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A VISIT TO U. S. A., CANADA, EIRE AND BRITAIN

[*Sri B. N. Rau was deputed by the President of the Constituent Assembly to visit the countries mentioned in the heading to this chapter for personal discussions of important features of India's draft constitution with leading constitutional experts. This is his report embodying the results of his discussions with prominent personalities.*]

BETWEEN October and December 1947, I visited the U. S. A., Canada, Eire and England for personal discussions with the leading constitutional experts of these countries. I had discussions in Washington with the Chief Justice of the Supreme Court, ex-Chief Justice Hughes and Justices Frankfurter, Burton and Murphy, as well as with Mr. Boland, the Irish Secretary for Foreign Affairs; in Ottawa with Justice Thorsen, President of the Exchequer Court, Mr. John Hearne, the High Commissioner for Ireland, Mr. Wershof and Mr. Jackett, constitutional experts; in New York with Justice Learned Hand of the Federal Circuit Court of Appeals.

As the result of these discussions, I have proposed two amendments to India's draft constitution. The first of them is designed to secure that when a law made by the State in the discharge of one of the fundamental duties imposed upon it by the constitution happens to conflict with one of the fundamental rights guaranteed to the individual, the former should prevail over the latter: in other words, the general welfare should prevail over the individual right. Indeed,

Justice Frankfurter considered that the power of judicial review implied in the due process clause, of which there is a qualified version in section 16 of the Indian draft constitution, is not only undemocratic (because it gives a few judges the power of vetoing legislation enacted by the representatives of the nation) but also throws an unfair burden on the judiciary; and Justice Hand considered that it would be better to have all fundamental rights as moral precepts than as legal fetters in the constitution.

The other amendment is designed to secure that when the national interest requires that a certain matter, ordinarily falling in the exclusively provincial sphere, should be dealt with on a national basis, the Centre should have power to legislate on it on that basis.

The provision in clause 238 of the draft constitution enabling the Federal Parliament during the first three years to amend the constitution by a simple Act of its own was regarded as a wise precaution.

Two other clauses of the draft constitution were considered of particular interest. Clause 230 provides for the appointment of a Commission to investigate the conditions of the backward classes and recommend measures for improving their lot. It is interesting to note in this connection that the President of the United States appointed a committee to recommend measures for the better protection of the civil rights of the people of the United States, and the committee gave particular attention to the position of certain underprivileged classes. The committee's report amply proved the usefulness of a periodic review of this kind. Besides making a number of valuable recommendations, the committee drew attention to the remarkable work done in this sphere by the civil rights section of the Department of Justice. This section was started as an experiment in 1939, but it has already proved a most useful agency and the committee recommended that its hands should be further strengthened. Clause 229 of

the Indian draft constitution provides for the appointment of similar agencies in India (they are called special officers for minorities) both at the Centre and in the provinces.

The Canadian authorities, particularly Justice Thorsen, advised me not to finalise the provisions of the constitution relating to the relations between the Centre and the provinces, especially in the sphere of taxation and finance, without a careful study of the Rowell-Sirois Commission's Report on Dominion-Provincial Relations in Canada. The Government of the United States has also issued the Magill Report on the tax structure of the Federation.

The other materials I was able to gather in the U. S. A. bore, not so much on the constitution itself as on the supplemental legislation that would be necessary under the constitution. Thus, Mr. Hearne, the Irish High Commissioner in Ottawa, was emphatically of the view that India should, as soon as possible, have a Nationality Act of her own; and Mr. Boland, the Irish Foreign Secretary, explained how Ireland had tried to solve the problem. Apparently, in future, Irish citizens will not be British subjects, even outside Ireland, as they are at present, but they will have most of the privileges of British subjects. Reciprocally, British subjects will be granted similar privileges in Ireland, although they may not be Irish citizens. This indicates a possible mode of evolving a common citizenship—or something almost equivalent thereto—even as between countries tha do not acknowledge a common allegiance, *e.g.*, between any two members of the U.N. on a basis of reciprocity. Thus, citizens of State 'A' will not be automatically citizens of State 'B'; but 'A' may grant, within its own boundaries, all or any of the privileges of citizenship to the citizens of 'B', provided 'B' does the same to the citizens of 'A'.

