

(6) Rights and liabilities arising under any Statute or contract in existence at the commencement of the Act, including existing immunities from Indian income-tax in respect of interest on sterling loans issued or guaranteed by the Secretary of State in Council, will be maintained.

Any remedies which, but for the passing of the Act would have been enforceable by or against the Secretary of State in Council will, after the commencement of the Act, be enforceable against the Secretary of State.

All obligations arising under any such statute or contract which imposed a liability on the revenues of India will remain a liability on all the revenues of India whether Provincial or Federal.

(7) The Federation and every Province are under an obligation to place the Secretary of State in possession of sufficient funds to enable him to make such payments as he may have to make in respect of any liability which has to be met out of the revenues of the Federation or the Province, as the case may be.

## CHAPTER XLI.

### The Federal Court.

323. A Federal Court is an essential element in a Federal Constitution.

(1) It is, at once, the interpreter and guardian of the Constitution itself.

(2) It is a tribunal independent of Federal, Provincial and State Governments to decide on questions concerning the respective spheres of the Federal, Provincial and State Authorities.

324. The Federal Court has both original jurisdiction and appellate jurisdiction. Its original jurisdiction extends to the determination of disputes involving a matter of legal right, where the parties before it are two or more of the following parties, namely, the Federation and the Units.

**Original jurisdiction.**

The dispute involving a matter of legal right may arise out of

- (a) the interpretation of the Act itself or Orders in Council made thereunder or the determination of any rights and obligations arising thereunder,
- (b) the interpretation of Federal Laws,
- (c) the interpretation of an agreement, unless the agreement otherwise provides.

With regard to a State unit, the Federal Law must be such as would be applicable to the State.

**Appellate jurisdiction.**

325. It has an exclusive appellate jurisdiction in the following cases :—

(a) From judgments, decrees or final orders of High Courts in British India, on a certificate from the High Court that the case involves a substantial question of law as to the application or the interpretation of the Act, or any Order in Council made thereunder,

(i) on the ground that any such question has been wrongly decided, or

(ii) on any ground on which an appeal could have been filed to the Privy Council, *i.e.*, where the value exceeds a certain amount, or

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

(b) From a High Court of a Federated State, on the ground that a question of law with respect to the application or interpretation of the Act, or an Order in Council made thereunder has been wrongly decided. An appeal under this provision shall be by way of special case on facts stated by the Court from which the appeal is brought. The Federal Court may, on application for leave to appeal, require a special case to be stated, and may return a special case so stated for a further statement of facts.

326. The direction of the Federal Court in cases, where a special case is required to be stated or re-stated, or where the aid of the civil or judicial authority in a Federated State is required, will be in the form of a letter of request to the Ruler of the State.

**Letter of request to Federated States.**

The reason for this rule is thus explained by the Select Committee: "It was urged before us that to permit a litigant in a State Court to apply to the Federal Court for leave to appeal, if the State Court had already refused leave, would be to derogate from the sovereignty of the Ruler of the State, and that the refusal of a State Court to grant leave to appeal, at any rate in a case concerning the interpretation of Federal laws, should be treated as final. We should much regret the inclusion of a provision of this kind. The appellate jurisdiction of the Federal Court, so far as regards an Indian State arises from the voluntary act of the Ruler himself, *viz.*, his accession to the Federation; the jurisdiction is in no sense imposed on him *ab extra*

This being so, and since it is proposed that all appeals to the Federal Court should be in the form of a Special Case to be stated by the Court appealed from, we think the position of the States would be appropriately safeguarded if it were provided that the granting of leave to appeal by the Federal Court were in the form of Letters of Request, directed to the Ruler of the State to be transmitted by him to the Court concerned."

327. An appeal lies to the Privy Council from a decision of the Federal Court, by leave of the Federal Court or of the Privy Council. The Joint Select Committee stated as follows on this point:—

"The jurisdiction of the Privy Council will extend to appeals involving rights and obligations arising under the Constitution Act, as well as the interpretation of the Act itself. Effect will be given to the decisions of the Federal Court, as is the case with decisions of the Privy Council, by the Courts from which the appeal has been brought; and all Courts within the Federation will be bound to recognise decisions of the Federal Court as binding upon themselves. We may perhaps point out that the jurisdiction of the Privy Council in relation to the States will be based upon the voluntary act of the Rulers themselves, *i.e.*, their Instruments of Accession."

