meston Committee. The basis of the Meston Settlement which was that "the Government of India are to give and the Provinces must receive" gave no fair play to the principle of self-government in the provinces. The Meston Settlement had three serious defects viz., (1) although the provinces had expanding needs the sources of revenue assigned to them were insufficient and inelastic; (2) it treated the provinces unequally; (3) it gave practically no power to the provinces to tax industrial activities. This defective settlement was responsible, to a great extent, for the failure of the working of the Constitution envisaged in the Act of 1919. Mr. W. T. Layton, the financial assessor of the Simon Commission 1929, found from an analysis of the chief features of the financial situation in India that (a) the mass of the people were extremely
poor, (b) India was incurring expenditure on the primary functions of government, such as defence and maintenance of law and order, as high in proportion to her wealth as Western nations; (c) her expenditure on social services was far behind Western standards. But the possibility of further taxation was not ruled out by Mr. Layton.

Mr. Layton emphasised that the system of distribution of revenues must enable a province to benefit from its own economic development and from the enlargement of its own tax-producing capacity, but he did not fail to point out that haphazard geographical distribution of the provinces made it inequitable to distribute all centrally collected taxes on the basis of the province from which they came, and that the distribution must to some extent accord with the needs of the various provinces, the complete scheme being distribution according to origin and according to population.

The framers of the Government of India Act 1935 were confronted with the problem of the distribution of revenues, as the facade of provincial autonomy can have a stable basis on the satisfactory allocation of resources in a federal system. The assessment of relative financial needs of the Centre and of provinces collectively is a difficult task, but the adjudication of rival claims of the provinces is still more difficult. Soon after the Act of 1935 was passed, Sir Otto Niemeyer was appointed as an expert to investigate and make recommendations for completion by Order in Council of the scheme of financial relations between the Centre and provinces embodied in the Government of India Act 1935 and for other adjustments ancillary to that scheme. The matters remaining to be determined by Order in Council were the allocation between the Centre and provinces of the proceeds of income-tax and jute export duty and prescription of grants-in-aid of revenues of such provinces as were found to require assistance in this form. The inquiry was related to the necessity of “equipping
the provinces with at least a sufficient minimum of resources at the outset and of providing them with further resources in future, for questions at once arise both of the ability of the Central Government to surrender a part of its present resources and of the manner in which the sums available should be distributed among the provinces.” Section 138 (1) provides that taxes on income other than agricultural income shall be levied and collected by the Federation, but that (subject to surcharges for federal purposes) a percentage to be prescribed by His Majesty in Council of the net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Chief Commissioners' Provinces or to taxes payable in respect of federal emoluments, shall be assigned to the provinces. Sub-section 2 of Section 138 empowers the Federation to retain out of the moneys assigned by sub-section 1 of the said Section such sum as may be prescribed by His Majesty in Council. The assignment of the proceeds of income-tax to the units producing it was necessitated by the fact that the provinces have to be provided with some sources of revenue which would keep them going with the increased expenditure consequent on the introduction of provincial autonomy and that the Indian States would not consent to have income-tax raised within their area from their own subjects. The needs of the Centre were also great, and they are to be prejudicially affected by the expenses in connection with the inauguration of federation, the financial adjustment with the States in terms of Section 147, and the separation of Burma entailing a loss of Rs. 3 crores per year. The recommendations of Sir Otto Niemeyer were incorporated in the Government of India (Distribution of Revenues) Order 1936. The scheme may be summarised thus:

(1) One-half of the net proceeds of income-tax (excluding Corporation tax) from provincial sources belongs to the provinces, and the sums shall be distributed as follows:
<table>
<thead>
<tr>
<th>Province</th>
<th>Percentage</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Madras</td>
<td>15 p.c.</td>
<td></td>
</tr>
<tr>
<td>Bombay</td>
<td>20 p.c.</td>
<td></td>
</tr>
<tr>
<td>Bengal</td>
<td>20 p.c.</td>
<td></td>
</tr>
<tr>
<td>The United Provinces</td>
<td>15 p.c.</td>
<td></td>
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<tr>
<td>The Punjab</td>
<td>8 p.c.</td>
<td></td>
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<tr>
<td>Bihar</td>
<td>10 p.c.</td>
<td></td>
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<tr>
<td>The Central Provinces</td>
<td>5 p.c.</td>
<td></td>
</tr>
<tr>
<td>Assam</td>
<td>2 p.c.</td>
<td></td>
</tr>
<tr>
<td>The N.W.F. Province</td>
<td>1 p.c.</td>
<td></td>
</tr>
<tr>
<td>Orissa</td>
<td>2 p.c.</td>
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</tr>
<tr>
<td>Sind</td>
<td>2 p.c.</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100</strong></td>
<td></td>
</tr>
</tbody>
</table>

(2) The enjoyment by the provinces of the 50 per cent share is postponed

(a) first for a period of five years from 1st April 1937 during which time the provinces get only such amount if any of the divisible net proceeds of the taxes on income which together with the contribution by the Railways exceeds the sum of Rs. 13 crores,

(b) next for a second period of five years during which there is a gradual and automatic reduction of the amount withheld by the Federation. At the end of 11 years from the starting of provincial autonomy the provinces will be in full possession of the moiety allotted to them under sub-section 1 of Section 138. But the operation of the automatic grant to the provinces can be delayed by the Governor-General in his discretion (vide proviso ii of subsection 2 of Section 138).

(3) Section 140 (2) provides that one-half, or such greater proportion as His Majesty in Council may determine, of the net proceeds in each year of any export duty on jute or jute products shall be assigned to the provinces in proportion to the respective amounts of jute grown therein. The Order in Council 1936 allocates 62½ p.c. of export duty on jute to the provinces growing jute in proportion
to their production. This benefits Bengal particularly, although Bihar, Assam and Orissa come under the benefits of the scheme.

(4) Section 142 provides for grants from the federal Centre to the revenues of such provinces as His Majesty may determine to be in need of assistance. The Order in Council 1936 assigns the following grants.

A. Permanent.

1. N.W.F. Province—Rs. 100 lakhs a year.
2. Orissa—Rs. 47 lakhs in the first year.
   Rs. 43 lakhs in each of the next four succeeding years.
   Rs. 40 lakhs per year subsequently.
3. Assam—Rs. 30 lakhs a year.

B. Temporary.

1. The United Provinces—Rs. 25 lakhs a year up to 1942 only.
2. Sind—Rs. 110 lakhs in the year 1937-38.
   Rs. 105 lakhs a year in the years 1938-39 to 1947-48.
   Rs. 80 lakhs a year in the years 1948-49 to 1968-69.
   Rs. 65 lakhs a year in the years 1969-70 to 1974-75.
   Rs. 60 lakhs a year in the years 1975-76 to 1980-81.
   Rs. 55 lakhs a year in the years 1981-82 to 1986-87.

(Sind is to get aid for 50 years).

The aid from federal revenues in the case of all the provinces concerned (except the N.W.F. Province) cannot be increased without the consent of both Chambers of the federal legislature. The governing intention was that the aided provinces should develop their own resources.

Complete fiscal autonomy for the provinces is not contemplated in the Act of 1935. The Niemeyer award undoubtedly improved the position of the provinces suffering under the weight of the Meston settlement. It has helped the working of provincial autonomy, although the situation is still far from satisfactory inasmuch as the provinces are left with the inelastic sources of revenue. The Provincial Finance Ministers' Conference which was held
at Bombay in June 1937 found that the Central Government had fruitful sources of revenue and that there were three possibilities for the province, viz., retrenchment, borrowing, and new taxation. A popular Ministry hesitates to retrench and tax, but borrowing for unproductive purposes is unsound. New taxation is, however, inevitable, and there have been taxes on sale of goods, agricultural income and professions and employment in the provinces.

Section 150 (1) lays down that no burden shall be imposed on the revenues of the Federation or the provinces except for the purposes of India or some part of India, but sub-section 2 thereof provides that the Federation or provinces may make grants for any purpose, notwithstanding that the purpose is not one with respect to which the Federal or the provincial legislature may make laws. Section 155 states that the Government of a province shall not be liable to federal taxes in respect of lands or buildings situated in British India or income accruing, arising or received in British India, but the Government of a province trading on business operations outside that province is not to be entitled to the exemption. "It is consistent with the general practice of federal constitutions to exempt the Governments of units from federal taxation, that being merely part of a reciprocal arrangement under which the Federal Government also is exempt from taxation by the several units." Accordingly, Sections 154 and 155 are to be taken as complementary to each other, and they provide for the mutual exemption of the property of the Federation and the units from taxation imposed by the other. As between the units themselves there is no mutual exemption from taxation. Sections 172 to 175 define the property which vests in the provinces and the Federation.

The executive authority of the province extends to borrowing upon the security of the revenues of the province within such limits as may from time to time be fixed by the Act of the provincial legislature. A province may not without the consent of the Federation borrow out-
side India, nor can it raise any loan without the like consent, if there is still outstanding any part of a loan made to the province by the Federation or by the Governor-General in Council or in respect of which a guarantee has been given by the Federation or by the Governor-General in Council. The consent of the Federation is not to be unreasonably withheld.

The East India Loans Act was passed giving effect to Sections 161 and 315 of the Act of 1935. This empowered the Secretary of State to borrow in sterling on behalf of the Government of India during the period between April 1, 1937 and the establishment of the Federation in India to make provision for the administration of any debt so created and to make similar provision for the future administration of the India sterling debt outstanding on April 1. It is necessary because the effect of Sections 161 and 315 of the Government of India Act is that the statutory borrowing power now vested in the Secretary of State in Council will expire on the 1st of April 1937, and that any India sterling borrowing between that date and the establishment of the Federation must be undertaken by the Secretary of State subject to the provision being made on that behalf by the East India Loans Act.

The Niemeyer award prescribes that during the second prescribed period of five years (that is, after five years of provincial autonomy) the Centre shall relinquish to the provinces by equal steps so much of the provincial share as it is retaining in the last year of the first period. But this scheme was altered as the Government of India (Distribution of Revenues) Order, 1936, was amended in 1940 to the following effect: (a) the Centre be permitted to retain a fixed share of Rs. 4½ crores annually for 3 years 1939-40 to 1941-42 out of the provincial moiety in addition to its own half of the divisible income-tax irrespective of the contribution by the Railways, (b) the Centre will retain, for the second period of five years, progressively reduced amounts from the basic sum of Rs. 4½ crores in 1941-42,
instead of a much smaller sum that would be retainable under the Order of 1936, read together with Section 138. Thus the losses to the provinces for the second period of five years will be huge, and the fixation of the retention by the Centre at Rs. 41½ crores out of the provincial share will deny full share of increased yield from the income-tax to the provinces. The provinces will also be denied any share in the prosperity of the Railway finances. This amendment was strongly resented by the Bengal legislature, and Mr. Nalini Ranjan Sarker who was Bengal’s Finance Minister led the opposition to the amendments of the Niemeyer Award in the Bengal Legislative Assembly (March 1940) when he no longer sat on the treasury benches.

