

SECTION III

THE FEDERATION

Federation and the Crown

151. We pass next to the proposal in the White Paper to create a new polity in which both the British India Provinces and the Indian States will be federally united. We have already given our reasons for approving this proposal in principle and have pointed out that it involves two distinct operations, the one a necessary consequence of the grant of Provincial Autonomy to British India, the other the establishment of a new relationship between British India and the Indian States. It only remains for us to consider the method by which each of these two operations is to be carried out.

Federal
Union of
States and
Provinces.

152. The dominion and authority of the Crown extends over the whole of British India and is exercised subject to the conditions prescribed by the existing Government of India Act. It is derived from many sources, in part statutory and in part prerogative, the former having their origin in Acts of Parliament, and the latter in rights based upon conquest, cession or usage, some of which have been directly acquired, while others are enjoyed by the Crown as successor to the rights of the East India Company. The Secretary of State is the Crown's responsible agent for the exercise of all authority vested in the Crown in relation to the affairs of India, and for the exercise also of certain authority which he derives directly from powers formerly vested in the Court of Directors and the Court of Proprietors of the East India Company, whether with or without the sanction of the body once known as the Board of Control. The superintendence, direction and control of the civil and military Government of India is declared by the Government of India Act to be vested in the Governor-General in Council, and the government or administration of the Governors' and Chief Commissioners' Provinces respectively in the local governments; but powers of superintendence, direction and control over "all acts, operations and concerns which relate to the government or revenues of India" are, subject to substantial relaxation in the transferred provincial field, expressly reserved to the Secretary of State; and whether the Governor-General in Council exercises (though no doubt under the general control of the Secretary of State) original powers of his own, or is only the agent and mouthpiece of the Secretary of State, remains perhaps an open question. It is one which has been the subject of dispute in the past between Secretaries of State and the Governor-General; but the spheres of their respective jurisdictions are now well recognised, and the Secretary of State, though maintaining his powers of control, does not in practice exercise any powers of direct administration, a result to which the increasing authority of the Indian Legislature has no doubt materially contributed.

Existing
distribution
of authority
in British
India.

Legal basis
of new
Federal
Constitu-
tion.

153. It is clear that, in any new Constitution in which autonomous Provinces are to be federally united under the Crown, not only can the Provinces no longer derive their powers and authority from devolution by the Central Government, but the Central Government cannot continue to be an agent of the Secretary of State. Both must derive their powers and authority from a direct grant by the Crown. We apprehend, therefore, that the legal basis of a reconstituted Government of India must be, first, the resumption into the hands of the Crown of all rights, authority and jurisdiction in and over the territories of British India, whether they are at present vested in the Secretary of State, the Governor-General in Council, or in the Provincial Governments and Administrations; and second, their redistribution in such manner as the Act may prescribe between the Central Government on the one hand and the Provinces on the other. A Federation of which the British Indian Provinces are the constituent units will thereby be brought into existence.

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Accession
of States to
Federation
a voluntary
act.

154. The rights, authority and jurisdiction which will thus be conferred by the Crown on the new Central Government will not extend to any Indian State.¹ It follows that the accession of an Indian State to the Federation cannot take place otherwise than by the voluntary act of its Ruler. The Constitution Act cannot itself make any Indian State a member of the Federation; it will only prescribe a method whereby the State may accede and the legal consequences which will flow from the accession. There can be no question of compulsion so far as the States are concerned. Their Rulers can enter or stand aside from the Federation as they think fit. They have announced their willingness to consider federation with the Provinces of British India on certain terms; but, whereas the powers of the new Central Government in relation to the Provinces will cover a wide field and will be identical in the case of each Province, the Princes have intimated that they are not prepared to agree to the exercise by a Federal Government for the purpose of the Federation of an identical range of powers in relation to themselves.

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Rulers'
Instruments
of Accession.

155. It is proposed that the Ruler of a State shall signify to the Crown his willingness to accede to the Federation by executing an Instrument of Accession²; and this Instrument (whatever form it may take) will, we assume, enable the powers and jurisdiction of the Ruler, in respect of those matters which he has agreed to recognise as Federal subjects, to be exercised by the Federal authorities brought into existence by the Constitution Act; that is to say, the Governor-General, the Federal Legislature, and the Federal Court, but strictly within the limits defined by the Instrument of Accession. Outside

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¹ The relations between the Crown as Paramount Power and the States are the subject of treaties and engagements of various kinds. For details see Aitchison's "Treaties, Engagements and Sanads, 1929," published by the Government of India.

