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OPTING IN AND OPTING OUT

[THE POSSIBILITY of a provision to enable provinces to opt in or to opt out of the Federal Union of India had been visualised in the original Cripps plan of 1942. In an informal discussion in November 1945 (some months before the Cabinet Mission's statement of 16th May 1946, Sri B. N. Rau had sought Sri Jawaharlal Nehru's view on the nature of the voting in the constitution-making body. When it was suggested that to make the vote binding on all the participants might deter some provinces from even coming into the constitution-making body, Sri Nehru agreed that an element of coercion might have that undesirable effect. The relevant questions and answers are reproduced below: *

Question: If you tell the Panjab or Sind that, by coming into the constitution-making body, they would be bound by its decisions even when they themselves dissent from those decisions, are they not likely to stand out from the very beginning? If, on the other hand, you tell every province that it is free to come in, contribute to the discussion, and accept or reject the resulting constitution as it thinks fit, is there not a greater chance of its coming into the constitution-making body and of accepting the constitution framed, either immediately or possibly at a later date? Of course, if this plan is adopted, the decisions of the constitution-making body must not be held to bind even the dissentient units: these must be given a chance of accepting or rejecting the constitution as they think fit. The Congress has accepted the position that no unit can be coerced into a constitution of which it does not itself approve.

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* For a full statement, see the Introduction.

J. N.: Yes; I think it would be better to give an option of adherence or accession to every unit, after the deliberations of the constitution-making body are over. Undoubtedly, there can be no coercion in the matter. I recognise that the psychological effect of telling a province that even if it comes into the discussions the door will still be open for it to go out, may be that it will elect to stay in.

Question: From another point of view also, would it not be unreasonable to ask a province to join the constitution-making body and compel it to accept a constitution which has not yet been framed and is only to be framed by that body? The province may very well say that without knowing what safeguards for minorities the proposed constitution is to contain, it cannot be expected to take a leap in the dark.

J. N.: That is so. At the same time, I cannot help thinking that the question of safeguards has not hitherto been discussed in the context of existing conditions.

Later, in a similar discussion with Mr. Jinnah (after the publication of the Cabinet Mission's statement), the question of Pakistan presumably figured somewhat prominently. At any rate, Sri B. N. Rau recorded in a note after the discussion:

"The assumption underlying Pakistan is that there are certain areas in India which are predominantly Muslim and whose affairs can be administered in complete isolation from the rest of the country. The Muslim League in demanding Pakistan and the Congress in conceding self-determination, both assumed this; and if the assumption were true there would be no question left except of demarcating areas to be separated. Unfortunately, the investigations heretofore made show that Pakistan, however its boundary may be drawn—whether provincewise, districtwise or in any other manner—cannot be self-supporting, as regards defence; nor will it be able, unaided, to solve the problem of raising the standard of life of its population. For this purpose at least, it cannot isolate itself from the rest of India.

"Either the Cripps plan or some alternative (the details of which have been tentatively worked out) will probably offer no difficulty except in the Panjab and Bengal. In these two provinces neither plan ensures self-determination for the Muslims, or for the Hindus and Sikhs; for it is possible that on either plan a province as a whole may be found to be voting 'in', although the majority of the Muslims may vote 'out', or voting 'out', while the Hindus and Sikhs may vote 'in'.

"To give effect to the provincial vote as a whole and to put the entire province 'in' or 'out' in such cases is a matter requiring the most anxious consideration and the decision may turn to some extent on factors which cannot be known or even specified just now.

"For example, if Sind and the North-Western Frontier Province vote 'in' and the Panjab as a whole votes 'in', while a majority of the Muslims vote 'out', it would hardly be practical politics to carve out a portion of the Panjab and put it out of the Union. We cannot tell now how Sind and the N.W.F.P. will vote as the draft constitution may contain other relevant but indisputable factors.

"Therefore, a third plan would be to leave out the controversial cases for future consideration in the light of all the circumstances then prevailing and to provide now merely for others. Thus we may, for the present, say that in the Panjab and in Bengal (*a*) if the majority of the Muslims and the majority communities of other than Muslims separately vote for, the province may be deemed to have accepted the plan; (*b*) if they have voted against, it may be deemed to have been rejected.

"The question is, which of these plans does the Congress propose?"]