The following items of expenditure are charged on the revenues of the province:

1. The salaries and allowances of the Governor and the other expenditure relating to his office. (Provision for this is required to be made by Order in Council). Salaries, allowances and expenses of providing accommodation and facilities for the Governor’s Secretarial staff. Any sum to give effect to the provisions of Third Schedule (re: Governors).

2. Debt charges for which the province is liable.

3. The salaries and allowances of Ministers and of the Advocate-General.

4. The salaries and allowances of Judges of any High Court.

5. Expenditure connected with the administration of any areas which are for the time being excluded areas.

6. Any sums required to satisfy any judgment, decree or award of any Court or arbitral tribunal.

7. Any expenditure declared by the Constitution Act of 1935 or any Act of the provincial legislature to be so charged.

8. Any payment heretofore made to any State by any local Government under any arrangements made with the State before the Act of 1935.
9. Expenses of any Court of commission or the pension payable to or in respect of a person serving the province.

10. Salary, allowances and pension of the Provincial Auditor-General.

11. Salaries and allowances of persons appointed to a civil service or a civil post by the Secretary of State or to other services in or before 1924 when they happen to serve the province. It includes the compensation ordered by the Secretary of State.

12. The expenses of the Provincial Public Service Commission except such pension as is charged on the revenues of the Federation.

13. Costs incurred by defendant public servants connected with the province in civil or criminal proceedings, so far as such costs are not recoverable from the plaintiff.

14. Costs incurred by and damages and costs awarded against public servants in civil suits if the Governor in his individual judgment so directs.

15. Salaries and allowances of members of the Revenue Appeal Tribunal constituted under Section 296.

16. Political and compassionate pensions.

It is significant to note that Sections 154 and 155 of the Act of 1935 contemplate that provincial Governments may engage in a trade or business; they may invest their revenues in trade or business outside and inside their borders. In Lahore Electric Supply Company, Ltd. v. Secretary of State and others (1 F.L.J. H.C. 155) the Lahore High Court has decided that the action of the Punjab Government in engaging in the business of the supply of electrical energy was not ultra vires under the Act of 1935. It is an improvement on the Act of 1919, so far as provincial powers are concerned.

The Distribution of Legislative Powers

The Constitution Act 1935, read together with the Seventh Schedule thereto, devises the following scheme in the matter of distribution of legislative powers:
(1) The Federal legislature has exclusive power over List I, concurrent power over List III, and no power over List II.

(2) The provincial legislatures have no power at all over List I, concurrent power over List III and exclusive power over List II.

It is to be noted that the concurrent powers of the provincial legislatures over List III and their exclusive powers over List II are to be subject to the powers of the Federal legislature over Lists I and III. Section 104 enacts that the Governor-General acting in his discretion may empower either the Federal legislature or a provincial legislature to enact a law with respect to any matter not enumerated in any of the three lists. Section 102 empowers the Federal legislature, on proclamation of emergency, to make laws for a province with respect to any of the matters enumerated in the Provincial Legislative List and also provides that such federal law shall prevail over any provisions of the provincial law that may be repugnant to it.

Section 100 makes it clear that if any matter falls within the Federal Legislative List, provincial legislation in respect thereof is altogether ultra vires. Section 107 provides that the provincial law will give way (to the extent of the repugnancy) only if it is repugnant to an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, unless the assent of the Governor-General or of His Majesty has been obtained. With respect to matters in the Provincial List, the provincial law is effective with the assent of the Governor. Section 107(1) recognises that a law may be invalid to a limited extent on account of a conflict.

The onus of showing the repugnancy of provincial legislation lies on the party attacking its validity, and there is a presumption in favour of its validity. Repugnancy must exist in fact, and the Act should be liberally construed as to reconcile the apparent clash. If the invalid part of an Act can be separated in its operation from other parts
without frustrating the whole object of the Act, then only such part is invalid. It is quite possible that a Statute is *ultra vires* in respect of a subject which is beyond the power of the enacting legislature and *intra vires* in respect of a matter which is within its jurisdiction. But “if the offending provisions are so interwoven into the scheme of the Act that they are not severable, then the whole Act is invalid.”

When a subject falls either in the Concurrent Legislative List or in the Provincial Legislative List, Section 100 makes the former the dominant list. But this principle cannot apply “where the result would be to rob the provincial entry of all its content.” In Canada, Marriage and Divorce is in the federal list, the Solemnisation of Marriage in the province is in the provincial list. Under Section 91 of the British North America Act, the federal list is the dominant list. The federal list may be interpreted to swallow the provincial list, and in that case, the provincial list loses all its significance. But such an all embracing interpretation to reduce the provincial list to a cipher should be avoided. In the Indian Act, Civil Procedure is in the Concurrent Legislative List, but Jurisdiction and Powers of all courts except the Federal Court is in the provincial list. The Calcutta High Court in *Stewart v. Brojendra Kishore Roy Chowdhury* (2 F.L.J.H.C. 112), held that “civil procedure” in the Concurrent Legislative List must be held to exclude matters relating to jurisdiction and powers of courts.

Under the Indian Constitution Act, if the two sets of legislative lists are found to overlap, federal legislation is to prevail. The British North America Act contains analogous provisions. Section 91 of the Canadian Act invests the Dominion legislature with a general power to legislate for the peace, order and good government of Canada “in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces.” Section 92 of the
Canadian Act gives the provincial legislatures exclusive authority to make laws in relation to matters coming within the list of provincial subjects enumerated in that section, the last class in the list being described as "generally all matters of a merely local or private nature in the Province." The rule of construction is that general language in the heads of Section 92 yields to particular expressions in Section 91, where the latter are unambiguous. The Chief Justice of the Federal Court of India holds that the said rule of construction laid down by the Judicial Committee in a long series of decisions for the interpretation of the two sections of the British North America Act may be accepted as a guide for the interpretation of similar provisions in the Government of India Act. On a strict interpretation, it may be held that there is no question of overlapping in the Indian Constitution Act when we find that if there is any subject in the Legislative List II which falls in List I or List III, it must be taken as cut out from List II, because the dominant position of the Central Legislature with regard to matters in List I and List III is recognised. But the words "with respect to" which signify "pith and substance" do not encourage any strict literal interpretation as incidental encroachment is permissible. There may be competency and yet repugnancy also. The provincial legislature cannot fundamentally affect a federal law. In Canada the solution of repugnancy exists mostly in judge-made law, but in the Indian Act the principle is embodied in Section 107.

In the Indian Constitution we find specific directions in the Instruments of Instructions to the Governor-General and Governors that certain categories of Bills, such as those vitally derogating from the powers of the High Court, altering the character of the Permanent Settlement, offending against provisions with respect to discrimination etc. are to be reserved ultimately for the pleasure of His Majesty in Council. But the validity of an Act passed by the competent legislatures and assented to by the Governor-General
or the Governor cannot be questioned on the ground that it was meant to be "reserved" under the Instrument of Instructions.

The true nature and character of legislation is to be looked at in determining if it is within the express powers of the federal or provincial legislature in a federal system. If on the view of the statute as a whole "the pith and substance of the legislation" falls within the allotted powers of a particular legislature, it is not to be invalidated on the ground of incidentally touching on matters outside the authorised field. The object of the legislator is not enough; if the clauses of the Act are passed in respect of forbidden matters, they are ultra vires.¹

The scheme of the British North America Act in Canada is different from that of the Government of India Act 1935. The Canadian Act exhausts the whole range of legislative power, but whatever was not given to the provincial legislatures rested with the Dominion Parliament. In view of Section 104, this cannot be said of the Government of India Act. In Canada, "the legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in Section 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislatures by Section 92", and "it is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial Legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation enumerated in Section 91." This principle cannot be applied to interpreting List III of the Seventh Schedule of the Constitution Act of 1935. The Canadian and Indian Acts are not in pari materia, although the residual power is left with the Central Government. In India powers are given to the legislatures both exclusively as well as

¹Gallagher v. Lynn, House of Lords, July 19, 1937.
concurrently. The doctrine of the occupied field is found inserted in Section 107 of the Indian Act.

It is to be remembered that within their own sphere the powers of the Indian legislatures are as large and ample as those of Parliament itself. If any subject matter falls within the sphere of the legislature, it can be dealt with retrospectively or prospectively. Section 292 of the Constitution Act cannot subject the legislature to prohibition against retrospective legislation. The retrospective effect will be given only when it is expressly provided for. A provincial or Central legislature, when acting within its limits, is "not in any sense an agent or delegate of the Imperial Parliament", but it is intended to have plenary powers of legislation within its allotted sphere.

The subjects dealt with in three Legislative Lists (Schedule VII to the Constitution Act of 1935) are not defined with precision. The general word is amplified and explained by a number of illustrations: the list of illustrations is not exhaustive; it is indicative, and as such "none of the items in the Lists is to be read in a narrow or restricted sense, and each general word should be held to extend to all ancillary or subsidiary matters which can and reasonably be said to be comprehended in it".

With respect to any matter falling under the Concurrent List (List III) the assent of the Governor-General would be required under Section 107 (2) to validate an Act passed by a provincial legislature.

If the previous sanction of the Governor, required to be taken under Section 299 (3) of the Constitution Act (re: extinguishment or modification of rights in land) is not obtained, it is completely disposed of by Section 109 (2) in the event of assent being given to the enactment of a Bill.

If any provincial Act conflicts with any existing law, it can be void, under Section 107 (1) of the Constitution Act, only to the extent of their repugnancy to each other;
the former will be deemed to have been repealed or amended, "as the last expression of the will of the legislature must always prevail".

The following well known principles of interpretation are of great interest to students of constitutional law:—

(a) A taxing Statute should be interpreted strictly.
(b) Vested rights should not be presumed to be affected; therefore for Statutes taking away legal rights or altering the jurisdiction of the courts of law, express and unambiguous words are necessary.
(c) The ousting of the jurisdiction of the Civil Court does not refer to the High Court, unless expressly mentioned.
(d) No Act can be invalidated on the ground that it may possibly be abused.
(e) The words "with respect to" are not necessarily the exact equivalent of "relating to" or "connected with"; remote relation or indirect connection would not establish that particular legislation is with respect to such subject.

It is a principle, enunciated by the Judicial Committee of the Privy Council, that a broad interpretation should be given to the express power at the expense of the unspecified residuary power. The express power given in the provincial legislative list should be endowed with the utmost liberal interpretation. But if there is a general power on any subject given to the Centre, and if it is limited by an express power on the subject in the provincial list, the rule of interpretation should not permit the extension of the meaning of the term in the Central list at the expense of the provincial list. In the Indian Act, the Federal legislature has power to impose duties of excise and the provincial legislature an exclusive power to impose
taxes on the sale of goods. To be an excise the tax must be levied on goods. In a loose sense, every tax on the sale of goods produced in India is an excise duty, although an excise duty is not necessarily a tax on sales. The expression "duty of excise" is to be given a restricted meaning. The Federal Court delivered an advisory opinion on a reference by the Governor-General under Section 213 in respect of the question whether the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act 1938 imposing a tax on the retail sale of petrol was within the competence of the Central Provinces legislature. They were of the opinion that the power of the Central Legislature to impose duties of excise (List I, Entry No. 45) was a power to impose duties on the manufacturer or producer of the goods and did not extend further the power to impose a tax upon the sale of goods after manufacture or production in terms of List II, Entry No. 48. The Central Provinces legislature was found competent to impose a tax on retail sales of petrol. They left open the question if the tax upon the first sale of goods manufactured or produced in the province was to be regarded as falling within the provincial list. In the Province of Madras v. Boddu Paidanna & Sons, May 8, 1942 (5 F.L.J. 61), the Federal Court held in connection with the Madras Sales Tax Act of 1939 that the power of the provincial legislatures to levy a tax on the sale of goods extended to sales of every kind, whether first sales or not, and differed from the opinion of the Madras High Court which held that the provincial legislature in India had no power to tax a sale by the manufacturer or producer. It is true that a tax on the first sale is a tax on the sale by the manufacturer or producer who will be doubly hit by the sales tax and the excise duty. But there is no way out of this difficulty as the sales tax is levied upon the producer as seller and not as producer. The two taxes are economically separate and distinct imposts.