328. In matters in which an appeal lies to the Federal Court, either as of right or by leave of Court, no appeal whether by special leave or otherwise will lie direct to the King in Council against any decision of a High Court in British India.

329. Provision has been made conferring on the Federal Court powers similar to those enjoyed by the High Courts, enabling the Court to grant remedies, and to enforce its decrees and orders.

The Court will be empowered, with the approval of the Governor-General in his discretion, to make rules of Court, regulating the procedure and practice of the Court, including fees to be charged in respect of proceedings in the Court.

The rules may enable the Court to sit in two divisions, and specify the class of cases to be heard before each Division. The Chief Justice shall determine what Judges are to constitute a division. But no case may be heard before less than three Judges.

330. The law declared by the Federal Court and the Privy Council shall be binding on all Courts in British India, and in respect of the Federated States they shall be binding in regard to the application

or interpretation of the Act, or any order in Council made thereunder, or with regard to any matter with respect to which the Federal Legislature has power to make laws in relation to the State.

331. The Federal Court will not have any control over the High Courts in British India, and *a fortiori* over the State Courts. But all authorities, Civil and Judicial, throughout the Federation are enjoined to act in aid of the Federal Court. Its process will run throughout the Federation.

The judgment of the Federal Court in its original jurisdiction shall be a declaratory judgment. Its appellate judgment shall declare the judgment or order which is to be substituted for the original judgment.

The Federal Court will not have power of Federal execution either in British India or in the States. Its judgments will be carried out and made effective through the agency of the Courts from which the matter before it came, following the practice of the Privy Council and the American Supreme Court.

332. The Federal Court will be a Court of Record and will sit at  
**Composition.** Delhi and at such other places as the Chief Justice may fix after the approval of the Governor-General, and will consist of a Chief Justice of India and such number of Judges as His Majesty may appoint. Until the Federal Legislature presents an address to His Majesty through the Governor-General the number shall not exceed six. They will hold office until they attain the age of 65 years, unless they resign, or are removed by His Majesty for misbehaviour or infirmity of mind or body on the report of the Judicial Committee of the Privy Council.

In the Dominions, the Judges both of the Federal Court and the Provincial Courts are appointed by the Dominion executive and are removable from office only upon an address from both Houses of the Dominion Legislature.

**Qualification of Judges.** 333. In order to qualify for appointment as a Judge of the Federal Court, a person must

(a) have held office for 5 years as a Judge of a High Court in British India, or in a Federated State, or

(b) be a barrister of at least 10 years standing, or

(c) be a pleader or advocate of 10 years standing, of any such High Court, or of two or more High Courts in succession.

The salaries, pensions and leave and other allowances of Judges of the Federal Court will be fixed by Order in Council.

The conduct of a Judge of a Federal Court in the performance of his judicial functions shall not be open to discussion in the Federal Legislature or in any Provincial Legislature.

334. The establishment of a Federal Court will confer on the States a right which they have, so far, not enjoyed. Disputes between one State and another, or between a British Indian Province and a State have, so far, been decided by the Crown as the Paramount authority by means of 'orders' or 'decisions' in its executive capacity. Under an All-India Federation these disputes will be decided by the Federal Court.

335. The Federal Court has no power to entertain suits by private individuals against a State or its Ruler, or against a Provincial Government alleged to have transgressed legitimate authority. Such suits have, obviously, to be instituted in the State Courts or the Provincial Courts.

There is no specific provision for a case where an individual has a cause of action against a Federal Government. Obviously a State Court or a Provincial Court is not the proper forum to decide and adjudicate upon the liability of the Federal Government.

**Advisory jurisdiction.** 336. The Federal Court has also the power to decide any point of law referred to its opinion by the Governor-General.