Again, Justice Frankfurter was very emphatic that any jurisdiction exercisable by the Supreme Court should be exercised by the full court. His view was that the highest

court of appeal in the land should not sit in divisions. Every judge, except of course such judges as might be disqualified by personal interest or otherwise from hearing particular cases, should share the responsibility for every decision of the court. Regarding the removal of judges, he drew attention to a provision which had been proposed in New York State—the provision which was lately approved and which has the support of most of the judges and lawyers in this country.

The provision is:

"9-a (1) A judge of the court of appeals, a justice of the Supreme Court, a judge of the court of claims, a surrogate, a special surrogate, a judge of the court of general sessions of the county of New York, a county judge, a special county judge or a justice of a city court of record may be removed or retired also by a court on the judiciary. The court shall be composed of the Chief Judge of the Court of Appeals, the senior associate judge of the court of appeals and one justice of the appellate division in each department designated by concurrence of a majority of the justices of such appellate division. In the absence, inability or disqualification of the Chief Judge of the Court of Appeals or of the senior associate judge of that court, the Court of Appeals shall designate a judge or judges from the Court of Appeals to act in his or their stead.

"(2) No judicial officer shall be removed by virtue of this section except for cause or be retired except for mental or physical disability preventing the proper performance of his judicial duties, nor unless he shall have been served with a statement of the charges alleged for his removal or the grounds for his retirement, and shall have had an opportunity to be heard.

"(3) The trial of charges for the removal of a judicial officer or of the grounds for his retirement shall be heard before a court on the judiciary. The affirmative concurrence of not less than four members of the court shall be necessary for the removal or retirement of a judicial officer. The court in its discretion may suspend a judicial officer from the exercise of his office pending the determination of the proceedings before the court. The action of the court shall not extend further than to removal from office, or removal from office and

disqualification to hold and enjoy any public office of honour, trust or profit under this State, or to retirement for disability; but any judicial officer whose removal is sought shall be liable to indictment and punishment according to law. A judicial officer retired for disability in accordance with this section shall thereafter receive such compensation as the legislature may provide.

" (4) The Chief Judge of the Court of Appeals may convene the court on the judiciary upon his own motion and shall convene the court upon written request by the Governor or by the presiding justice of any appellate division or by a majority of the judicial council or a majority of the executive committee of the New York State Bar Assòciation thereunto duly authorised. The Chief Judge of the Court of Appeals shall act as the presiding officer of the court but in the absence, inability or disqualification of the Chief Judge, the senior associate judge of the Court of Appeals sitting on the court shall act as the presiding officer. After the court on the judiciary has been convened and charges of removal have been preferred against a judicial officer, the presiding officer of the court shall give written notice to the Governor, the President of the Senate and the Speaker of the Assembly of the name of the judicial officer against whom such charges have been preferred, of the nature of the charges, and the date set for the trial thereof, which date shall be not less than sixty days after the giving of such notice. Immediately upon receipt of such notice, the legislature shall be deemed to be in session for the purpose of this proceeding."

Mr. John Hearne, the High Commissioner of Ireland, told me—and as the Constitutional Adviser for India I was told by Mr. De Valera himself—that the system of functional representation, provided under the Irish Constitution for the election of the Senate, has proved unsatisfactory and Ireland is passing (or has just passed) new legislation for the purpose.