The authority of the provincial legislature in respect of matters specified in the provincial Legislative List is indeed
The list of illustrations must not be taken to be exhaustive. The U.P. Regularisation of Remissions Act of 1938 went beyond the subject of remission of rents. In pith and substance it was an Act not only with respect to the relation of landlord and tenant or the collection of rents but also with respect to the conferring on the provincial Government of extensive powers of interference with the legal rights of landholders in their lands. But it was an Act with respect to matters covered by item No. 21 of List II which was within the exclusive authority of the provincial legislature, and as such it was not void. The Federal Court definitely held that the items in the legislative lists should be held to extend to all subsidiary matters which could be fairly and reasonably said to be comprehended in them and to both substantive and procedural laws with respect to the matters specified. The judgment of the Federal Court in the United Provinces v. Mst. Atiqa Begum and others, dated December 6, 1940 (3 F.L.J. 97) clearly lays down that liberal interpretation must be given to invest the provincial legislature with full power to legislate with respect to the items in the provincial list.

The extent of the authority of the provincial legislature is so great that a provincial law could not be impugned if it affects civil rights outside the province only collaterally as a necessary incident to its lawful powers of good government within the province¹.

The Bombay High Court held that the urban immovable property tax at 10 p.c. of the annual letting value of such buildings or lands and the tax levied and paid at the rate of 5 p.c. of the annual letting value in the city of Bombay on the lands and buildings the annual value of which would not exceed Rs. 2,000, as provided for in the Bombay Finance Act 1939, was a tax on lands and buildings within item 42 of the Provincial Legislative List and was not a tax on income falling within item 54 or a tax on the

capital value of assets falling within item 55 of the Federal Legislative List.  

Special Legislative Powers

Section 88 provides for the issue of ordinance when the legislature is not in session. Under Section 89, the Governor can promulgate an ordinance if he is satisfied that circumstances render it necessary for him to do so for the discharge of his functions. Under Section 90 the Governor has full powers necessary to deal with every contingency and can enact, as a Governor’s Act, the Bill proposed by him to the legislature. The validity of the ordinance is not to be determined by the evidence adduced before the Court; it is immaterial if there was a valid case for the issuing of the ordinance. It is for the Governor to decide if the circumstances justify any ordinance. All these sections relate to the legislative powers of Governors, and section 54 states that the Governor shall be under the general control of the Governor-General in regard to matters in which he is directed to act in his discretion or in his individual judgment. The responsibility to the Governor-General is immediate, whereas the ultimate responsibility is to Parliament through the Secretary of State for India under Section 14. All this involves infraction of provincial autonomy. Under the Government of India Act 1919, it was the Governor-General who had the power of promulgating ordinances; the provincial Governors had no such power. The Act of 1935 introduces provincial autonomy and authorised the Governor to behave as an independent delegate of the Crown. The provinces derive their powers directly from the Sovereign, and the provincial

1 Justice Kanic observed:—“If the land and buildings are treated as investments and the return, as income, is taxed it is a tax on the income. On the other hand, if the tax is on the lands and buildings themselves and the assessment is on a standard named by the legislature which may fluctuate or vary on the produce or income from it, it would be a tax on the property. (Sir Byramji Jeejeebhoy v. the Province of Bombay, Bombay High Court, September 27, 1939).
Governors are appointed by His Majesty without consultation with the Governor-General. The Centre and the provinces are now rendered co-ordinate Governments. Section 122 lays down an obligation that the executive authority of every province shall be so exercised as to secure respect for the laws of the Federal legislature which apply in that province. Under Section 123, the Governor-General may direct the Governor of any province to discharge as his agent such functions in and in relation to tribal areas as may be specified and also in relation to defence, external affairs and ecclesiastical affairs as may be specified. The Governor can overrule his Ministers if their action tends to impede or prejudice his action in the reserved sphere. In discharging such agency functions, the Governor is to act in his discretion.

The provincial legislature may make laws for the province or for any part thereof. Section 102 authorises the Federal legislature, in the event of a proclamation of emergency by the Governor-General, to invade the subjects in the provincial field by legislation. The extent of the Governor-General's legislative power is co-extensive with that of the Federal legislature. The restrictions on the power of the Federal legislature are found in the proviso to sub-section 1 of Section 102. Under Section 102 (5), as provided for in the Government of India (Amendment) Act 1939, the Governor-General may proclaim a state of emergency if he in his discretion is satisfied that there is imminent danger of war or internal disturbance. It is to be noted that discretion in public affairs is seldom absolute; it must be used judiciously, not in a capricious and impetuous way. Section 126 of the Act of 1935 deals with the exercise of the executive power of the Federation in the provinces. Normally, the Federal Government, in its exclusive field of subjects, has power to give detailed directions to a provincial Government. The Amending Act of 1939 widens the executive authority of the Central Government when a proclamation of emergency is in
A new section 126A is inserted whereunder the executive authority of the Federation shall extend to the giving of direction to a province as to the manner in which the executive authority thereof is to be exercised. It is also provided that "any power of the Federal Legislature to make laws for a Province with respect to any matter shall include power to make laws as respects a Province conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Federation or officers and authorities of the Federation as respects that matter, notwithstanding that it is one with respect to which the Provincial legislature also has power to make laws". This power is to be exercised with an eye to proper provision for emergency.

Under Section 102 a proclamation was issued by the Governor-General on the 3rd of September 1939 on the outbreak of war between Great Britain and Germany. India was declared a belligerent on behalf of Great Britain without reference to the Central legislature. On the 29th of September 1939 the Defence of India Act was enacted. Before that date, the Defence of India Ordinance 1939 was promulgated by the Governor-General under Section 72 of the Act of 1919 which was kept continuing under Section 317 and the Ninth Schedule of the Act of 1935.

The Defence of India Act 1939 provides that the Central Government may make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order, or the efficient prosecution of war. The Central legislature practically divested itself of its legislative authority, but it acted within its limits. The Central Government is armed with a new legislative power to invade provincial autonomy where it hampers the execution of the Defence of India Act.

The Federal Court in *Keshav Talpade v. King Emperor* (6 F.L.J. 28) held that paragraph (x) of sub-section (2) of
Section 2 of the Defence of India Act 1935 was *infra vires* the Central legislature inasmuch as Entry No. 1 of List I of the Seventh Schedule of the Constitution Act 1935 gave the Central legislature power to legislate with respect to preventive detention in British India for reasons of State connected with defence and certain other specified matters; that Rule 26 of the Defence of India Rules 1939 went beyond the rule-making powers which the legislature had thought fit to confer upon the Central Government and was for that reason invalid; and that as Rule 26 was invalid, the order under it was a nullity.

Section 2 (1) of the Defence of India Act 1939 provides that "the Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community." Subsection (2) provides that "without prejudice to the generality of the powers conferred by sub-section (1) the rules may provide for, or may empower any authority to make order providing for, all or any of the following matters." Paragraph (x) of this sub-section was in the following terms: "the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a matter prejudicial to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do, or abstain from doing, anything." Under Rule 26 it is enough that the Central or the Provincial Government "is satisfied with respect to any particular person that his detention is necessary with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign
powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war." Nothing is said in Rule 26 about suspicions, reasonable or otherwise, that the person concerned has acted, is acting, or is about to act in a prejudicial manner. Accordingly, the Federal Court held that "Rule 26 in its present form goes beyond the rule making powers which the legislature has thought fit to confer upon the Central Government and is for that reason invalid." A large number of people were detained under Rule 26, and the divergence between Rule 26 and paragraph (x) of Section 2 (2) of the Defence of India Act 1939 led to the filing of a number of habeas corpus applications in the different provinces in respect of persons detained under Rule 26. Mr. Amery stated in the House of Commons that the technical irregularity pointed out by the Federal Court could be righted by the Governor-General. In exercise of the powers conferred by Section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act 1935, the Governor-General promulgated the Defence of India (Amendment) Ordinance 1943 seeking to validate Rule 26 of the Defence of India Rules and to enact that "no order heretofore made against any person under Rule 26 of the Defence of India Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in exercise of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under Section 2 of the Defence of India Act 1939."

The Special Bench of the Calcutta High Court (composed of Mr. Justice R. C. Mitter, Mr. Justice A. N. Sen and Mr. Justice Khundkar) in connection with the habeas corpus applications contesting detention under Rule 26 held (Mr. Justice Khundkar dissenting) that the new ordinance promulgated by the Governor-General validating Rule 26 of the Defence of India Rules was ultra vires the
ordinance making powers of the Governor-General, as in their opinion the Governor-General by an Ordinance under Section 72 of the Government of India Act could not directly amend an Act of the Central legislature. The detention of the petitioners was held illegal inasmuch as Ordinance 14 of 1943 was ultra vires the powers of the Governor-General and also improper inasmuch as the orders of detention were not made in accordance with the provision of Rule 26 of the Defence of India Rules. The judgment was delivered on the 3rd of June 1943. The petitioners were released, although they were arrested again under Regulation III of 1818. The Judges laid emphasis on the ideal set forth by Lord Atkin: “In accordance with British Jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on condition that he can support the legality of his action before a Court of Justice and it is the tradition of British Justice that Judges should not shrink from deciding such issues in the face of the executive.”