The following memorandum on "Opting in and Opting out" was circulated to the members of the Constituent Assembly:

QUEENSLAND

The following extracts from the *Historical Introduction to the Constitution of the Australian Commonwealth* by Quick and Garran are relevant. In order to understand the extracts it may be of assistance to remember that the Convention, which drafted the Australian Commonwealth Constitution, began its first session in 1897, the idea of such a Convention having been decided upon at a Conference of Premiers in 1895.

The Premiers' Conference: "The Conference of Premiers met at Hobart on 29th January 1895, the Premiers present being Mr. Reid (New South Wales), Mr. (afterwards Sir) George Turner (Victoria), Mr. (afterwards Sir) Hugh M. Nelson (Queensland), Mr. C. C. Kingston (South Australia), Sir Edward Braddon (Tasmania), and Sir John Forrest (Western Australia). The following resolutions, submitted by Mr. Reid, were carried:

(1) That this Conference regards Federation as the great and pressing question of Australasian politics.

(2) That a Convention, consisting of ten representatives from each colony, directly chosen by the electors, be charged with the duty of framing a federal constitution.

(3) That the constitution so framed be submitted to the electors for acceptance or rejection by a direct vote.

(4) That such a constitution, if accepted by the electors of three or more colonies, be transmitted to the Queen by an Address from the Parliaments of those colonies praying for the necessary legislative enactment.

(5) That a Bill be submitted to the Parliament of each colony for the purpose of giving effect to the foregoing resolutions.

(6) That Messrs. Turner and Kingston be requested to prepare a draft Bill for the consideration of this Conference. (*pp.* 158-159, *op. cit.*) . . . .

"On 6th February the draft Bill prepared by Mr. Turner and Mr. Kingston was 'considered, amended and agreed to as

the draft of a type of Bill suitable for giving effect to the resolutions of the Conference'. Mr. Reid intimated that 'so soon as practicable after the reassembling of the New South Wales Parliament his Government would introduce a measure providing for the chief objects of the Bill as defined in the draft'. Messrs. Turner, Kingston and Nelson and Sir Edward Braddon intimated that as soon as New South Wales had passed the Bill they would follow suit—Mr. Nelson, however, reserving the right to dispense with the direct reference to the electors." (*p.* 159 *op. cit.*) . . . .

" New South Wales having redeemed her pledge and led the way, other colonies were not slow to follow." (*p.* 161 *op. cit.*) . . . .

" Queensland and Western Australia were now being waited for. But Sir Hugh Nelson, the Queensland Premier, had meanwhile discovered difficulties in the way of passing a Bill in the form agreed upon. Queensland was tripartite in interest, the North and the Centre being arrayed against the South in their demand to be erected into separate colonies. This question of separation became interwoven with the question of Federation. The North and the Centre looked forward to Federation, not only for its own sake, but also as a step towards sub-division; whilst Brisbane and the South feared that their trade would suffer from open competition with New South Wales and its metropolis. Each of the three divisions preferred to have separate representation in the Convention rather than to trust to the chances of a single electorate. Moreover, the government and a large section of the Parliament favoured parliamentary rather than direct election. Sir Hugh Nelson accordingly provided in his Bill that the Queensland representatives should be elected by the members of the Legislative Assembly, grouped according to the three great districts. The Premiers of the four colonies which had substantially adopted the model Bill joined in a remonstrance against this departure from the Hobart understanding, but without avail. Sir Hugh Nelson proceeded with the Bill, but somewhat half-heartedly, without committing himself to the whole of the process, and reserving to the Parliament the right to send the constitution to the people or not, as it pleased. He made no profession of being an ardent federalist, but argued that it could do no harm to have a voice in framing the constitution which they would afterwards be free to accept.

or reject. On the motion for the second reading, Mr. G. S. Curtis moved an amendment affirming that no enabling Bill would be acceptable which did not provide for the election of representatives by direct popular vote. This was negatived by 36 votes to 26 and the Bill passed the Assembly in July 1896. But in the Council (*i.e.*, the Upper House) it was not unnaturally claimed that if the election was to be parliamentary, both Houses should take part in it; and accordingly the Bill was returned to the Assembly amended to that effect. The Assembly, however, denied the representative character of a nominee House. The difference between the Houses proved irreconcilable; and in November—though Mr. Reid journeyed to Brisbane to assist a settlement—the Bill was laid aside." (*p.* 162 *op. cit.*)