On November 19, 1947, I had the privilege of seeing President Truman at the White House. Almost the first thing he said was, " Whatever else you may copy from our constitution, do not copy our provision for mid-term elections ". Under the U.S.A. Constitution, the President has a four-year

term and the House of Representatives a term of two years, so that there is a general election for the House in the middle of the President's term of office. This sometimes results in the return of a party opposed to the President. It was this inconvenience which the President had in mind. Since we have adopted the parliamentary system in the Indian Constitution, the point is not as important as it is in the U.S.A. Nevertheless, I was able to tell the President that we had made the President's term of office nearly the same as that of the House of the People, so that we have not copied the provision in question. President Truman then went on to say that the U.S.A. provision of an indissoluble Senate, one-third of which was renewable every two years, might well be copied: which, in fact, has been copied in the Indian Constitution.

I then mentioned that India had specially noted the step taken by him in December 1946, in appointing a committee on civil rights—particularly the civil rights of the under-privileged classes. The committee's report, which has just been published, has proved how valuable was a periodic investigation of this kind, and accordingly there has been inserted in the Indian Constitution an express provision empowering the President to appoint, from time to time, a Commission to investigate the position of the backward classes. We have gone further in India and have actually anticipated one of the recommendations of the President's committee. The committee has recommended that there should be a special section in the Department of Justice, both at the Centre and in the States, to protect the civil rights guaranteed by the constitution. We have provided in the Indian Constitution for the appointment of special officers for minorities, both at the Centre and in the provinces for a similar purpose. At the end of the interview, the President said, "I am very greatly interested and should like to have, if I may, a copy of your constitution," adding humorously

that he might borrow a point or two from us. He also expressed a desire that I might stay a little longer and see some of the more prominent Senators; but my programme made that impossible. He gave the assurance that whatever assistance or material I might require from the State Department would be gladly given.

On November 20 and 21, I saw Dr. Jessup (Professor of International Law, Columbia University), Professor Mirkine (Constitutional Consultant, United Nations), Dr. Hamburger (Secretary-General, United Nations Year Book of Human Rights), and Professor Dowling (Professor of Constitutional Law, Columbia University). I had detailed discussions with each of them. Both Dr. Jessup and Prof. Dowling regarded as very important the amendment giving power to the Centre to legislate on a subject which is normally provincial if it has come to be of national importance.

I arrived in Dublin on November 26, 1947. I first saw the Attorney-General, with whom I discussed various constitutional details. He pointed out that some of the fundamental rights guaranteed in the Irish Constitution were proving very inconvenient, particularly the one relating to property. This had come under consideration in the Irish Supreme Court in connection with the Sinn Fein Funds Act. The Act related to certain trust moneys which were lying in deposit in court. The moneys belonged to the Sinn Fein organisation. While they were in court, certain persons claimed them as honorary treasurers of the organisation and while the claim was pending, the Irish Parliament passed an Act discharging the pending action (after payment of costs, etc., to the plaintiffs) and vesting the moneys in a board of which the Chief Justice of the Supreme Court was made the chairman. The Act gave the board absolute discretion to pay the moneys to the members of various armed forces and their dependants who might be in needy circumstances. The Supreme Court held that the Act was unconstitutional on the ground that it took

away the property which might have belonged to the plaintiffs and vested it in the board; however desirable might be the objects of the Act, it was said to be in conflict with the rights of property guaranteed in the Irish Constitution. Certain other cases too have led to the feeling that the fundamental rights have been expressed in too broad terms.

The Attorney-General also said that the system of proportional representation, which had been provided for in various parts of the Irish Constitution, had worked very unsatisfactorily. It had resulted in multiplying groups in the legislature, often compelling coalition governments in which no one could be certain of the continued allegiance of a particular group, with the result that the administration was greatly weakened. Steps were being taken, he added, without amending the constitution, to minimise this inconvenience by reducing the number of members in each constituency to three. Some constituencies had as many as nine members, so that a small group which could command the votes of even a tenth of the electorate could secure representation in Parliament. In the proposed redistribution, 22 constituencies would have three members and the rest four each.