It is to be noted, in this context, that emergency legislation in England is parliamentary legislation or Order in Council passed under the authority of the parliamentary Statute, and it is always subject to parliamentary control including in the last resort the right to insist on the annulment or modification of the Order in Council or even the repeal or modification of the Statute itself. Under the Indian Constitution the legislature has no share in or control over the making of an ordinance or the exercise of powers thereunder, nor has it any voice in making for its repeal or modification (Section 72 of the Ninth Schedule of the Government of India Act 1935). Even under these limitations the Judiciary in India was careful to prevent “serious excess in the use of special emergency powers.” The Federal Court by a majority of two judges, viz., Sir Varadachariar (Acting Chief Justice) and Sir M. Zafrullah (Mr. Justice Rowland dissenting) dismissed on
the 4th June 1943 the Bengal Government's appeal against
the Calcutta High Court's judgment declaring certain
provisions of the Special Criminal Courts Ordinance 1942
*ultra vires*. The Federal Court held: "We are of the
opinion that Sections 5, 10 and 16 of the ordinance are
open to objection as having left the exercise of the power
thereby conferred on executive officers to their absolute
and unrestricted discretion without any legislative provi-
sion or direction laying down the policy or conditions
with reference to which that power is to be exercised." The
ordinance-making authority in the Special Criminal Courts
Ordinance 1942 evaded the responsibility of laying down
any rules or conditions or even enunciating the policy with
reference to which cases are to be assigned to the ordinary
criminal courts and to the Special Courts respectively and
left the whole matter to the unguided and uncontrolled
action of the executive authorities. The Federal Court and
the Calcutta High Court took serious objection to this.
It was staggering to find that the Special Criminal Courts
Ordinance was not restricted in its application to offences
connected with the state of emergency on account of which
the Ordinance was promulgated and that it was for the
executive authorities to consider and decide what offences
should be tried under it. In June 1943 the Special Criminal
Courts Ordinance 1942 was repealed by a new Ordinance
which provided that the sentences passed under the old
Ordinance should be deemed to have been passed by regular
courts under the Criminal Procedure Code and subject to
the rights of appeal conferred by the Code and that
pending cases under the Special Courts Ordinance should
be transferred to ordinary courts. The new Ordinance
gives indemnity in respect of all action taken under the
old Ordinance.

The India and Burma (Emergency Provisions) Act
1940 makes the Governor-General the supreme authority
during the period of emergency. The Act provides that
(1) any power of appointment to, or removal from, any
office in India being a power which would be exercisable by His Majesty shall be exercisable also by the Governor-General; (2) any provision which under the Act of 1935 could be made by an Order in Council or by rules made by, or with the sanction of, the Secretary of State may be made also by the Governor-General by notification in the Gazette of India; and (3) the words "for the space of not more than six months from its promulgation" as regards ordinance under Section 72 of the Government of India Act 1919 (which is set out in the Ninth Schedule of the Act of 1935) were omitted. The Governor-General will exercise these new functions in his discretion to deal with the emergent situation in which the country is placed.

Thus the powers of the Governor-General have been so broadened that on the plea of proper discharge of his function to meet the emergency conditions in the country, provincial autonomy can be, and has been, to a large extent reduced to a farce. This emphasises the organic unity of India for defence and other considerations when the security of India is threatened. The Defence of India Rules made under the Defence of India Act 1939 make serious encroachments on provincial autonomy, and all this is justified on the plea of emergency conditions obtaining in the country. Rule 34 (6) of the Defence of India Rules forbids acts which bring into hatred or contempt or excite disaffection towards His Majesty or the Crown Representative or the Government established by law in British India or any other part of His Majesty's dominions or are likely to influence the conduct or attitude of the public or of any section of the public in a manner likely to be prejudicial to the defence of British India or the efficient prosecution of war. The Federal Court (in Niharendu Dutt Majumder v: King Emperor, 1942, 5 F.L.J. 47) laid down that such rules are not to be read in a literal sense and that they should take a broad view as "criticism of an existing system of Government is not excluded, nor even the expression of a
desire for a different system altogether." In the opinion of the Federal Court, "the law relating to the offence of sedition as defined in the Code is equally applicable to the prejudicial act defined in the Defence of India Rules".

**Rules of Construction**

Under Section 46 (2) of the Constitution Act of 1935, Burma ceased to be part of India. Accordingly, a British Indian Court cannot affect properties situated in Burma. It is an interesting question of constitutional law whether the separation of Burma will affect pending suits in a British Indian Court on the ground of want of jurisdiction. It will not, as "once the Court has seizin of the case, it has jurisdiction to try to its conclusion, unless there is any reason for holding that that jurisdiction has been removed". Statutes relating to both substantive and adjective law will not be given retrospective operation unless there is an express provision to that effect. It is also a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. Courts, unless compelled by the language of the Statute, do not apply a new Act to a pending action. Section 292 continues the existing law, although it does not validate any law; section 293 deals with the continuance of existing Indian laws, subject to the power of His Majesty in Council to make necessary adaptations and modifications.

It is to be noted particularly that the general rules of construction in the Interpretation Act 1889 will govern the construction of the Act of 1935. In a federal constitution, it is essential that the function of a court of law is not only to ascertain the actual meaning of the words used in the Statute but to draw conclusions which are in the spirit though not within the letter of the text. Nothing is to be read into the Statute on grounds of policy. But "a Constitution
must not be construed in any narrow or pedantic sense”, and “the construction most beneficial to the widest possible amplitude of the powers of the legislature must be adopted.” The legislature cannot add to its own powers, nor can it declare the meaning of the Constitution. Acquiescence for no length of time can legalise a usurpation of power. The rule of progressive interpretation which is applicable to a Constitution Act, designed to serve a permanent end, can be given only by a court of law, and the extent and ambit of the legislature may grow with the progress of history, aided by courts of law. It will, therefore, be instructive to read the ambit of the provincial legislatures from the decisions of courts of law, and it is found that both legislature and courts of law are extremely vigilant to exploit the Constitution Act for the utmost extension of provincial autonomy. The Speakers and Presidents of the provincial legislatures act as custodians of their rights and privileges. The President of the Bengal Legislative Council gave a ruling during the discussion of the Bengal Money-Lenders’ Bill 1939 that “when I am not free from doubts in my mind I should not hold that the matter is outside the scope of the Provincial Legislature.”

But there is a general presumption that a legislature does not intend to exceed its jurisdiction. It was held by the Federal Court in a very important reference under Section 213 of the Act of 1935 that the Hindu Women’s Rights to Property Act 1937 and the Hindu Women’s Rights to Property (Amendment) Act 1938 passed by the Central

1 Khan Bahadur Azizul Huque, Speaker of the Bengal Legislative Assembly, was also very careful to extend the rights and powers of the provincial legislature, and he gave a significant ruling in the Bengal Legislative Assembly, April 1939, regarding the Bengal Money-Lenders’ Bill: “Money-lending being in the exclusive provincial list, whoever does money-lending, bank, corporation or person, must come within the scope of provincial legislation. Even though bank and corporation come within federal subjects, it means money-lending functions of those institutions come within the competency of the provincial legislature. If Promissory Notes come within the Federal list, it means all other matters except the element of money-lending are federal while money-lending comes within the provinces.”
legislature would not regulate succession to agricultural land in the Governors' provinces (entry No. 21 in the provincial legislative list), but they would regulate devolution by survivorship of property other than agricultural land (entry No. 7 of the concurrent legislative list).

It is accepted that where a Statute is ambiguous, the presumption that a legislature does not intend to interfere with vested rights is reinforced by the absence of provision for compensation, but where the language is clear and there is no ambiguity, there is no room for argument based on the absence of a provision for compensation.1 Under the Indian Act, no person shall be deprived of his property in British India save by the authority of law. It is only in the case of compulsory acquisition for public purposes of any land or any commercial or industrial undertaking that the question of compensation arises (vide Section 299). But if vested rights are invaded without making for acquisition for public purposes, such legislation cannot be held invalid on the ground of providing no compensation if the legislature are otherwise competent to do so. The legislature can enact particular purposes as public or clothe the Executive with authority so to notify as to be binding on the courts. It is a matter for the legislature to decide what is just compensation.

It is to be noted that in the Indian Act there is no provision for full or fair compensation. The legislature aided by the Governor can prejudice vested rights to so extraordinary a degree as to nullify the spirit of the basic provision that a person can not be deprived of his property in India save by operation of law. The rule of construction, applied to the Indian Constitution Act 1935, is not helpful for the property-owning community. If property-holders are deprived of lawful rights with inadequate compensation, they have hardly any legal relief under the Act; they are at the mercy of the Governor or of

1 Bhola Prasad v. the King Emperor, Federal Court, March 4, 1942 (5 F.L.J. 17).
His Majesty to disallow any Act assented to by the Governor or the Governor-General within twelve months from the date of the assent.

The Federal Court held in *Thakur Jagannath Baksh Singh v. the United Provinces* (1943, 6 F.L.J. 55) that although some of the provisions of the U.P. Tenancy Act 1939 had cut down the absolute rights claimed by the talukdars of Oudh and Agra to be comprised in the grant of their estates as evidenced by sanads granted by the British Government in 1859, the Act was within the competence of the legislature of the United Provinces to enact. The provisions of the Act fell within entry No. 21 of the Provincial Legislative List.

**Ambit of the Provincial Legislature**

A few decisions of the courts of law on some of the new provincial Acts are given to show the extent of the power of the provincial legislature and the trends of legislation. It is an interesting study as they show that the provincial legislatures under the Reforms Act of 1935 have sought to widen their power and exercise their authority at the expense of the stake-holders in favour of the new electors, principally the lower middle classes, who have become the ultimate masters of the legislators. Some of the provincial measures prejudicially affected the given basis of class relations, and there was a swing of public opinion in the advancement of the cause of the petite bourgeoisie. Money-lenders and landlords were generally hit most. The provincial legislatures struck them low, but could not provide a happy alternative; they froze credit but could not create new wealth; they transferred more rights in land to the ryots but did not devise any better nursing of land. The results achieved were demonstrative and spectacular but not helpful to the regeneration of decaying rural economy. Party politics and electoral prospects swayed the legislators in making promises
and redeeming them; there was not a diligent search for recovery of the malaise afflicting the country.

The Bihar Agricultural Income Tax Act of 1938 was tested before the Federal Court with regard to its validity. Act VII of 1938 was found to be *intra vires* the Bihar legislature, and it did not modify or affect Regulation I of 1793. The Court further directed that the provincial legislature was entitled to impose a tax on some categories of agricultural income. Accordingly, it does not affect the validity of legislation if some categories of agricultural income are excluded from the operations of any Agricultural Income Tax Act. This gives room for favoured treatment. The Patna High Court held that the Bihar Agricultural Income Tax Act was *ultra vires* in so far as it purported to tax income from revenue-free estates in a municipality, as such income cannot be held to be agricultural income under the definition given in the Income Tax Act.

The Permanent Settlement Regulation 1 of 1793 was an Indian law enacted like any other Indian law by the legislative machinery then in operation in India. It was enacted by the Governor-General in Council who had the requisite authority to "make and issue rules, ordinances and regulations for the good order and civil government of the Company's settlement at Fort William and other factories and places subordinate or to be subordinate thereto." It was not an Act of Parliament, as the expression Act of Parliament has been used in Section 108 (2) (a) of the Constitution Act in the sense of enactments actually passed by Parliament and not of laws passed by a subordinate legislative body under authority conferred upon it by an Act of Parliament. This decision was recorded by the Federal Court in *Hulas Narain Singh and others v. the Province of Behar*, February 23, 1942. The Federal Court in *Hulas Narain Singh and others v. Deen Mohammad Jhalak Prasad Singh v. Province of Bihar*, (1941, 4 F.L.J.H.C. 178).
Mian and others (6 F.L.J. 68) held that Section 178-B of the Bihar Tenancy Act 1937 (which forbade the claiming of rent at a rate higher than nine-twentieths of the produce) was validly enacted and that it did not contravene Section 299 (2) or Regulation 1 of 1793.

