

A MODEL PROVINCIAL CONSTITUTION

[At its sitting held on April 30, 1947, the Constituent Assembly of India set up two committees, one to report on the main principles of the Union constitution (see Chapter 6) and the other on the principles of a model provincial constitution. Of the 25 members of the Provincial Constitution Committee, seven sent replies. The following is an independent memorandum prepared by Sri B. N. Rau and submitted by him for the consideration of the committee.]

PART I

GOVERNORS' PROVINCES

CHAPTER I

THE PROVINCIAL EXECUTIVE

1. For each province there shall be a Governor elected
Governor by the provincial legislature by secret vote
 according to the system of proportional
 representation by the single transferable vote.

[Note: In a unitary constitution and even in a federal constitution approximating to the unitary type like that of Canada, provincial Governors may be appointed by the Central Government. Under the Cabinet Mission's plan of May 16, 1946, the Union Government will not have this power and some other method of selecting Governors has to be adopted. We can either have direct election by the people of the province or some system of indirect election. As the Governors are intended for the most part to be responsible heads acting on the advice of

ministers, it is perhaps unnecessary to have direct election with all its complications. As at the Centre, we may have election by the legislature. This is what has been proposed in the above provision.]

2. (1) The Governor shall hold office for a term of five years, except in the event of death, resignation or removal.

(2) The Governor may be removed from office for misbehaviour or infirmity of mind or body by a resolution of the provincial legislature supported by not less than two-thirds of the total membership of the legislature.

(3) The Governor shall be eligible for re-election once, but only once.

[*Note:* I have not suggested any provision in this memorandum as to how casual vacancies in the office of Governor are to be filled. The majority of the replies from the members of the committee propose that there should be a Deputy Governor, elected in the same manner as the Governor, who would take his place in the event of a casual vacancy. The proposal requires careful consideration. With a parliamentary type of executive, there is hardly room for a Deputy Governor in the sense that he can hardly be given any regular functions. Where the legislature is bicameral, he might perhaps be made *ex-officio* Chairman of the Upper Chamber in the same way as the Vice-President of the U.S.A. is the Chairman of the Senate. But most of the replies are against the creation of an Upper Chamber. The result will be that we shall have a Deputy Governor with no normal functions. There are obvious risks in the creation of such an office. I have accordingly, for the present, omitted any provision for a Deputy Governor.

The Commission device which has been adopted for casual vacancies at the Centre would hardly be appropriate in a province, because most of the provincial legislatures will be unicameral. A possible solution would be to utilise the Council of State; if this is acceptable, the provision would run thus:

“The Council of State may by a majority of its members make such provision as they think fit for the discharge of the functions of the Governor in the event of any casual vacancy or other unforeseen contingency.”]

3. The executive authority of the province shall be exercised by the Governor either directly or through officers subordinate to him, but this shall not prevent the Union Parliament or the provincial legislature from conferring functions upon subordinate authorities, nor shall it be deemed to transfer to the Governor any functions conferred by any existing Indian law on any court, judge or officer or local or other authority.

4. Subject to the provisions of this constitution and of any special agreement, the executive authority of each province shall extend to the matters with respect to which the legislature of the province has power to make laws.

[*Note:* The reference to special agreements in this provision requires a word of explanation. It is possible that in the future there may be Indian States or groups of Indian States desiring to have a common administration with a neighbouring province in certain specified matters of common interest. In such cases, the Rulers concerned may, by a special agreement, cede the necessary jurisdiction to the province. Needless to say, this will not interfere with the accession of the State or States concerned to the Union, because the accession to the Union will be in respect of Union subjects, whereas the cession of jurisdiction contemplated here is in respect of provincial subjects.]

5. There shall be a Council of Ministers to aid and advise the Governor in the exercise of his functions except in so far as he is, by or under this constitution, required to exercise his functions or any of them in his discretion.