This jurisdiction is analogous to that possessed by the Privy Council under S. 4 of the Judicial Committee Act, 1833, which provides that His Majesty may refer to the Committee for hearing or consideration, any matters whatsoever as His Majesty may think fit, and that the Committee shall thereupon hear and consider the same, and shall advise His Majesty thereon. The Canadian Supreme Court has also the duty of giving advisory opinions on constitutional issues submitted to it by the Governor-General in Council of Canada. (*Vide* 1912 Appeal Cases 571.)

As observed by the Joint Select Committee, "this advisory jurisdiction may often prove of great utility. We agree that it need not be limited to the federal sphere and that the right of referring any matter to the Court for an advisory opinion should be in the Governor-General's discretion." (Para. 327).

**The powers of the Supreme Court of the U. S. A.** 337. In this connection we may state the powers possessed by the Supreme Federal Court in the U. S. A. and Australia.

The original jurisdiction of the Supreme Court of the United States is fixed in the Constitution and includes only cases affecting

Ambassadors, other public Ministers, Consuls, and those in which a State shall be a party. Its appellate jurisdiction includes

(a) All cases from State Courts involving conflict between State law and Federal law.

(b) Cases involving the interpretation of the Federal Constitution, or any federal law or treaty.

(c) Cases involving a conflict between a State Constitution, and the Constitution of the United States.

(d) All cases where the decision of the Circuit Court of Appeals is not final.

(e) Certain appeals from special Courts such as Court of Customs Appeals, Court of Claims, and certain District Courts.

It must be remembered, in this connection, that the federal judicial system consists of three parts—the District Courts, then the Circuit Court of Appeals which hears appeals from the District Courts, and the decisions of which in certain matters are final, and lastly the Supreme Court of the United States.

**The powers of  
the High Court of  
Australia.**

338. The provisions in the Commonwealth of Australia Act are as follows :—

(a) The High Court of Australia has original jurisdiction under S. 75 of the said Act, in all matters

- (i) arising under any treaty,
- (ii) affecting consuls or other representatives of other countries
- (iii) in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party,
- (iv) between States, or between residents of different States, or between a State and the resident of another State,
- (v) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

(b) The High Court may, under S. 76 of the said Act, be conferred, by Act of the Commonwealth Parliament, additional original jurisdiction in any matter

- (i) arising under the Constitution, or involving its interpretation,
- (ii) arising under any laws made by the Commonwealth Parliament,

- (iii) of Admiralty and maritime jurisdiction,
- (iv) relating to the same subject-matter claimed under the law of different States.

(c) The appellate jurisdiction of the High Court of Australia under S. 73 of the Act is very wide. It can hear and determine appeals from all judgments, decrees, orders or sentences

- (i) of any justice or justices exercising the original jurisdiction of the High Court,
- (ii) of any other Federal Court or Court exercising Federal jurisdiction, of the Supreme Court of any State, or of any other Court of any State from which an appeal lay, at the time of the establishment of the Commonwealth, to the Privy Council,
- (iii) of the Inter-State Commission (a body constituted under S. 101 of the Commonwealth Act for the execution and maintenance of the provisions of the Constitution relating to trade and commerce, and of all laws made thereunder), on a question of law.

339. It will be observed that the provisions in the Commonwealth Act, and in the United States Constitution confer jurisdiction on the Federal Court in cases where the Federation or a State is sued at the instance of a private citizen whereas no such jurisdiction is vested in the Federal Court of India.

340. It will also be observed that appeals to the Privy Council will lie as a matter of course against certain decisions of the Indian Federal Court. The position is different in the Dominions. In the case of Canada and Australia appeals to the Privy Council lie only by special leave, and in some cases, appeals are prohibited unless permission is granted by the Court against whose decision the appeal is sought. The Irish Free State Act provides for appeal to the Privy Council not as a matter of course but only by special leave of the Privy Council, "the intention being that it should be confined to constitutional issues of high importance."