The Bihar Money-Lenders' Act of 1938 was passed with the assent of the Governor of the province only. The Patna High Court held Sections 11 and 16 of the Act void under Section 107 of the Constitution Act. These sections were re-enacted, with retrospective effect, in the Bihar Money-Lenders' Act of 1939 which was passed in conformity with the procedure prescribed in Section 107 of the Constitution Act. Section 11 of the Act of 1938 was found to be repugnant to the provisions of the Usury Laws Repeal Act 1855 and Usurious Loans Act 1918; Section 16 read with Section 17 was found to be repugnant to the proviso which the High Court had added to Order XXI, Rule 66, of the Civil Procedure Code. The assent of the Governor-General validated those sections which were repugnant to existing Indian laws. The Federal Court in Surendra Prasad Naram Singh v. Gujadhar Prasad Sahu Trust Estate and others (3 F.L.J. 27) held that the appellant was entitled in his appeal before the Federal Court to the benefit of the Act of 1939, even though it was passed only after the decision of the Patna High Court.

An interesting law point touching on the right of the provincial legislature came up before the Patna High Court, whether the Bihar Money-Lenders' Act of 1939 was an enactment which trespassed upon an enactment connected with item No. 38 of Schedule VII of List I, that is, banking. It was contended that the Money-Lenders' Act had no application to banking transactions. The Patna High Court\(^2\) held that (1) the legislation contemplated by item 38 of List I (Banking) is of the type which is to be found in the Imperial Bank of India Act 1920, or the Reserve Bank

of India Act 1934, which deal with the establishment of the bank, the nature of the business carried on by the bank and the way in which a bank can be wound up; (2) Section 13 of the Bihar Money-Lenders’ Act 1939 did not legislate either directly or indirectly with regard to the “conduct of banking business by corporations, etc.,” and it could not be, therefore, said to have trespassed upon the rights of the Central legislature, and (3) money-lending is only a part of the business of the bank, and, therefore any legislation with regard to money-lending could not be said to be an enactment in connection with the conduct of banking business.

The Government of Bihar issued a notification under the Bihar and Orissa Excise Act of 1915 prohibiting the possession of country liquor and certain drugs in certain areas. The Patna High Court held the notification invalid and laid stress on the fact that the Act of 1915 was an Excise Act, designed mainly for the benefit of provincial revenue, and not for introducing the policy of prohibition. As a consequence of the decision of the Patna High Court, the Governor of Bihar enacted a Governor’s Act entitled the Bihar Excise Amendment Act 1940 which validated the said notification. The Federal Court enunciated that “there is no reason in theory or principle why an Excise Act should not have a double object, the benefit of the revenue and the improvement of public health or morals by a greater control of the liquor trade.” It did not endorse the finding for total prohibition. The power to legislate with respect to “intoxicating liquors and narcotic drugs”, given in entry No. 31 of the provincial legislative list, includes the power to prohibit intoxicating liquors, but a power “to regulate” may imply the continued existence of the thing to be regulated.

In July 1939 the Government of Bombay issued a notification under sub-section 2 of Section 14-B of the Bombay Abkari Act of 1878 prohibiting the possession by any person of any intoxicant specified in the Schedule in excess
of a specified quantity without a permit or licence. The Bombay High Court in April 1940 held that the said notification was ultra vires. The provincial legislature has power to prohibit possession, provided that in so doing it does not encroach upon the powers of the Centre under item 19 of the federal legislative list to legislate in respect of import and export across customs frontiers. Absolute prohibition of possession destroys, though indirectly none the less effectively, the right to import and export intoxicants across the sea frontier of Bombay. Section 14-B (2) of the Act of 1878 was amended by the Bombay Act VI of 1940 to enable prohibition to be extended to the public.

The Bengal Money-Lenders' Act 1940 was an Act of the Bengal legislature, but it was enacted with the assent of the Governor-General. The Act disturbed vested rights violently, as it gave the Courts power in certain cases to re-open transactions and to set aside decrees passed before the Act came into operation. The Calcutta High Court\(^1\) held that the subject matter of the Act came within item 27 of List II in Schedule VII of the Government of India Act and that although a decree was "property" within the meaning of Section 299 of the Constitution Act, the provincial legislature had power to interfere with it by legislation with retrospective effect. There is restriction on the power of the provincial legislature if it clashes with item 28 or item 53 of the Federal list. There is no restriction on the power of the provincial legislature to make laws as to money-lending and money-lenders, and where plenary powers of the legislature exist as to particular subjects, they may be exercised absolutely or conditionally; they may also be used in an injurious manner.

The Punjab Alienation of Land (Second Amendment) Act 1938 was a very drastic measure, and its principal

\(^1\) Promode Kumar Roy and another v Benoy Krishna Chakrabarty, March 5, 1941; and Harshudas Balissendras v. Dhirendra Nath Roy and others, March 11, 1941.
provision which is numbered 13A of the principal Act of 1900 is this: "When a sale, exchange, gift, will, mortgage, lease of farm purports to be made either before or after the commencement of the Punjab Alienation of Land (Second Amendment) Act 1938 by a member of an agricultural tribe to a member of the same agricultural tribe or of a tribe in the same group, but if the effect of the transaction is to pass the beneficial interest to a person who is not a member of the same tribe or of a tribe in the same group, the transaction shall be void for all purposes, and the alienor shall be entitled to possession of the land so alienated, notwithstanding the fact that he may have himself intended to evade the provisions of this Act". The Act provides for a limited measure of compensation for the value of improvements effected by a bona fide transferee for value, but it makes no provision for refund or reimbursement either in favour of the ostensible alienee or of the beneficiary or even bona fide transferees for value from them and not even in cases where the transaction thus avoided has been completed many years before the enactment of the measure. Section 13-A of the Act was held to be discriminatory, and the judgments of the High Court and the Federal Court showed that Section 298 (r) could operate as a bar to the wild exercise of the powers of the provincial legislature.

There was a very important judgment by the Lahore High Court² which held that (1) the Punjab Alienation of Land (Second Amendment) Act (X of 1938) was not ultra vires on the ground that it offended against Section 292 of the Constitution Act, (2) the said Act would be invalid as offending against the provision of Section 298 (r), as

² Punjab Province v. Daulat Singh, (1941, 4 F.L.J.H.C. 83). The High Court directed that "Agricultural land" must, in the absence of any indication to the contrary in the Government of India Act, be taken in its normal meaning. It is obviously land actually used for agriculture or for purposes subservient to agriculture. It does not include pastoral land or other rights in land which are included in the definition of land in the Punjab Alienation of Land Act. In the Constitution Act land comprises both corporeal and incorporeal rights and interests.
its pith and substance was to penalise certain transactions resulting in the acquiring of a beneficial interest in land by certain persons on the ground of descent alone; (3) the Act was *intra vires qua* sales or mortgages of agricultural land effected by agriculturists in favour of agriculturists who are benamidars for non-agriculturists after the commencement of Act X of 1938; and (4) Section 298 (2) saves only sale or mortgage of agricultural land, and it does not save other kinds of alienations. In the opinion of the majority of the Federal Court (*The Punjab Province v. Daulat Singh and others*, 4 F.L.J. 73), Section 13-A of the Act is clearly discriminatory, and a prohibition against a person acquiring or holding property as a beneficiary offends Section 298 (1) of the Constitution Act quite as much as a prohibition against his obtaining a transfer of the legal title. Under the Act of 1900 he cannot acquire a legal interest permanently, and under the Act of 1938 he cannot acquire a beneficial interest either. Sub-section 2 of Section 298 purports to save the operation of any law which prohibits the sale or mortgage of agricultural land etc., but Act X of 1938 not merely prohibits such transactions being entered into after the date of the Act, but vacates or nullifies even titles or rights acquired before the passing of the Act. “Prohibit” in Section 298 (2) does mean the forbidding of a transaction. Mr. Justice Beaumont of the Federal Court delivering a minority judgment held that Section 13-A of the Act is not *ultra vires* and he observed as follows: “If the only basis of the Act is discrimination on one or more of the grounds specified in Section 298 (2), then the Act is bad; but if the true basis of the Act is something different, the Act is not invalidated because one of its effects may be to invoke such discrimination”. In his opinion, the true object of the Act of 1938 was to avoid a method of evading the principal Act of 1900 which itself is unobjectionable. The Punjab Restitution of Mortgaged Lands Act (IV of 1938) was found by both High Court and Federal Court
intra vires the provincial legislature as the subject matter fell within the expression used in item 21 of the Provincial Legislative List. The pith and substance of the Act was to empower the Collector to extinguish subsisting mortgages effected before 8th June 1901 subject to the condition of payment of compensation in certain cases. The Lahore High Court laid down that if the subject matter fell within the provincial legislative list, the mere fact that it might be affected by certain provisions in the concurrent legislative list would not attract the provisions of Section 107 regarding repugnancy.

The Bengal Non-Agricultural Tenancy (Temporary Provisions) Act of 1940 was enacted with the assent of the Governor. Under this Act, every suit and proceeding in any Court for ejectment of a non-agricultural tenant, other than a suit or proceeding for ejectment on account of the non-payment of rent by such tenant, was stayed for two years from the 30th May 1940. The provincial legislature has the legislative power to direct the courts to stay proceedings for ejectment of a non-agricultural tenant. The Calcutta High Court held that in view of the provisions of Sec. 4 (1) of the Civil Procedure Code, the provisions of the Act of 1940 directing the Courts to stay proceedings for ejectment of a non-agricultural tenant are not repugnant to Order XXI, Rule 24, of the Civil Procedure Code, and that they are not invalid under Section 107 of the Act of 1935.

The Calcutta High Court (in Sheikh Akbar Ali and others v. Sheikh Mafijuddin of Islampur, June 6, 1941) held that Section 26G of the Bengal Tenancy Act so far as it allows the mortgagor of an occupancy holding in any form of usufructuary mortgage to recover possession of the mortgaged property after the expiry of 15 years was in conflict with the provisions of Section 62 of the Transfer of Property Act, but this repugnancy does not render Section 26G ultra vires inasmuch as transfer or alienation of agricultural land is not a matter falling in the concurrent
list but a provincial subject coming under item 21 of the provincial list of the Act of 1935, and all contracts relating to agricultural lands are also excluded from item 10 of the concurrent legislative list.

The U.P. Regularisation of Remissions Act of 1938 which regularised the remission of rent before the passing of the Act on account of the fall in prices was held by a full bench in the Allahabad High Court (3 F.L.J. H.C. 83) as beyond the competence of the United Provinces Legislature by reason of Section 292 of the Constitution Act of 1935. Section 292 provides that all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent legislature or other competent authority. The High Court held that the alteration, repeal or amendment of any previously existing law could not be made with a retrospective effect, as the expression "until" put a time limit on the power of the legislatures. The Federal Court in the United Provinces v. Mst. Atiqa Begum and others (1941, 3 F.L.J. 97) definitely held that the Act XIV of 1938 was not beyond the competence of the legislature of the United Provinces which had power to legislate retrospectively within the sphere allotted to it.