[*Note:* For the most part, the Governor will act on advice, but there are certain functions which even a responsible head has to exercise in his discretion *e.g.*, the choice of the Prime Minister, the dissolution of the legislature (in certain events) and so on. In the present circumstances, similar discretion may have to be vested in the Governor in the matter of the protection of minorities and the maintenance of law and order. Of course, it is possible that if in any of these "discretionary"

matters, the Governor were to act against the advice of the Ministry, the Ministry might resign and the Governor might not be able to find an alternative Ministry. In such cases the Governor would normally accept the advice of the Ministry in preference to his own judgment, but in an extreme case he might dissolve the legislature. If the new legislature endorses his view of the situation and returns a different party to power, his action will have justified itself. If, however, it returns the same party to power, the Governor will then have no option except to act in accordance with the advice of his former ministers. The "discretionary" power will, in such cases, have at least the effect of bringing the issue before the electorate.]

6. If any question arises whether a matter is one for the Governor's discretion or not, the decision of the Governor in his discretion shall be final.

7. The question whether any and, if so, what advice was tendered by the ministers to the Governor shall not be enquired into in any court.

8. Subject to the provisions of the next succeeding clause, *Other provisions as to ministers* the Governor's ministers shall be chosen and summoned by him and shall hold office during his pleasure.

9. (1) The Governor may, if he thinks fit, leave all his ministers to be elected according to the system of proportional representation, by means of the single transferable vote, by the provincial legislature or, where the legislature is bicameral, by the Lower Chamber of the provincial legislature.

(2) The normal term of office of the ministers so elected shall expire with the term of the provincial legislature or, where the legislature is bicameral, the term of the Lower Chamber of the provincial legislature which elected them:

Provided that they shall continue in office until the election or appointment of their successors.

(3) Any minister so elected shall not be removable from office during his normal term except by a decision of

the provincial legislature or, where the legislature is bicameral, by a decision of the Lower Chamber of the provincial legislature supported by not less than two-thirds of the total number of members of the legislature or the Chamber, as the case may be.

(4) Vacancies among the ministers so elected arising within the normal term of office shall be filled at the next meeting of the provincial legislature for the remainder of that term.

[*Note:* This provision is an attempt to introduce something like the Swiss type of executive in those provinces where this type is considered preferable. The choice is left to the Governor whether he will have this type or the British type.]

10. (1) A minister who for any period of six consecutive months is not a member of the provincial legislature shall at the expiration of that period cease to be a minister.

(2) The salaries of ministers shall be such as the provincial legislature may from time to time by Act determine and, until the provincial legislature so determine, shall be determined by the Governor:

Provided that the salary of a minister shall not be varied during his term of office.

11. The functions of the Governor with respect to the choosing and summoning and the dismissal of ministers (except where he leaves them to be elected by the legislature under clause 9) and with respect to the determination of their salaries shall be exercised by him in his discretion.

12. The relations between the Governor and his ministers (except where he leaves them to be elected by the legislature under clause 9) shall, as nearly as possible, be the same as those between the King and his ministers in England.

13. (1) In the exercise of his functions, the Governor shall have the following special responsibilities: that is to say,

Special responsibilities of Governor

(a) the prevention of any grave menace to the peace and tranquillity of the province or any part thereof; and

- (b) the safeguarding of the legitimate interests of minorities.

[*Note:* Until the advisory committee has proposed a scheme for the administration of the excluded and partially excluded areas, it will not be possible to say whether the Governor should be given any special responsibilities in connection with their administration.]

(2) If and in so far as any special responsibility of the Governor is involved, he shall, in the exercise of his functions, act in his discretion.

14. (1) The Governor shall appoint a person, being a *Advocate-General for province* person qualified to be a judge of a High Court, to be Advocate-General for the province to give advice to the provincial government upon legal matters.

(2) The Advocate-General shall hold office during the pleasure of the Governor and shall receive such remuneration as the Governor may determine.