² White Paper, Proposals 2-3.

these limits the autonomy of the States and their relations with the Crown will not be affected in any way by the Constitution Act. The list of exclusively federal subjects is set out in List I of Appendix VI to the White Paper, to which we have already drawn attention, and we understand the hope of His Majesty's Government to be that Rulers who accede will in general be willing to accept items 1 to 48 of List I as federal subjects. We have indicated our view that the Lists in Appendix VI require some modification, a matter with which we deal hereafter ; and, therefore, though we speak of items 1 to 48, we do not wish to be understood as necessarily implying that we accept all these items as appropriately falling within the federal sphere, so far as regards the Indian States, or that we think that the definition of some of them is not susceptible of improvement. Subject to this, it is convenient to consider the questions which arise in connection with the Instrument of Accession on the basis of the White Paper proposal, with the explanations which have been given to us on behalf of His Majesty's Government.

156. It would, we think, be very desirable that the Instruments of Accession should in all cases be in the same form, though we recognise that the list of subjects accepted by the Ruler as Federal may not be identical in the case of every State. Questions may arise hereafter whether the Federal Government or the Federal Legislature were competent in relation to a particular State to do certain things or to make certain laws, and the Federal Court may be called upon to pronounce upon them ; and it would in our opinion be very unfortunate if the Court found itself compelled in any case to base its decision upon some expression or phrasology peculiar to the Instrument under review and not found in other Instruments. Next, we think that the lists of subjects accepted as Federal by Rulers willing to accede to the Federation ought to differ from one another as little as possible, and that a Ruler who desires in his own case to except, or to reserve, subjects which appear in what we may perhaps describe as the standard list of Federal subjects in relation to the States, ought to be invited to justify the exception or reservation before his accession is accepted by the Crown. We do not doubt that there are States which will be able to make out a good case for the exception or reservation of certain subjects, some by reason of existing treaty rights, others because they have long enjoyed special privileges (as for example in connection with postal arrangements, and even currency or coinage) in matters which will henceforward be the concern of the Federation ; but in our judgment it is important that deviations from the standard list should be regarded in all cases as exceptional and not be admitted as of course. We do not need to say that the accession of all States to the Federation will be welcome ; but there can be no obligation on the Crown to accept an accession, where the exceptions or reservations sought to be made by the Ruler are such as to make the accession illusory or merely colourable.

Instruments should, so far as possible, follow a standard form.

Accession of sufficient number of States a condition precedent to Federation. 157. We regard the States as an essential element in an All-India Federation ; but a Federation which comprised the Provinces and only an insignificant number of the States would scarcely be deserving of the name. This is recognised in the White Paper, where it is proposed that the Federation shall be brought into existence by the issue of a Proclamation by His Majesty, but that no such Proclamation shall be issued until the Rulers of States representing not less than half the aggregate population of the States, and entitled to not less than half the seats to be allotted to the States in the Federal Upper Chamber, have signified to His Majesty their desire to accede to the Federation.¹ We accept the principle of this proposal. We observe also that it is proposed that both Houses of Parliament should first present an Address to His Majesty praying that the Proclamation may be issued. We approve this proposal, because Parliament has a right to satisfy itself not only that the prescribed number of States have in fact signified their desire to accede, but also that the financial, economic and political conditions necessary for the successful establishment of the Federation upon a sound and stable basis, have been fulfilled. This is a matter which we discuss more fully in a subsequent part of our Report, and it is unnecessary to do more than allude to it here.² We note also in passing that the establishment of Autonomy in the Provinces is likely to precede the establishment of the Federation ; but in our judgment it is desirable, if not essential, that the same Act should lay down a Constitution for both, in order to make clear the full intention of Parliament.

Differentiation of functions of Governor-General and Viceroy. 158. We have spoken above of the rights, authority and jurisdiction of the Crown in and over the territories of British India. But the Crown also possesses rights, authority and jurisdiction elsewhere in India, including those rights which are comprehended under the name of paramountcy. All these are at present exercised on behalf of the Crown, under the general control of the Secretary of State, by the Governor-General in Council ; and it will be necessary that they should also be resumed in their entirety into the hands of the Crown. But clearly they cannot under the new Constitution be exercised on behalf of the Crown by any federal authority, save in so far as they fall within the federal sphere, and only then when they affect a State which has acceded to the Federation. The White Paper proposes that (subject to the exception which we have mentioned) they should in future be exercised by the representative of the Crown in his capacity as Viceroy ; and that, in order to put the distinction beyond doubt, the office of Governor-General should be severed from that of Viceroy.³ We agree with what we conceive to be the principle underlying this proposal, but we are not clear that the method employed to give effect to it is entirely appropriate. We agree that there must

¹ White Paper, Proposal 4.

² *Infra*, para. 273.