The Madras Agriculturists’ Debt Relief Act of 1938 was enacted with the assent of the Governor-General. The Act related, among other things, to the scaling down of debts and interest due on promissory notes and other negotiable instruments. The Madras High Court held in 1939 that as the Act in substance related to agriculture and money-lending which were subjects reserved for the provincial legislature its validity could not be affected. Moreover, the Act related to “contracts” falling within the concurrent legislative list, and it having received the assent of the Governor-General under Section 107, its provisions must prevail in the province unless and until the Federal legislature thinks fit to legislate in respect of of the same matter.
It was pointed out by the Madras High Court that the effect of Section 107 (1) and (2) is this: a federal law always overrides a provincial law unless the provincial law is in respect of one of the matters enumerated in the concurrent legislative list and has been reserved for the consideration of the Governor-General or for the signification of His Majesty’s pleasure and has received the assent of the Governor-General or of His Majesty, in which case the provincial law prevails in the province until the federal legislature chooses to legislate further. The Federal Court also agreed with the judgment of the High Court, although the Madras Act dealt in a very drastic manner with the problem of rural indebtedness and contained many unusual and startling provisions. The Act was applicable to all debts of an agriculturist. Both “debt” and “agriculturist” were defined in very wide terms.

New Amendments

The imposition of employment tax in the United Provinces by the provincial legislature brought out the question whether the provincial legislature had power to impose taxes for the benefit of a province in respect of professions, trades, callings or employments. “Tax” in legal parlance means nothing more than money which individuals are compelled to pay for public purposes. It is impossible to distinguish “tax” from cess or rate or duty. Such a measure was objected to on the ground that it relates to a tax on income. The Government of

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1 There was, however, a dissenting judgment in the Federal Court by the Hon’ble Justice Sulaiman. In his opinion, the Madras Act was repugnant to the existing Indian law relating to promissory notes, which is exclusively a federal subject, and is void to that extent. The Hon’ble Chief Justice, Sir Maurice Gwyer, held: “I doubt whether any Provincial Act could in the form of a Debtors’ Relief Act fundamentally affect the principle of negotiability or the rights of a bona fide transferee for value.” (Subrahmanyan Chettiar v. Munuswami Gounden, 1940, 3 F.L.J. 157).

2 The judgment of Hon’ble Justice Din Mohammad, Lahore High Court, in Daulat Ram v. Municipal Committee, (4 F.L.J.H.C. 47).
India Act 1935 was amended, and a new section 142-A was inserted by the India and Burma (Miscellaneous Amendments) Act 1940, providing that no provincial law relating to taxes for the benefit of a province in respect of professions, trades, callings or employments shall be invalid and that the total amount of such tax payable in respect of any one person shall not exceed fifty rupees per annum. It was also provided that any such tax which was in force during the financial year ending with the 31st day of March 1939 might not continue to be lawfully levied at a higher rate than fifty rupees per annum unless provision to the contrary is made by the Federal Legislature. This Amending Act did not limit the generality of the entry in the Federal legislative list relating to taxes on income. The Central Legislature passed the Professions Tax Limitation Act 1941 whereby the total amount payable in respect of any such person by way of such tax was limited to fifty rupees per annum. The Act saved the following taxes on professions, trades and callings as imposed under Chapter XII of the Calcutta Municipal Act 1923, Section 123 (1) (f) of the Bengal Municipal Act 1932, Section 128 (1) (ii) of the U.P. Municipalities Act 1916 and Section 66 (1) (b) of the C.P. Municipalities Act 1922.

There were other miscellaneous amendments by the India and Burma (Miscellaneous Amendments) Act 1940, some of which are connected with the question of provincial autonomy, viz.,

(A) the following was added in the Provincial Legislative List: 48-A. Taxes on vehicles suitable for use on roads, whether mechanically propelled or not, including tramcars."

"48-B. Taxes on the consumption or sale of electricity, subject, however, to the provisions of Section 154-A of this Act."

(B) A new section numbered as 154A was inserted whereunder it was provided that "no Provincial law or law
of a federated State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity which is consumed by the Federal Government or sold to the Federal Government for consumption by that Government, or consumed in the construction, maintenance or operation of a Federal Railway by the Federal Railway Authority or a railway company operating that Railway."

(C) A new proviso was inserted at the end of sub-section 3 of Section 88 of the Act of 1935.

(1) "Provided that, for the purpose of the provisions of this Act relating to the effect of an Act of a provincial legislature which is repugnant to an Act of the Federal Legislature or an existing Indian Law with respect to a matter enumerated in the Concurrent Legislative List, an ordinance promulgated under this section in pursuance of instructions from the Governor General, acting in his discretion, shall be deemed to be an Act of the Provincial Legislature which has been reserved for the consideration of the Governor-General and assented to by him."

(2) For the proviso to sub-section (1) of the said Section eighty-eight there shall be substituted the following proviso:

"Provided that the Governor—

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section, if—

(i) a Bill containing the same provisions would under this Act have required his or the Governor-General's previous sanction to the introduction thereof into the Legislature; or

(ii) an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, it had received the assent of the Governor-General or of His Majesty; and
(b) shall not without instructions from the Governor-General, acting in his discretion, promulgate any such ordinance if—

(i) a Bill containing the same provisions would under this Act have required the Governor-General's previous sanction for the introduction thereof into the Legislature; or

(ii) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the Governor-General; or

(iii) an Act of the provincial legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, it had received the assent of the Governor-General or of His Majesty".

(3) In the proviso to sub-section (4) of Section 89, and the proviso to sub-section (3) of Section 90, of the principal Act, after the words "repugnant to an Act of the Federal Legislature" there shall be inserted the words "or an existing Indian Law with respect to a matter enumerated in the Concurrent Legislative List."

(D) The following paragraph was substituted for paragraph 17 of the Provincial Legislative List:

"17. Education, including Universities other than those specified in paragraph 13 of List I."

The following additions were made:

(a) at the end of paragraph 33 of the Federal Legislative List, there shall be added "but not including Universities."

(b) for the words "other than corporations specified in List I" in paragraph 83 of the Provincial Legislative List, there shall be substituted "not being corporations specified in List I or Universities."
The Civil Service

All service under the Crown is public service, that is for public benefit. It is a fundamental principle, based on public policy, that the Crown should have the unfettered discretion to remove a public servant at pleasure. The power to dismiss at will can only be controlled by a Statute but cannot be abridged or controlled by rules and regulations of service. The rules and regulations are directions given by the Crown for general guidance, and any violation of them would entitle such servant to appeal only to the administrative authorities and not to the civil courts. To give redress to a public servant in the case of suspension or dismissal is the responsibility and the sole responsibility of the executive Government. The expression “servant of the Crown” is not defined in the Government of India Act 1935, but it is to have the same meaning as “servant of the Queen”, defined in the Indian Penal Code. Section 240 of the Act of 1935 provides that every person who is a member of a civil service of the Crown in India holds office during His Majesty’s pleasure. The statutory prohibition in Section 240 to the effect that no office-holder shall be dismissed from service by any authority subordinate to that by which he was appointed could not be qualified or taken away by statutory rules. Section 241 provides that appointments to the civil services of the Crown in India shall be made in the case of services of a province by the Governor or such person as he may direct. All the powers of the provincial Governments including the power to recruit public servants and to regulate their conditions of service are derived under the Act of 1935 directly by delegation from the Crown and not by devolution from the Government of India. The provincial services will be essentially Crown services, and the Governor has a special relation to all the Crown services. No public servant appointed by the Governor will be subject to dismissal save by order of the Governor. The Joint Parliamentary Committee on Indian
Constitutional Reform noted that the Governor's Ministers should remember that "advice on matters affecting the organisation of the permanent executive services is a very different thing from advice on matters of legislative policy." Subject to the recruitments to the Indian Civil Service, the Indian Medical Service and the Indian Police Service by the Secretary of State for India and to his option to appoint persons in the Irrigation Department (as provided in Sections 244 and 245), the Federal and the provincial Governments are given freedom to recruit their own officers. Section 270 is a great safeguard for the servants of the Crown; it prohibits the initiation of proceedings in respect of the acts described therein against all servants of the Crown employed in connection with the affairs of the Government of India or of the province. The consent of the Governor-General or of the Governor is an essential prerequisite to the competency of the court to entertain civil or criminal proceedings, and its absence renders the entire proceedings void "ab initio". \(^1\) Section 270 deals with past acts; Section 271 relates to future protection.

**Provincialism**

The Bengali-Bihari controversy under the regime of the Congress Ministry in Bihar offers an illustration that provincial autonomy, unless exercised within discreet limits born of the national unity of the country as a whole, tends to encourage inter-provincial jealousies and dissensions. Dr. Rajendra Prasad was asked to submit a report on the Bengali-Bihari controversy and the Congress Working Committee at its session in Bardoli, 1939, on the basis of Dr. Prasad's report adopted a long resolution formulating principles to guide the general policy of the Congress Governments in provincial administration. The resolution has its own importance in the working of provincial autonomy by the Congress, and the general principles enunciated therein are given below:

\(^1\) *In Arjan Singh v. Emperor*, (1939, 2 F.L.J.H.C. 129).
(1) The rich variety of Indian culture and diversity of life are to be preserved and cherished; the idea of common nationality and common background of our cultural and historical inheritance is to be encouraged so that India may be built upon unity of purpose and aim.

(2) In regard to service there should be no bar preventing any Indian living in any part of the country from seeking employment in any other part, subject to the following considerations (a) a fair representation of the various communities in the province; (b) encouragement of backward classes and groups, (c) preference to the people of the province. (The preferential treatment is to be governed by rules and regulations framed by the provincial Government).

(3) In regard to Bihar, there should be no distinction between Biharis and Bengali-speaking residents of the province born or domiciled there. The practice of issuing certificates of domicile is to be abolished. Domicile is to be proved by evidence that the applicant has made the province his home. The length of residence, possession of house or other property are relevant. Birth in the province or ten years' continuous residence should be regarded as a sufficient proof of domicile.

(4) All persons holding posts under Government should be treated alike, and promotion should be based on seniority, coupled with efficiency.

(5) There should be no prohibition against anyone carrying on trade or business. When accommodation is limited in educational institutions, place may be reserved for different communities. Preference may be given to the people of the province.

(6) In the parts of Bihar where Bengali is the spoken language the medium of instruction in primary schools should be Bengali. In secondary schools education should be given through the medium of the language of the province, but the State should provide for education
through the medium of any other languages where there is a demand for it from the residents.

With the starting of provincial autonomy, unaccompanied by responsible government in the Centre seeking to blunt the edges of provincial narrowness, a spirit of degenerate provincialism threatening the concept of Indian citizenship and Indian integrity grew up more or less in every province. In Bengal, such a restricted view did not flourish in governmental activities. But the communal approach in the province of Bengal blackened many efforts. Provincialism in Bengal was however nursed by the grievances of Bengali Moslems against the appointment of non-Bengali Moslems in the province. The Moslem League being an all-India organisation, the Ministry under the influence of the Moslem League preferred Moslems of any part of India to Hindus in appointments to positions of trust and influence. This policy narrowed down, in a sense, the gulf between Bengali Moslems and Bengali Hindus, and it was not a strange phenomenon that protests were heard from a common platform. It is difficult to choose between the two evils, narrow provincialism and intolerant communalism. Both are fatal to the integrity of India.