341. In every country the Federal Court plays a very prominent part in the development of the Constitution on healthy lines. The success of the American Constitution, especially in the early days of its establishment was, not a little, due to the independence and integrity of the Supreme Court, and the name of Chief Justice Marshall has been handed down to posterity as one of the great builders of the American Constitution. We have already observed that the framers of the Indian

Federation have to tackle problems which the framers of Federations elsewhere had not to deal with, and the success of the future Indian Federation would depend very much on the working of the judicial machinery. "If it either becomes a citadel of social obscurantism, prohibiting progressive legislation on the ground of guarantees to minorities, or of a defiant spirit of advance, justifying every legislative action however fundamentally it may go against the religious and cultural interests of communities, it will fail to cement the constituent States of the Federation. If it becomes a champion of Central Authority, and allows the Federal Legislature and Executive to override, on various pretences, the guaranteed rights of the States, or on the other hand if it tries to uphold and extend the jurisdiction and sovereignty of the States at the expense of the necessary powers of the Central Government, it will mar the prospects of a free, progressive, and united India. Only if it follows a steady middle course, and establishes, within a short time, a prestige and an ascendancy which neither the Central Government nor the States, neither the majority nor the minority would dare to question, then and only then can India be assured of a safe voyage through the stormy seas of Constitutional Federation."\*

342. Opinion was divided on the question of a Supreme Court.

**A Supreme Court  
of appeal for  
British India.**

The jurisdiction of such a Court would necessarily be limited to British India and its functions would be, within the limits assigned to it, to act as a final Court of Appeal in India from the decision of the Provincial High Courts on matters other than those—mainly constitutional—which will fall within the jurisdiction of the Federal Court. With such a Court in existence there will be good ground for restricting the right of appeal to the Privy Council. On the other hand, the other view taken is that it is an unnecessary and unjustifiable expense and that it will be difficult to find, in addition to the Judges of the Federal Court and the High Court, a body of judicial talent, of the calibre essential, if it is to justify its existence. There is a further view as to whether such a Court may not be part of the Federal Court. According to this plan the Federal Court would be constituted into two permanent divisions, one division confining its work to interpreting the Constitution and deciding constitutional disputes, the other division functioning as a Supreme Court of Appeal. The Joint Select Committee was of the opinion that a separate Supreme Court was unnecessary, and that in any event, there was no need for a Court of Criminal Appeal, and that if a second division of the Federal Court should

---

\* Mr. Panikkar in "Federal India."

function as a court of appeal, it should not be empowered to hear criminal appeals. They state as follows :—

“ The White Paper proposes that the Federal Legislature should be empowered to establish a separate Supreme Court to hear appeals from the provincial High Courts (1) in civil cases and (2) in criminal cases where a death sentence had been passed, provided of course that an appeal did not lie to the Federal Court. The Court would in effect take the place of the Privy Council, though an appeal would still lie to the latter by leave of the Supreme Court or by special leave of His Majesty. We have given very careful consideration to this proposal, but we do not feel able to recommend its adoption. A Supreme Court of this kind would be independent of, and in no sense subordinate to, the Federal Court; but it would be impossible to avoid a certain overlapping of jurisdictions, owing to the difficulty of determining in particular cases whether or not a constitutional issue was raised by a case under appeal. This might involve the two Courts in undignified and very undesirable disputes, and we are satisfied that the existence of two such Courts of co-ordinate jurisdiction would be to the advantage neither of the Courts themselves nor of the Federation. There is much to be said for the establishment of a Court of Appeal for the whole of British India, but in our opinion this would be most conveniently effected by an extension of the jurisdiction of the Federal Court, and we think that the Legislature should be empowered to confer this extended jurisdiction upon it. It has been objected that not only would so great an increase in the *personnel* of the Court be required as to make it difficult to find a sufficient number of Judges with the necessary qualifications, but also that the essential functions of the Federal Court as guardian and interpreter of the Constitution would tend to become obscured. We fully agree that the quality of the Federal Judges is a matter of the highest importance and that nothing ought to be done which might diminish or impair the position of the Court in its constitutional aspect, but we think that the fears expressed are unfounded. In the first place, it is clear that there would have to be a strict limitation on the right of appeal, so as to secure that only cases of real importance came before the Court; and, if this were done, we see no reason why a comparatively small number of additional Judges should not suffice. Secondly, we assume that the Court would sit in two Chambers, the first dealing with federal cases, and the second with British India appeals. The two Chambers would remain distinct, though we would emphasise the unity of the Court by enabling the Judges who ordinarily sit in the Federal Chamber to sit from time to time in the other Chamber, as the Chief Justice might direct, or Rules

Joint Select Committee on the Supreme Court of appeal.

of Court provide ; but beyond this we do not think that the two Chambers should be interchangeable.

