

*(August 28, 1933)*

## The Constitutional Future of India

BY MOHAMMAD ZAFRULLA KHAN.

The speaker was introduced by President Sifton, as a distinguished representative of the Council of India.

MOHAMMAD ZAFRULLA KHAN:—Mr. Chairman and gentlemen—I propose this afternoon to give you in brief the outline of the proposed new constitution for India. The time at your disposal and at my disposal is so short that it will be difficult to make an attempt to go into details of any kind and even with regard to the main features in that constitution, I am afraid I shall have to omit a good deal that does not bear directly upon the constitutional issue.

Before I go on to make an attempt to describe this constitution that is being shaped for India I may be permitted to make a few observations of a preliminary character. Most of you may be familiar with the matters to which I am going to allude in the beginning of my address but I venture to think in order to enable you properly to follow that which may come later perhaps those details may be necessary.

India, you are aware, with the exception of two entirely independent states, Nepal and Bhutan, may be divided into two parts, British India and what are described as the Indian States. In area the Indian states are almost one third of the whole of India and in population slightly less than one quarter. The present constitution of India is that which was delivered down by the Government of India Act of 1919 which is generally described as embodying the Montague-Chelmsford scheme of reform. For the purpose of my address I need not go further back than that.

Under the system which is in force under the Government of India Act of 1919 the Indian states may be left

out of the picture, as that Act does not attempt to bring the Indian states into the constitution of India. In British India the system introduced by that Act was this. The British Indian provinces which, prior to the passing of the Act, were merely administrative units carrying on the policy laid down by the central government, were sought to be converted into constitutional units. The conversion was not complete but the foundations were laid.

Let me in brief explain the constitution of a province as it exists today under the 1919 Act. The executive authority is vested in the governor, advised by ministers with regard to what are known as the transferred subjects and acting through executive members of his council, as they are called, with regard to reserved subjects. The whole field of administration in a province is divided into these two compartments and generally it may be said that the beneficent departments are transferred departments—education, medicine, public health, communications, local self-government and so on—whereas generally, police, justice, finance and revenue are reserved departments in the provinces.

Now as I have said, the transferred departments are administered by ministers who are chosen from the legislature, who must be elected members of the legislature in responsibility to the legislature, normally, that is to say. The governor has the power of overruling the ministers with regard to transferred subjects, if he disagrees with them and thinks that, having regard to his responsibility as the head of the executive, he ought to differ from them or direct action should be taken contrary to the views of the councillors. In the reserved departments the responsibility is entirely his own. Of course he has due regard to the wishes of the legislature expressed through resolutions and debates in the chamber and so on, but the decision must be his and he takes entire responsibility for it. This is known as the diarchic system, divided by the provincial fields into two parts. At the centre under the present system there is no responsibility. There is a legislature consisting of two houses, the Council of State being the upper chamber and the Assembly being the lower, and they have the right of discussion, of passing resolutions, of

discussing the budget, asking questions, and passing legislation. But the government is not carried on in responsibility to the legislature. The various departments are committed to the charge of executive members, a certain number of whom by convention are appointed from the Indian Civil Service and a similar number from public men. This smaller number may be taken or may not be taken from the Legislature. But if a member of the legislature is appointed an executive member, he ceases to be an elected member of the legislature. He becomes an official member and his responsibility is entirely to the Governor-General. That is in brief the present system.

Now this was introduced by the Government of India Act in 1919 and the Government of India Act said that after the expiry of ten years from the act coming into force a Royal Commission would be appointed to report the manner in which the reforms then passed had worked and as to the steps to be then taken to confer greater responsibility upon Indians in the matter of the government of their own country. In the Autumn of 1927 this Royal Commission was appointed. It was appointed within the ten years and not after the expiry but that was legalized by an amending Act of Parliament and this Commission is generally known as the Simon Commission.

The Simon Commission made two visits to India, took evidence and finally issued its report in the Spring of 1930. That report aroused a great deal of hostile criticism and agitation in India as it was considered to be reactionary in many respects and it was thought it didn't go far enough in many others. As the result of that agitation and the dissatisfaction expressed throughout the country with the report, the viceroy announced that with the approval of His Majesty's Government in India His Majesty's Government intended to summon a Round Table Conference of the representatives of Indians and the representatives of the three parties in parliament to meet in London and to make an attempt to arrive at agreed conclusions with regard to the future constitution of India.