**The High Court**

It is to be noted that the Regulating Act of 1773 established the Supreme Court and Section 13 thereof gave it full power and authority to exercise and perform all civil, criminal, admiralty and ecclesiastical jurisdiction and to do all such other things as shall be found necessary for the administration of justice. The High Courts Act of 1861 abolished the Supreme Court and established the High Court in its place. Clause 16 of the Letters Patent provides that the High Court shall be a court of appeal from civil courts; all classes of civil courts and all other courts are subject to its superintendence. The following are the classes of civil courts: the Court of the
District Judge, the Court of the Additional District Judge, the Court of the Subordinate Judge and the Court of the Munsiff. The words "Civil Courts" in an Act do not include the High Court. By virtue of Section 223 of the Constitution Act of 1935, the High Court possesses just the same powers as it had before the Act came into force. The powers and jurisdiction of the High Court are derived partly from the Letters Patent and partly from Acts of Parliament. A provincial Act, even if it is assented to by the Governor-General, cannot cut down the powers of the High Court to hear suits and execute its decrees. In strict theory, provincial autonomy would suggest that the provincial legislature should have power to make laws touching the jurisdiction, powers and authority of all courts within the province with respect to subjects on which it is competent to legislate. The High Courts were taken out of the jurisdiction of the provincial legislature. Accordingly, it was provided in the Instrument of Instructions to the Governor-General and the Governor that any Bill which would derogate from the powers of the High Court should be reserved for the signification of His Majesty's pleasure. In *Narsingdas Tansukdas vs. Chogemull* (1939, 2 F.L.J.H.C. 71) the Calcutta High Court held that (1) Section 34 of the Bengal Agricultural Debtors' Act, so far as it relates to proceedings of the Calcutta High Court, is *ultra vires*, notwithstanding the fact that sanction had been accorded by the Governor-General under Section 80-A(3) for the enactment of that Act and (2) local legislatures, under the Government of India Acts of 1915 and 1918, had no power, even with the sanction of the Governor-General, to pass an enactment affecting the jurisdiction of a High Court derived from Parliament.

The trends of provincial legislation, if analysed, will be found to exclude the jurisdiction of civil courts in favour of establishing the authority of the executive. That amounts to executive despotism in the legislative field. The exclusion of the jurisdiction of civil courts creates a sense
of dissatisfaction to the aggrieved party, and where rights are concerned, they should not be taken away without an adjudication by civil courts. The following rule, as laid down by the Privy Council, should be noted: it is a settled law that the exclusion of the jurisdiction of civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the Statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.

**The Federal Court**

A Federal Court is the conscience and balance wheel of a federal constitution. It is a tribunal for the determination of disputes between the constituent units of the Federation; its primary duty is to interpret the Constitution. It is, in that sense, the guardian of the Constitution. The Act of 1935 provides for the establishment of a Federal Court, which guarantees the smooth working of provincial autonomy. The Federal Court was duly inaugurated in India on the 1st of October 1937, and it consisted of a Chief Justice and two other Judges. The number of judges is not statutorily fixed. The increase in the number of puisne judges beyond six can be made at the request of the Federal Legislature, but presumably such an increase would be rendered necessary if the appellate jurisdiction of the Court was extended under Section 206.

The appointment of the Judge of the Federal Court is to be made by His Majesty by warrant under the Royal Sign Manual. The qualifications for the appointment of a Judge are: (1) a Judge of a High Court in British India or in a Federated State for at least five years; (2) a Barrister-at-Law or a pleader of a High Court of at least ten years standing. A person who is a Judge of a High Court as a
member of the Indian Civil Service cannot be appointed the Chief Justice of India. A lawyer who is a Judge of a High Court for at least five years or a Barrister-at-Law or a pleader of a High Court of fifteen years standing is qualified for appointment as the Chief Justice of India. The Judge of a Federal Court can be removed on the ground of misbehaviour or of infirmity of mind or body by the Crown on the advice of the Judicial Committee of the Privy Council. He may, however, resign his office by sending in his resignation addressed to the Governor-General.

There is provision for temporary appointment of the acting Chief Justice, but no such provision for appointment of a temporary or acting Judge of the Federal Court exists. The salaries, allowances and pensions payable to or in respect of Judges of the Federal Court are not votable by the legislature. By Order in Council passed on the 29th of July 1937, the salaries, allowances and pensions have been regulated. The salary of the Chief Justice has been fixed at Rs. 7,000 per month and that of the puisne Judge at Rs. 5,000 per month. The Federal Court shall sit in Delhi, but it might sit in such other places as may be fixed by the Chief Justice with the approval of the Governor-General.

The Federal Court is the highest tribunal in India, but it is not a Court of last resort. An appeal lies from the Federal Court, with leave, in its decision given in exercise of its appellate jurisdiction. The High Courts in British India can review their judgments by Section 114 of, and order XLVII of the first schedule to, the Civil Procedure Code. The Federal Court of India observes the maxim that a case once tried by it ought not to be re-opened and re-heard. That is the practice of the Judicial Committee and of the House of Lords; only mistakes and errors can be rectified. The Federal Court is not to sit as a court of appeal from its own decisions, nor is it to entertain applications to review on the ground that one of the parties in the
case conceives himself to be aggrieved by the decision.\(^1\)
In the absence of express statutory prohibitions, the rule-
making power of the Federal Court may be utilised in
regulating applications for a review of its judgments.

The Chief Justice, Sir Maurice Gwyer, recommended\(^2\)
that the following rules adopted by the Supreme Court of
the United States should be followed by the Federal Court,
\textit{viz.}, (1) it has power in the exercise of its appellate juris-
diction not only to correct error in the judgment under review
but to make such disposition of the case as justice requires
and (2) it is bound to consider any change, either in fact or in
law, which has supervened since the judgment was entered.

Under Section 176(1) of the Constitution Act, a
provincial Government may sue or be sued by the name of
the province. But the Federal Court laid down, on the
analogy of the Dominion practice, that where the validity
or constitutionality of provincial legislation was in issue,
and not any matter relating to the proprietary rights or
interests of the province, the Advocate-General should
represent the Executive Government for the time being of
the province.\(^3\) In cases between private persons involving
the constitutional validity of a Statute, the Advocate-General
is a necessary and proper party, “in the sense that without
him the Court cannot effectually and completely adjudicate
upon and settle all the questions involved in the suit.”

Under Section 204 of the Act of 1935, the Federal Court
has, to the exclusion of any other Court, an original juris-
diction in any dispute between a province and the Centre, if
and in so far as the dispute involves any question (whether
of law or fact) on which the existence or extent of a legal
right depends. The ingredients of “legal rights” are a
legal recognition and a legal protection.

\(^1\) Raja Prithwi Chand Lall Choudhury v. Rai Bahadur Sukhraj
Rai and others, and Subhanand Choudhury and another v. Apurba
Krishna Mitra and another, (1940, 3 F.L.J. 67)
\(^2\) Lachmeswar Prasad Sukul and others v. Keshwar Lal Chaudhuri
and others, (1940, 3 F.L.J. 73).
\(^3\) The United Provinces v. Mst. Atiga Begum and others, (3
F.L.J. 97).
Under Section 205 (1) of the Act of 1935, if a High Court certifies that a case before it involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder, an appeal would lie to the Federal Court:

(a) on the ground that the question has been wrongly decided,

(b) on any ground on which an appeal would have lain to the Judicial Committee of the Privy Council without special leave if no such certificate had been given (vide Sections 109 and 110 of the Civil Procedure Code), and

(c) with the leave of the Federal Court on any other ground.

Section 205 imposes on the High Court the duty of considering and determining in every case, as part of its judgment, decree or final order, whether to give or withhold the certificate mentioned therein. A certificate under Section 205 is a necessary condition precedent to all appeals to the Federal Court. If the High Court refuses to grant a certificate, the Federal Court cannot entertain any appeal against the refusal. It is true that the constitutional question involved in a case is the primary ground for reference to the Federal Court, but once the certificate of the High Court is granted, the whole case including the other issues involved becomes appealable to the Federal Court.

The Federal Court cannot question the refusal of a High Court to grant a certificate or to investigate the reasons which prompted the refusal; the matter is one for the High Court when the forum of appeal is the Federal Court on the strength of the certificate granted; the right to go to the Privy Council, with or without special leave, disappears in terms of Section 205 (2). The procedure of appeals from High Courts is framed by the Federal Court, and practically the procedure in appeals from High Courts to the Judicial Committee, as regulated by Order XLV of the Civil
Procedure Code, is extended with necessary adaptations and modifications. Thus, a good part of the preliminary proceedings connected with an appeal is put under the control of the High Court. In the interest of justice, the Federal Court can relax the rigid compliance with procedural provisions. The High Court cannot revoke any certificate, once granted, on non-compliance with the Federal Court rules, nor has it any inherent power to alter a certificate in the event of a change in the circumstances.

The Federal Court cannot in appeal substitute its own discretion for that of the High Court. If the question is one of a discretion of the High Court, the Federal Court cannot interfere with the way in which the discretion was used or waived, “unless it appears that the High Court did not apply its mind at all to the question, or acted capriciously or in disregard of any legal principle, or was influenced by some extraneous considerations wrong in law.” An appeal from the Federal Court would be admitted by the Privy Council if it raises a really substantial case.

The Federal Court of India does not encourage appeal to the Privy Council on constitutional questions. It rejected the applications in October 1942 for leave to appeal to the Privy Council in respect of the Punjab Restitution of Mortgaged Lands Act, the Bihar Agricultural Income Tax Act, the Punjab Land Alienation Act, the Madras Sales Act, and the Federal Court observed as follows:—“We are not disposed to encourage the Indian litigant to seek for determination of constitutional questions elsewhere than in their own Supreme Court. We do not and indeed we cannot lay down the rule that we will never grant leave to appeal, for that would be to alter the provision of the Act and to usurp legislative functions, but we shall grant it sparingly and only in exceptional cases.”

1 Lachmesevar Prasad Shukul and others v. Girdhari Lal Chaudhri and others, (1940, 3 F.L.J. 15).
2 Jai Mohan Singh and others v. Lachmi Narain Ram and others, (1940, 3 F.L.J. 46)
CHAPTER VI

THE PARTY SYSTEM

Party government, it is obvious to the advocates of the British system of parliamentary democracy, is the vital principle of representative government. The business of a political party is to influence the electorate to accept its programme and to get its own leaders into office; its function is to keep them in office. The party machinery in Great Britain is, accordingly, organised on technical and professional lines. The rigidity of party discipline is an inevitable consequence, as a candidate for elections is left at the mercy of the party machinery. The candidate returned does, therefore, act not as a delegate of the electors but of his own party. A break with the party is generally a danger to the candidate because of the professionalised organisation of the party system.