Thus, Queensland opted out of the Convention, so to speak, at the beginning. But the sequel is interesting. The Convention, with representatives from the other States, proceeded with the constitution-making without Queensland. Then there was another Premiers' Conference in 1899, after the constitution had been drafted, for the purpose of considering certain suggestions made by New South Wales. At this Conference Queensland was represented by its new Premier. What happened when the amended draft of the constitution was sent round to the States for adoption is thus described: "The real interest now centred in Queensland. The Premier, Mr. Dickson, ably supported by his colleague, Mr. R Philp, took up the cause with enthusiasm. . . . One difficulty to be faced was that Queensland—though it had been ably represented at the 1891 Convention, whose work was the basis of the draft constitution now presented—had, through the fault of its politicians, taken no part (except through its Premier, Mr. Dickson, at the Premiers' Conference) in the actual framing of the constitution." Ultimately, however, in spite of this drawback the amended draft constitution was accepted by Queensland at a referendum by 38,488 votes against 30,996.

Thus, although Queensland opted out at the beginning and deprived itself of a voice in the making of the constitution, it

opted in at the end with a sense of grievance against those who were responsible for the initial opting out.

PRINCE EDWARD ISLAND & NEWFOUNDLAND

"The task of framing the resolutions on which the British North America Act was based—the task so successfully performed at Quebec in October 1864—was achieved by the thirty-three men who in Canada today are always spoken of with veneration as the Fathers of Confederation." (Porritt's *Evolution of the Dominion of Canada*, *p.* 208.)

> "At the Quebec Convention the United Provinces (Quebec and Ontario) were represented by twelve delegates; Nova Scotia by five; New Brunswick by seven: Prince Edward Island by seven; and Newfoundland by two." (*op. cit.*, *p.* 209.)
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> "These resolutions (*i.e.*, the Quebec resolutions) having been adopted by the legislatures of the United Provinces (Quebec and Ontario), Nova Scotia* and New Brunswick, they were embodied in the British North America Act which was passed by the Imperial Parliament." And in a footnote, "Newfoundland and Prince Edward Island withdrew from the negotiations after the Quebec Conference, although Prince Edward Island came into Confederation in 1873." (*op. cit.*, *p.* 200.)

Owing to the withdrawal of Prince Edward Island and Newfoundland, the British North America Act, 1867, contains two sections providing for their subsequent admission:

> *Section* 146: "It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective legislatures of the colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those colonies or provinces, or any of them, into the Union, etc."

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* Actually, the Quebec Resolutions were adopted only by the legislature of the United Provinces. They were subsequently adopted, with slight modifications, by the delegates of Nova Scotia and New Brunswick, as well as of the United Provinces to the Westminster Palace Hotel Conference in London and were then embodied in the British North America Act. (See Egerton's *Federations and Unions in the British Empire*, Introduction, *pp.* 31-33).

Section 147: "In case of the admission of Newfoundland and Prince Edward Island or either of them, each shall be entitled to a representation, in the Senate of Canada, of four members, etc."

"In 1873, the Dominion secured a new member by the entrance into it of Prince Edward Island under the terms of the same section of the British North America Act as that which applied to British Columbia. In this case financial exigencies effected what had hitherto proved impossible. . . . In 1895 Newfoundland, under the stress of financial failures, sought to join the Confederation; but the Dominion Ministry was not quick to seize the proffered hand and the opportunity, once missed, has never recurred." (Introduction to Egerton's *Federations and Unions in the British Empire*, *p.* 38.)

It is clear from these extracts that both Prince Edward Island and Newfoundland participated in the Quebec Convention which framed the basis of the Canadian Constitution; they subsequently "opted out" and remained outside the Federation; then, owing to financial difficulties, Prince Edward Island "opted in"; but Newfoundland*, although at one time desirous of opting in, lost the opportunity and still remains outside the Federation.

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* Earlier also (on *p.* 50) it is stated that "Newfoundland definitely refused to come into the Union (Canada) and *is still outside.*" That was so at the time Sri B. N. Rau wrote his exposition on "Points of Procedure" (Ch. 4). Subsequently, on March 31, 1949, Newfoundland joined Canada.

At a second referendum (1948), eighteen out of the twenty-five electoral districts of Newfoundland showed a clear majority in favour of confederation. A delegation from Newfoundland held negotiations with the Canadian Government. Finally in 1949 the British Government consented by an Act of Parliament to a union between Canada and Newfoundland on terms which were mutually acceptable.—Ed.