15. All executive action of the government of a province shall be expressed to be taken in the name of the Governor.
Conduct of business of provincial government

16. The Governor shall make rules for the more convenient transaction of the business of the provincial government and for the allocation of duties among ministers.
Rules of business

CHAPTER II

THE PROVINCIAL LEGISLATURE

17. (1) There shall for every province be a provincial legislature which will consist of the Governor and the Legislative Assembly; in the following provinces, there shall, in addition, be a Legislative Council (here enumerate those provinces, if any, which desire to have an Upper Chamber).
Constitution of provincial legislatures

(2) The representation of the different territorial constituencies in the Legislative Assembly shall be on the basis of population and shall not be more than one representative for every lakh of the population.

(3) Every Legislative Assembly of every province, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting.

[*Note:* Under the existing constitution, Madras, Bombay, Bengal, the United Provinces, Bihar and Assam have two Chambers and the rest one. Mr. Kher, Chief Minister of Bombay and Dr. P. Subbarayan, Minister in Madras, no longer desire an Upper Chamber in their respective provinces. The question whether there is to be an Upper Chamber or not in any province and, if there is to be one, how it is to be constituted will probably have to be left to the decision of the representatives of that province in the Constituent Assembly. So too the question whether there is to be special representation in the Legislative Assembly for universities, for labour, for women and so on.]

18. The provisions for the meeting, prorogation and dissolution of the provincial legislature, the *Composition of provincial legislatures, etc.* relations between the two Chambers (where there are two Chambers), the mode of voting, the privileges of members, disqualification for membership, parliamentary procedure, including procedure in financial matters, etc. shall be on the lines of the corresponding provisions in the Act of 1935.

19. In the provincial legislature, business shall be transacted in Hindustani (Hindi or Urdu) or *Language* English, provided that the Chairman (where there is an Upper Chamber) or the Speaker, as the case may be, may permit any member who cannot adequately express himself in either language to address the Chamber in his mother-tongue. The Chairman (where there is an Upper Chamber) or the Speaker, as the case may be, shall make arrangements for giving the Chamber, whenever he thinks

fit, a summary of the speech in a language other than that used by the member and such summary shall be included in the record of the proceedings of the Chamber.

[This follows the corresponding provision in the Constituent Assembly rules.]

20. The provincial legislature may from time to time make provisions with respect to all or any of the following matters; that is to say,

Franchise for provincial legislature

- (a) the delimitation of territorial constituencies;
- (b) the qualifications for the franchise and the preparation of electoral rolls;
- (c) the qualifications for being elected as a member of either Chamber;
- (d) the filling of casual vacancies in either Chamber;
- (e) the conduct of elections under this constitution and the methods of voting thereat;
- (f) the expenses of candidates at such elections;
- (g) corrupt practices and other offences at or in connection with such elections;
- (h) the decision of doubts and disputes arising out of or in connection with such elections;
- (i) matters ancillary to any such matter as aforesaid:

Provided that the superintendence, direction and control of elections, including the appointment of election tribunals, shall be vested in the President acting in his discretion, but subject to the approval of the Council of State.

CHAPTER III

LEGISLATIVE POWERS OF GOVERNOR

21. (1) If at any time when the provincial legislature is not in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require.

(2) An ordinance promulgated under this clause shall have the same force and effect as an Act of the provincial legislature assented to by the Governor, but every such ordinance—

(a) shall be laid before the provincial legislature and shall cease to operate at the expiration of six weeks from the reassembly of the provincial legislature, or, if before the expiration of that period resolutions disapproving it are passed by the legislature, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the Governor.

(3) If and so far as an ordinance under this clause makes any provision which the provincial legislature would not under this constitution be competent to enact, it shall be void.

[*Note:* The ordinance-making power has been the subject of great criticism under the present constitution. It must, however, be pointed out that circumstances may exist where the immediate promulgation of a law is absolutely necessary and there is no time in which to summon the provincial legislature. As stated earlier, Lord Reading found it necessary to make an ordinance abolishing the cotton excise duty when such action was immediately and imperatively required in the interests of the country. The Governor who is elected by the provincial legislature and who has normally to act on the advice of ministers responsible to the legislature is not at all likely to abuse any ordinance-making power with which he may be invested. Hence the proposed provision.]