Such a party does not obtain in India. The two-party system, as we find it at present in Great Britain, arises "from accident rather than from design." In India, the growth of political parties is hampered by the communal composition of the legislature/ Indian politicians have no parliamentary experience; they thrive on opposition to Government; they are forced to appeal to the electorate as communal citizens; there is the presence of alien rule; the means of establishing touch with the village voters are not happy. All this retards the growth of a two-party system which is commended in English-speaking countries. The conditions in India make for the one-party system or for the multi-party system. The one-party system is fatal to parliamentary government, but the multi-party system makes for a coalition Government or for a minority Government. The one-party leads to personal dictatorship, as every successful leader tends to be a dictator; the two-party system helps "the dictatorship of the Cabinet" as the Government party seeks to support the Government in all that it does, "abdicating
the duty of frank and candid criticism”; the multi-party system brings about the transfer of the choice of the Government from the people to the elected legislature and necessitates compromises and adjustments of the party programme involving “inherent erosion of principle”. Mr. Ramsay Muir argues the case for the multi-party system and for the adoption of proportional representation. In India, political creed is sacrificed to give weightage to communal opinion, and as such political parties move on communal lines. It is the curse of political India.

In the ultimate analysis, the party is a mechanism to control “public opinion about property in the particular way its members deem desirable.” A party cannot maintain its cohesion unless there is agreement on certain fundamental principles, particularly of economic character. In our country, economic issues are being exploited for the furtherance of communal parties. The Moslem League is constituted of the higher middle classes appealing to the Moslem masses for the establishment of Moslem hegemony; the Hindu Mahasabha is dominated by the professional middle classes, anxious to win support on the issue of protection of Hindu traditions and culture as against the proselytising influence of the Moslem propaganda; the Congress looks more to wresting political power from the British through agitational obstruction and rally of anti-British forces; the Liberal Federation fights for more political rights through the path of working the Constitution on the analogy of the Dominions of the British Commonwealth. The continuance of communal electorates and the presence of a foreign Power, together with the complex cross-currents of the intricate Hindu society based on caste divisions, obstruct the emergence of political parties built around economic issues.

The Swaraj Party

The development of the party system in India cannot but take a peculiar line because of the presence of the
foreign Power. The Congress which is the best knit organisation in the country definitely cut itself away from the path of constitutionalism by launching the non-co-operation movement in 1921. The Congress boycotted the elections to the first reformed legislature under the Act of 1919. But in the second elections in 1923, a new all-India party under the leadership of Mr. C. R. Das was formed to substitute the policy of wrecking the legislatures from within for the policy of boycott pursued in the first elections. The new party was known as the Swaraj Party. It was formed with the help of those Congress men who, conscious of the failure of non-co-operation, turned to “a new method of embarrassing Government”. Its candidates offered themselves for election to the legislatures on a pledge of “uniform, continuous and sustained obstruction with a view to making government through the Assembly and the Councils impossible.” The Swaraj Party in the 1923 elections met with opposition from the adherents of Mahatma Gandhi in the Congress, but their striking success in the elections and their sustained opposition to Government in the legislatures brought popularity and prestige which could not be ignored by Mahatma Gandhi’s followers. And the Swaraj Party was recognised by the Congress. The Congress laid down that members of the Party in the legislatures should pursue a policy of obstruction and that no member was to accept office or a seat on a Select Committee or to take part, as an individual, in current business. The stiff attitude melted down later to some extent, but the Swaraj Party refused to accept ministerial responsibilities. In Bengal where the Swarajists were in a minority in the Legislative Council, and in the Central Provinces where the Swarajists obtained a majority in the legislature, Dyarchy was made unworkable, although temporarily, but in other provinces they functioned as an Opposition of a more constitutional kind, and “not infrequently played a useful part as keen and vigilant critics”. But the attitude of the Swaraj Party to
the Constitution was one of opposition and not of co-operation and as such it was of no help to the growth of constitutional government. It was undoubtedly a political party on non-communal lines, but its tactics were not helpful for the purpose of broadening the base of self-government through the working of the reforms.

The barren tactics of the Swaraj Party brought about fissures between its adherents. In the Indian Legislative Assembly, the Swaraj Party was functioning with success under the leadership of Pandit Motilal Nehru, but the policy of complete non-co-operation within the legislature did not win acceptance from certain influential members of the Party. Mr. Jayakar, Mr. Kelkar and Dr. Moonjee "split off from the main body and formed the party of responsive co-operation". The Responsivists were ready to take full advantage of the opportunities open to them under the Constitution, although they were "no less ready than the Swarajists to carry on the struggle for their common political ends."

In India, elections do not offer an arena "for the real contest between a party in power and a party or parties aspiring to power". The Swaraj Party appealed to the electorate for the support of its programme of obstruction within the legislature. In many scattered constituencies there have been personal appeals by individual candidates without any help of party machinery at election time; they are no substitute for party contest and political programme. It was only the Justice Party in Madras which could appeal as a Government party to the electorate on its record. The Swaraj Party could not attract the voters by pointing to the prize of office; it enthused them by promises of wresting power through obstruction and confusion. The introduction of real political responsibility giving rise to co-operating political parties was not achieved in India. The position of the Opposition in the legislatures in India is different from the Opposition in the British Parliament which lives and
grows on the prospect of a return to office. This difference is maintained by the unique organisational strength of the Indian National Congress, as all the non-Congress parties are in favour of working the Constitution, however disappointing and unsatisfactory it may appear to them. The technique of constitutionalism is detested by the Congress which seeks to win popular support by remaining a fighting organisation against the authority of British rule in India. The Congress sought to increase the people’s power of resistance through obstruction; it refuses to accept the modern political lessons that real power resides in the State, and that the seizure of State-power, however imperfect, can be utilised for the consummation of the Congress objective far more peacefully and effectively, although the period of interregnum may not be shortened as in the case of revolutionary action.

The Congress Party

The Congress has built up a remarkable organisation, by far the most efficient political machine in India. It is numerically the largest single party in British India. The Congress under the guise of the Swaraj Party entered the legislatures under the Reforms Act of 1919 to wreck the Constitution, and till the end it stuck to the principle of refusing office. In the reformed legislatures under the Act of 1935 the Congress sought elections to combat and wreck the Constitution, but it accepted office in 1937 after a good deal of hesitation. The Congress though pledged to wreck the Constitution from within did not try any such device, so long as it was in office. The Congress Ministers came out of office in 1939 as a protest against the war policy of the British Government in India.

The Congress in running the elections to the provincial legislatures under the Act of 1935 behaved as a well knit political party. In a press message to all the Congress candidates at the elections, issued from Allahabad on the 4th of January 1937, Pandit Jawaharlal Nehru, President,
Indian National Congress, observed: “Let them remember that they represent a cause, a principle and an idea. They do not stand on personal grounds but as soldiers of the Congress and of Indian Freedom, and it is on that ground alone that they seek the suffrage of our people. Those who believe in that cause must help them and vote for them”. Any Congress man standing against the official Congress candidate in the elections was suspended from the Congress organisation. The first instance occurred in the United Provinces where Guru Raghuvra Dayal of Cawnpore was suspended from the membership of the Congress for standing in opposition to the official Congress candidate, Dr. Jawaharlal, for Cawnpore city. Similar instances were found in nearly all provinces, and there was no hesitation in taking disciplinary action against those who refused to obey the Congress mandate. In Bengal, Mr. Sarat Chandra Bose, Acting President, Bengal Provincial Congress Committee, suspended Mr. Kamini Kumar Datta of Comilla, Mr. Dhiresh Chandra Chakravarty of Dacca West and Mr. Nishit Nath Kundu of Dinajpur from the primary Congress Committee membership for opposing the official Congress candidates. In Bihar, Dr. Satyanarain Singh was suspended by Dr. Rajendra Prosad, President, Bihar Congress Committee, for opposing the official Congress candidate from Saran district.

In the Congress Election Manifesto it was pointed out that “every party and every group that stands aloof from the Congress organisation tends knowingly or unknowingly to become a source of weakness to the nation and a source of strength to the forces ranged against it”. The Congress leaders pushed on Congress candidates as the only candidates pledged to work for the welfare of India, and clever propaganda was conducted to the effect that non-Congress candidates had not the true interests of India at heart, as they wished to flourish with the aid and support of the British Government. In the presidential address at the Faizpur Congress, 1936, Pandit Jawaharlal Nehru defined
the objective of the Congress: "The Congress stands to-day for full democracy in India and fights for a democratic State, not for socialism. It is an anti-Imperialist body and strives for great changes in our political and economic structure. The urgent and vital problem for us to-day is political independence and the establishment of a democratic State". This objective guided the Congress in running the elections and drawing up the parliamentary programme of the Congress Party.

The Congress Working Committee passed a definite resolution on the 1st of March 1940 that "Indian freedom cannot exist within the orbit of Imperialism and Dominion Status or any other status within the Imperial structure" and that "India's Constitution must be based on independence, democracy and national unity."

The Congress, in fact, stands for political democracy, not for economic democracy, in spite of the professions of the Congress Socialist Party. Political democracy is built upon capitalist foundations, and Indian capitalists have always leaned to the side of the Congress. It is a favourite thesis of Prof. Harold Laski that political democracy seeks, by its inner impulses, to become a social and economic democracy. But that stage may be delayed by offering a constantly increasing standard of life to the masses. The Congress has fought for Indian capitalists and criticised the commercial safeguards devised in the interests of foreign capitalists. The Congress Working Committee adopted a resolution in April 1938 that "India has the right to discriminate against non-national interests whenever and wherever the interests of India demand or require it". The Congress has no objection to the use of foreign capital or to the employment of foreign talent when such are not available in India or when India needs them but on condition that such capital and such talent are under the control, direction and management of Indians and are used in the interests of India. The Congress will not regard any concern as "swadeshi" unless its control, direction and
management are in Indian hands, and it would prefer to delay the development of Indian industries if this only results in the dumping of foreign industrial concerns who will exploit the natural resources of India.

The Congress accepts certain fundamental postulates in a free India, which were reiterated by the all-India Congress Committee at its Calcutta session in October 1937. They relate to the freedom of conscience and the right to profess and practise one's religion subject to public order and morality; the protection of the culture, language and the script of minorities and linguistic areas; equality before law; the removal of disability in public employment or in the exercise of trade or calling because of religion, caste, creed or sex; neutrality of the State in regard to all religions; universal adult suffrage and freedom to move, stay, acquire property and to follow a trade or calling throughout India. The Congress Committee gave a guarantee of freedom and an opportunity to the individual and each group to develop unhindered according to its capacity and inclination and an assurance that a minority is entitled to keep its personal law. The objective of the Congress, in the language of the resolution of the all-India Congress Committee, is an independent and united India where no class or group or majority or minority may exploit another to its own advantage and where all the elements in the nation may co-operate together for the common good and advancement of the people of India. The Congress claims that in all matters affecting the minorities in India it wishes to proceed by their co-operation and through their good will in a common undertaking and for the realisation of a common aim which is the freedom and betterment of the people of India.

It may be mentioned, in this connection, that the charter of fundamental rights approved by the Hindu Mahasabha in its Calcutta session in December 1939 runs on the lines adopted by the Congress in respect of free expression, free association, free combination and free