“ The Supreme Court under the White Paper proposals would, however, as we have said, have jurisdiction to hear certain criminal appeals from British India. We are satisfied that these would be so numerous that, if the Federal Court were given the extended jurisdiction which we have suggested, an increase in the number of Judges would be required in excess of anything which we should be willing to contemplate. The question then arises whether the Federal Legislature should be empowered, if and when they thought fit, to set up a separate Court of Criminal Appeal for British India, subordinate to the Federal Court. After careful consideration we have come to the conclusion that a Court of Criminal Appeal is not required in India. Nearly every case involving a death sentence is tried in a District Court, from which an appeal lies to the High Court, and, apart from this, no death sentence can be carried out until it has been confirmed by the High Court. Only three of the High Courts (excluding Rangoon) exercise an original criminal jurisdiction, and though there is no further appeal from these Courts, every prisoner under sentence of death can appeal for remission or commutation of sentence to the Provincial Government, or, if he wishes, can ask for special leave to appeal to the Privy Council. In these circumstances, the rights of a condemned man seem to be very fully safeguarded, and we think that no good purpose would be served by adding yet another Court to which appeals can be brought. We should add that at present under the Criminal Procedure Code, a condemned prisoner can apply for commutation of his sentence not only to the Provincial Government but also to the Governor-General-in-Council. We think that under the new Constitution the determination of applications for commutation or remission of sentence under S. 401 of the Code should rest with the authority primarily responsible for the preservation of law and order, namely, the Provincial Government, and that the Federal Government, that is to say the Governor-General acting on the advice of his Ministers, as the successor of the Governor-General-in-Council should no longer possess this statutory power of commuting or remitting sentences. At the same time, we are reluctant to diminish the opportunities for appeal which are at present enjoyed under the Indian Law, and we recommend that the power now exercisable in this respect by the Governor-General-in Council should henceforth vest in the Governor-General acting in his discretion, to whom in addition there will, we assume, be delegated as at present the prerogative power of pardon.” (Paras. 329 and 330.)

The Act gives effect to the recommendations of the Select Committee by providing for the setting up of an appellate division of the

Federal Court for hearing civil appeals only from British India in cases where the subject-matter in dispute is not less than Rs. 50,000 or such other sum not less than Rs. 15,000 as may be fixed by an Act of the Federal Legislature.

343. It will thus be seen, that there will be no separate Supreme Court for British India, and that when the appellate division of the Federal Court is constituted as aforesaid, to take the place of the Supreme Court, it will entertain only civil appeals. The view of the Select Committee that there is no need for a Court of Criminal Appeal is open to criticism. It is true, as the report of the Joint Select Committee says, that death sentences passed in the mofussil have to be confirmed by the High Court. But there are cases where, in the interests of the accused, there should be a higher tribunal in India to hear appeals from its decision. In regard to the High Courts which exercise original criminal jurisdiction such a Court of Criminal Appeal is absolutely essential, especially if the Advocate-General's power to give a fiat is to be limited in accordance with the decision of the Full Bench of the Madras High Court in the Karunguzhi Parcel Murder Case. The Privy Council is not a Court of Criminal Appeal. There is, therefore, a good deal to be said in favour of the suggestion that the Federal Court in the second division should have jurisdiction, as proposed in the White Paper, to hear appeals where sentences of death have been passed or where acquittals on certain criminal charges have been reversed by a High Court. Every prisoner under sentence of death can, of course, as the Joint Select Committee say, appeal for remission or commutation of a sentence to the Provincial Government or can ask for special leave to appeal to the Privy Council. But a Provincial Government cannot be a substitute for a Court of Criminal Appeal. Further, the Privy Council is not a Court of Criminal Appeal and High Courts feel reluctant, for this reason, to grant leave to appeal to the Privy Council. In such circumstances, the Joint Select Committee's observation that "the rights of a condemned man seem to be very fully safeguarded" is not either correct or just.

---