Well, this conference met in October of 1930 for the first time in London, and the peculiar feature of this con-

ference was that not only were representatives of British India invited to that conference but also representatives of the Indian States, and for the first time the Indian States began to figure in the future constitutional picture of India. And within the very first week of that conference declarations were made from different quarters showing that the only possible solution of the constitutional difficulties of India would be an All India federation at the centre, comprising not only the British India provinces but also the Indian states, or such Indian states as were willing to come into federation. And the round table conference was told to lay down by agreement certain principles, that the future constitution of India should be on the basis of an all India federation with the responsibility at the centre, except with regard to certain reserved departments and also subject to certain safeguards to autonomous provinces. That is to say the units of federation would be on the British side, the British Indian provinces which, so far as provincial matters are concerned should be free from control of the centre, and such Indian states or group of states as were willing to enter the federation. These were described as the three legs of the future constitution of India; responsibility at the centre, autonomous provinces and safeguards.

Well, the second of the three round table conferences attempted to develop the details of this picture and at the end of the third round table conference His Majesty's Government issued in the form of a White Paper their proposals with regard to the future constitution of India. This White Paper was laid before Parliament and the two Houses were invited to set up a joint select committee to consider proposals for constitutional reforms in India, and this committee was authorized to invite Indian representatives to sit with them during their examinations and deliberations. From the purely constitutional point of view there are two peculiar features attached to this committee and they are that this committee was set up before a bill was introduced in Parliament, the usual procedure being that a select committee of one or both Houses is set up only when the legislative measure is before Parliament. The

second is that for the first time in history a select committee of parliament was authorized to invite persons who were not members of the committee or even members of parliament to come and sit with them. Well, that committee is now in session. It began its sittings about the middle of May and adjourned for the Summer recess in the beginning of August and is to resume its sittings in the beginning of October.

Having regard to questions of privileges of the committee and of Parliament, I am not at liberty to say anything with regard to the deliberations of the committee but I do propose to go on in the briefest outline to describe to you the sort of constitution that is under consideration. It may be that the committee in the final report may seek to change some of the features of this constitution. It may be that parliament, when they are actually considering the bill which will be based on the report of this committee, may make alterations of whatever character it pleases, and therefore I must not be taken to express any view with regard to what the committee is likely to do or parliament is likely to do.

The kind of constitution that at present holds the field is this; and I shall develop each of the three legs of the constitution which I have already described. Let us take the centre first. It is proposed that the executive authority at the centre shall continue to vest in the Governor-General as representing the crown but that the central field shall be divided into two; one the reserved departments and the other the transferred departments. The reserved departments are proposed to be defence, external affairs and the ecclesiastical department. These departments will be put in charge of what will be known as executive councils. These executive councils will be appointed by the Governor-General but he will be entirely free in his choice of these executive councils. He may appoint members of the civil service to them, or he may appoint no officials to them. He may select his councillors from the legislature or outside the legislature. He may appoint English people to it or he may appoint Indians. It will be left entirely to him, and they will be responsible not to the legislature but to

the Governor-General. With regard to the other sections the rest of the field of administration at the centre, he will be advised by a council of ministers. What is proposed is that he should do something like this. After the elections have taken place he should summon the person who in his opinion has the largest following in the legislature and in consultation with him appoint the council of ministers. This council of ministers would normally be the body that will be responsible for the administration of the transferred departments and they will administer them in responsibility to the central legislature with the constitutional consequence that, if they lose the confidence of the legislature at any time, they resign and go out and others are appointed, and so on.

That is what is called central responsibility. That is the extent of the responsibility proposed to be conferred. But then there are two safeguards and the safeguards are these. It is felt that, until India is ready entirely to take over the responsibility for its internal affairs, there must be some special provisions defined to prevent a set of conditions arising which might ultimately lead to a breakdown and these provisions have been described as safeguards. Their technical name is discretionary powers and special powers of the Governor-General. The discretionary powers need not detain us very long but those are the usual routine constitutional powers exercised by the head of any Dominion or any executive in any country. These are, for instance, the power to summon and to prorogue and dissolve the Legislature, the power to give or withhold assent to legislative measures, and so on.

It is the special powers that are the peculiar feature of this proposed new constitution for India, and they are these. The Governor-General will have power to direct that action be taken contrary to the advice of his ministers in the transferred departments; (*a*) in order to prevent a grave menace to the peace and tranquility of India or a part thereof; (*b*) to safeguard the financial stability and credit of the federation; (*c*) to prevent serious prejudice to the legitimate interests of the minorities. Then (*d*) to secure to the services their statutory rights and privileges

and to safeguard their legitimate interests (e) to prevent commercial discrimination; (f) to safeguard the rights of Indian States; (g) in matters affecting the administration of the Indian Departments.