CHAPTER IV

DISTRIBUTION OF LEGISLATIVE POWERS

[This will have to await decisions on the report of the Union Powers Committee. But in any event there should be a clause on the following lines:

“ Provision may be made by provincial law in the interests of regional autonomy for delegation to representative bodies of defined

regions legislative powers in respect of such matters as the law may prescribe. Any such law shall determine the rights, powers and duties of such bodies and their relation to the provincial legislature and to the provincial government.”]

CHAPTER V

EXCLUDED AND PARTIALLY EXCLUDED AREAS

[The provisions of this Chapter cannot be framed until the Advisory Committee has reported.]

PART II

CHIEF COMMISSIONERS' PROVINCES

1. Subject to the other provisions of this Part, a Chief Commissioner's province shall be administered by the President of the Union acting, to such extent as he thinks fit, through a Chief Commissioner, or the Governor of a neighbouring province, or the Ruler of a neighbouring Indian State.

2. (1) The President shall not act through the Governor of a neighbouring province or the Ruler of a neighbouring Indian State, save—

- (i) with the consent of the Governor or Ruler concerned; and
- (ii) in accordance with the wishes of the people of the Chief Commissioner's province concerned, ascertained in such manner as he considers most appropriate.

(2) If the consent of the Governor or the Ruler or the people concerned is not forthcoming or is withdrawn, the President shall act through a Chief Commissioner.

[*Note:* These provisions have been suggested because some people from Coorg have expressed a desire that Coorg should

be administered as if it were a part of the province of Madras; others, as if it were a part of the State of Mysore.]

3. The President may, by Order, create or continue for any province administered through a Chief Commissioner—

(1) a local legislature; and/or

(2) a council of advisers

with such constitution, powers and functions, in each case, as may be specified in the Order.

4. Until other provision is made in this behalf by the President, the constitution, powers and functions of the Coorg Legislative Council and the arrangements with respect to revenues collected in Coorg and expenses in respect of Coorg shall remain unchanged.

PART III

THE PROVINCIAL JUDICIARY

The provisions of the Government of India Act, 1935, relating to High Courts may be adopted *mutatis mutandis*. As regards the appointment of High Court judges, it should be provided that judges shall be appointed by the Governor with the approval of at least two-thirds of the members of the Council of State.

[*Note:* The Council of State is a kind of Privy Council mainly for advising the President of the Union in certain matters where he is required to act in his discretion. It has been proposed in the memorandum relating to the Union constitution that the appointment of judges of the Supreme Court should be made by the President with the approval of at least two-thirds of the members of the Council of State. It is a non-party body of elder statesmen and judges including the Chief Justice and every ex-Chief Justice of the Supreme Court. It will, therefore, be a suitable body for approving of the appointment of judges, whether of the Supreme Court or of the High Courts. It should be remembered that High Court judges may be potential judges of the Supreme Court; it is, therefore, not inappropriate that

their appointment should be made subject to the approval of the Council of State.]

PART IV

P.P.S.C. AND PROVINCIAL AUDITORS-GENERAL

Provisions regarding Public Service Commissions and Auditors-General should be inserted on the lines of the provisions in the Act of 1935.

PART V

TRANSITIONAL PROVISIONS

1. Any person holding office as Governor in any province immediately before the commencement of this constitution shall continue as such and shall be deemed to be the Governor of the province under this constitution until a successor, duly elected under this constitution, assumes office.

2. There should be similar provisions, *mutatis mutandis*, in respect of the Council of Ministers, the Legislative Assembly and the Legislative Council (in provinces which decide to have an Upper Chamber).

[These provisions are necessary in order that there may be a legislature and a government ready to take over power in each province as soon as the transfer of power takes place in or before June 1948.]

3. The government of each Governor's province under this constitution shall be the successor of the government of the corresponding province under the Act of 1935 in respect of all property, assets, rights and liabilities.