³ White Paper, *Introd.*, para. 10.

be a legal differentiation of functions in the future ; and it may well be that His Majesty will be pleased to constitute two separate offices for this purpose. But we assume that the two offices will continue to be held by the same person, and, this being so, we think
 5 that the title of Viceroy should attach to him in his double capacity. This suggestion involves no departure from the underlying principle of the White Paper that, outside the federal sphere, the States' relations will be exclusively with the Crown and that the right to tender advice to the Crown in this regard will lie with His Majesty's
 10 Government.

The Area of Federal Jurisdiction

159. The area of federal jurisdiction will extend in the first instance to the whole of British India, which comprises at the present time the Governors' Provinces and the Chief Commissioners' Provinces of
 15 British Baluchistan, Delhi, Ajmer-Merwara, Coorg, the Andaman and Nicobar Islands, and Aden.¹ We give below our reasons for holding that Aden should henceforth cease to be part of British India. As regards the States which have acceded to the Federation, the federal jurisdiction will extend to them only in respect of those
 20 matters which the Ruler of the State has agreed in his Instrument of Accession to accept as federal.

160. The Settlement of Aden, which comprises the town of Aden
 itself and certain immediately adjacent districts, is at present administered by the Government of India as a Chief Commissioner's
 25 Province. Responsibility for the hinterland of Aden, which is commonly known as the Aden Protectorate and which is not British territory, has since 1917 rested with His Majesty's Government, who have also since the same date been responsible for the military and political affairs of the Settlement. Under arrangements reached in
 30 1926, an annual contribution, subject to a maximum of £150,000, but which amounts at the moment only to some £120,000, is made from Indian revenues to military and political expenditure on the Settlement and the Protectorate. The population of the Settlement is predominantly Arab, the Indian population, which is however of
 35 great commercial importance, numbering only about one seventh of the whole.

161. Proposals for Indian constitutional reform inevitably necessitated consideration of the future position of Aden, and in particular of the question whether the Settlement could satisfactorily
 40 be included in the new arrangements, or whether it would not be preferable to transfer responsibility for its civil administration to His Majesty's Government, in whom military and political responsibility for the Settlement and complete responsibility for the affairs of the hinterland already vest. We have received strong representations against any alteration in the status of Aden from important
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¹ White Paper, Proposals 5, 56-60.

and influential Indian interests. On the other hand we have received representations in favour of transfer from the Arab population who appear to view with some apprehension the possibility that Aden may permanently remain a part of British India.

Its
separation
from
British
India
recom-
mended.

162. We recognise the natural reluctance of Indian opinion 5
to sever a connection of almost a century's standing with an
area the development of which is largely due to Indian enter-
prise and where much Indian capital is engaged. But great
importance must also be attached to the interests and the feelings of
the Arab majority of the population of the Settlement. We are 10
impressed, apart from this, by the geographical remoteness of Aden
from India ; by the difficulties of merging it satisfactorily in a new
Indian Federation ; by the impracticability of a complete divorce
between the civil administration of the Settlement on the one hand
and political and military control of the Settlement and Protectorate 15
on the other ; and by the anomaly of including in such new con-
stitutional arrangements as may be approved for India an area pre-
dominantly Arab in population, already to some extent under
Imperial control, and in practice inseparable from the Aden Pro-
tectorate for which India has ceased to be in any way responsible. 20
The constitutionally anomalous position which would arise in regard
to Defence, if the present arrangements were allowed to continue
under the new Constitution, would be particularly marked. We
appreciate, moreover, the force in the argument that it is desirable on
general grounds, given the importance of Aden from a strategic stand- 25
point to the Empire in the East as a whole, and not merely to any
individual unit, that its control should vest in the Home Government.
After full consideration we are of opinion that the administration of
the Settlement of Aden should be transferred from the Government
of India to His Majesty's Government not later than the date of the 30
establishment of Federation. In reaching this conclusion we have
not ignored the apprehensions expressed by Indian interests con-
nected with Aden as to the possible prejudicial effect of a transfer
upon their position. We have, however, ascertained that His
Majesty's Government are prepared in the event of transfer, not 35
merely to relieve India of her annual financial contribution, but to
preserve a right of appeal in judicial cases to the Bombay High
Court ; to maintain (in the absence of any radical change in present
economic circumstances) the existing policy of making Aden a free 40
port ; to do their utmost to keep the administration at its present
standard ; and to impose no additional taxation unless in their
opinion such a course is absolutely necessary. They are further
prepared to agree that a proportion of Indian Service personnel shall
be retained for some years after the date of transfer ; that no racial
discrimination shall be permitted ; and that British-India subjects 45
shall be allowed to enter the Protectorate under precisely the same
conditions as any other British subjects. These assurances ought, in
our view, adequately to meet the apprehensions to which we have
referred above.