Each of these may require a word of explanation. The first two, peace and tranquility; the subject of law and order even at present is a provincial subject. It is not a central subject but it is felt that matters may arise in the future where certain implications of a specific character may affect more provinces than one, in which case it may be necessary for the Governor-General to take action over the governors of the respective provinces affected, and therefore, although this is a provincial subject, the ultimate power of directing action of an extraordinary or of an emergent character is left in the Governor-General. With regard to the financial stability and credit of the federation the power is visualized to be of somewhat this character. Ordinarily the finance minister of the federation would be left to frame his own budget and to put forward his own taxation proposals, and so on. But if there were a series of deficits, or if there was a finance minister who was reluctant to impose necessary taxation in order to meet a balanced budget, or if he otherwise failed to take action that would ensure the federation would continue to get its credit and its financial stability, power is given to the Governor-General to direct that action should be taken contrary to what is proposed by the finance minister. Again emergency services need not detain us long. It is felt people who have entered the provinces' services, not expecting that the government of India will be carried on in a manner which is not responsible to the parliament and not in responsibility to Indian legislators, require assurance that their pensions and their rights will not be set at naught by future popular ministers, and power is given to the governors of the provinces and the Governor-General in the centre to see that is not done.

Commercial discrimination. This is a peculiar reference to the commercial interests of British merchants in India. There is an apprehension, (I cannot say there is no justification for it, but it is alleged by British merchants

themselves that there is no present justification for it), but there is an apprehension that a set of conditions might arise in the future where they might be unfairly discriminated against in India. In order to see that that does not happen the Governor-General is given power to prevent any legislative action or other action which is designed to be discriminative against British commerce.

With regard to the Indian states the position is this. They desire to come into the federation with regard to a certain specified list of subjects. They will make those federal. With regard to the rest they have stipulated and quite rightly that there shall be no interference by the federation within their own states, that the remaining portion of subjects affecting their own states will be administered by them in their own way. Having regard to that the question arises, why should the Governor-General have a special power to safeguard their rights when the constitutoin itself will make that division. On the other side it was felt that occasions might arise when something is being done or is proposed to be done in British India which might affect either the peace and tranquility of neighboring Indian states or might affect the dynastic rights of a Prince ruling a neighboring state, and a host of other questions which cannot be exactly defined in the constitution; and in order to see that that doesn't happen or, if likely to happen, can be prevented the governor is given power to prevent prejudice to the Indian states.

The last special power is with reference to the reserved departments. The administration of the reserved departments will be in the hands of the Governor-General himself but a situation like this may arise, for instance; defence will be reserved but the real minister or the council of ministers of the cabinet might wish to pursue a policy with regard to measures which is prejudicial in some manner to the proper defence of India. That is a matter which arises in the transferred departments but affects the reserved department and there again the Governor-General can apply special powers to prevent that. This is the set of special powers or safeguards that will remain in the constitution during the transitional period until the re-

served departments can be handed over to ministers who will administer them in responsibility to the Legislature.

At the centre the Legislature will have two chambers, the upper and the lower as at present; but the modification will be this. At present there is a certain element of nominated members, chiefly officials of the government. Nomination will disappear entirely from the lower chamber and almost entirely from the upper chamber. It is proposed in the upper chamber out of 260 members ten shall be nominated by the Governor-General and 250 will represent British India and the Indian States. Well, apart from these nominated members by the Governor-General there will be another division of members as between British India and the Indian States. It is proposed as in the present federal chamber the Indian states shall have 40 per cent. of the total and the main Indian states 33 1-3 per cent. representation and the balance to British India. It is proposed also that British Indian representatives shall come in by election to both houses but that the representatives of the Indian States shall come in by nomination by the rulers of the states that join the federation. With regard to the method of election it is almost unanimously agreed that election of the British representatives, British Indian representatives to the upper chamber, shall be election by the provincial legislatures. The Provincial legislature shall elect their own quota of representatives to the upper federal chamber. That is, the election shall be indirect. The preponderant view with regard to the lower chamber is that election to the lower from British Indian provinces shall be direct; but there is some controversy and I cannot say what the final decision may be.

A few observations with regard to the proposed autonomous British Indian provinces. There it is proposed that the whole of the provincial field of administration shall be transferred to the control of ministers appointed from the legislature who shall carry on the administration in conformity with the wishes of the legislature, that is to say, who shall be responsible to the legislature. But there again, there is that set of special powers or safeguards. They are not exactly the same as in the case of the

Governor-General, as the same matters do not arise in the provinces as in the centre, but substantially the same. Again the first is to prevent grave menace to the peace or tranquility of the provinces or any part thereof. Secondly, to prevent serious prejudice to the legitimate interest of a minority. Third, to secure to these their statutory rights and privileges and safeguard their legitimate interests. Fourth to prevent commercial discrimination. Two further powers which brings the total to seven as in the case of the Governor-General, but these are different. Five, to prevent prejudice to the Indian States. Six, with regard to the administration of excluded or partially excluded areas, I shall explain in a moment what that is, and, seven, to carry out any orders lawfully issued by the Governor-General. Well, the first five I have explained in the case of the Governor-General. They are the same. You will notice two other safeguards with regard to the financial credit or stability in the provinces in the case of the governor and the reason is this. There will be further great matters of policy which might prejudice the stability of the province that are likely to arise in the provincial financial field. The whole field of taxation will be divided into two carefully delineated divisions and the provinces will be able to impose taxes allotted to them and make their budgets balance within those limits. And from past experience it appears that provinces are not unwilling to increase taxation when they want to expand their beneficent departments or any other activities. On the other hand there are two additional powers here given, one has regard to excluded areas and partially excluded areas. There are some portions of different areas in different provinces that are regarded as so backward and so sparsely populated, and the population of these areas is in such a nomadic condition: it is not felt possible at the moment to bring them into the scheme of reforms and therefore the governor is given special power to look after those areas. Their administration will be ordinarily carried on by the government but if any special question arises the governor would be able to give orders and not be bound by the constitutional procedure.

Then there is special power with regard to the governor

which does not exist with regard to the Governor-General. The latter may on occasion have to give directions to the governor of a province in respect of certain matters. For instance, in regard to the first power to prevent menace to the peace and tranquility of India, the instrument for carrying out that order will be the provincial government in the case of the province and therefore he has to be given a special power so that when he gets an order of that kind he should not be under necessity of persuading his own cabinet to carry it out. If the cabinet should not be willing to carry it out, he must carry it out himself. This will be the provincial field and the autonomous provincial governments.

There are several other aspects of the situation which will require to be touched upon if the picture even in barest outline is to be complete. For instance, franchise; or again, judiciary and questions of relations between autonomous provinces and the federal centre, both on the legislative side and the administrative side. Then there is the question which might arise in the provinces for which provision is being made of the manner of enforcing these special powers. Supposing the Governor-General in order to discharge one of the special responsibilities wants money and the legislature does not vote the money, or supposing they fail to make legislative provision for certain matters. There is provision being made for these matters also with regard to reserved departments and special responsibilities of the governor and with regard to his special responsibilities the governor should be able to certify funds if the funds are not being placed at his disposal by the legislature, and similarly that each of them may be able to put on the statute book measures of legislature if they effect these special responsibilities, and within that limited area if those measures are not passed by the legislature.

As an appendix to all this there is the breakdown provision which is this. If conditions arise throughout the country or within a particular province which make it impossible for the governor in the case of a province or the Governor-General in the case of the federation to carry on government within the constitution act, the Governor-General and the respective governors will be

given powers to assume to themselves whatever powers they consider necessary in the provincial or federal field and carry on the administration of the provinces or the country to that extent by their own order, as it were without responsibility to the legislature, by means of proclamation; but the proclamation in the case of the governor must be immediately communicated to the Governor-General and the secretary of state and in that of the Governor-General to the secretary of state and it shall ultimately be laid before parliament, and not remain in force longer than six months unless parliament of both houses shall extend the period. This is called the breakdown provision. Supposing the legislature in a province time after time refuses supply and starts as it were civil disobedience, the provision would come into force.

This is the sort of constitution that is under the consideration of the joint select committee. After this committee has reported, on the basis of their report the detail will be drafted and introduced and parliament will consider the bill and the question will arise as to how it is to come into force and when.

I have deliberately kept my address explanatory rather than propagandist for the reason that, being one of those who are still sitting with the joint select committee to examine these proposals. I thought it would not be fair to give my own opinion outside the committee. May I add this one word that, in the preamble of the act of 1919 and when in the various round table conferences, in the various speeches of the prime minister and the secretary of state and in the resolutions prepared, certain promises have been made and hopes held out to India with regard to its constitutional future. If these promises are fulfilled in a liberal spirit, I have not the slightest doubt that the new constitution will be worked successfully by the Indians and it will draw India much closer to Great Britain and the other parts of the Empire than has been the case in the past.

At the request of President Sifton, President Cody of the University of Toronto thanked the speaker on behalf of the Club for his definite and interesting exposition of the subject, praising his mastery of the English language.