The Attorney-General then mentioned that the provisions relating to functional representation in the Irish Senate had also given trouble: not so much the provisions in the constitution itself as the subsidiary provisions relating to panels. Under the Irish Constitution, the Senate consists of 60 members, of whom 49 have to be elected by a system of functional representation from various panels. It appears that all the 49 members have been regarded as forming a single constituency, and the total number of voters has been between 150 and 200. This has resulted in a quota of about four, so that any member could make sure of his election by making sure of four voters. Such a system facilitates corruption and the Irish Parliament has at present under consideration a Bill for altering it: (*a*) to break up the existing single constituency

into a number of separate constituencies, and (*b*) to increase the number of voters.

Finally, he observed that he was hopeful that, sooner or later, Northern Ireland and Southern Ireland would be re-united. Northern Ireland consists of six counties, in two of which the Nationalists (mainly Catholics) are already in a majority. In the other four, Nationalists form about 35 to 40 per cent of the total population; but as the Catholics are multiplying at a much faster rate than the Protestants, and as Protestant immigration has also at the same time almost ceased, it would not be long before the six counties taken together showed a Nationalist majority. He also said that although Southern Ireland had only seven per cent Protestants, the minority was treated not merely fairly but magnanimously, and that Protestants themselves had paid generous tributes to the government for the manner in which their interests had been recognised. This should facilitate re-union.

In the afternoon, I had the privilege of an interview with Mr. De Valera, who was most cordial and considerate. He remarked that if he had a chance of re-writing the Irish Constitution, he would make three changes: (i) He would do away with proportional representation in any shape or form. He preferred the British system, as it made for strong government. (ii) He would revise the provisions regarding functional representation in the Senate. (iii) He would make the right of property, guaranteed in the constitution expressly, subject to laws intended for the general welfare. So far as we have copied these provisions in the Indian Constitution, we may make similar changes.

As regards the other provisions in our draft, he had two comments to make: (1) Four years as the maximum life-time of the legislatures was far too short a period. In his experience, he had found that, under a parliamentary system of government, ministers required at least one year at the beginning

of their term to acquaint themselves with the details of administration, while the last year of the term was occupied with preparations for the next general election. Thus, with a four-year term, they would only have two years for effective work which was much too short for any kind of planned administration. He would suggest a term of not less than five years for the legislatures. (2) The period of three years provided for the amendment of the constitution by a simple Act of Parliament was also far too short. Here, again, he would suggest a period of not less than five years.

Towards the end of the interview, I mentioned to Mr. De Valera (as requested by Mrs. Vijayalakshmi Pandit) that there had apparently been some misunderstanding about India's attitude on Ireland's application for membership of the United Nations. He replied that he himself was aware of the true position that the matter voted on related only to procedure, but that there had been misunderstanding in certain other quarters.*

After leaving Mr. De Valera, I saw his Secretary, Mr. Boland, and had a long discussion in the course of which, among other things, Mr. Boland said that there was likely to be practically common citizenship between Ireland and the British Commonwealth on a basis of reciprocity, and there would thus be association between Ireland and the

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* The Eirean Prime Minister, Mr. Eamon de Valera, was asked by Mr. McBride, Republican leader, in the Dail (Parliament) on 10th December 1947 whether he could say why India opposed the admission of Eire to the United Nations.

Mr. De Valera replied that it was wrong to suggest that India opposed the admission of Eire. "I welcome the opportunity of saying this," he added, "because I know from the communications I have received from the Indian Government and from the leader of the Indian delegation at the Assembly that they are as anxious as we are that any misunderstanding that exists in this regard should be removed.

"The difficulties arose in connection with procedural matters. The fact is therefore that, far from opposing the admission of this country to the United Nations Organisation, the Indian delegates went out of their way to express friendship and goodwill towards Eire. I want to take the opportunity of assuring our Indian friends that these feelings are cordially reciprocated by us."

members of the Commonwealth on the basis of common citizenship.

I arrived in London on the 27th of November and interviewed in addition to the High Commissioner for India (Mr. V. K. Krishna Menon), Mr. Noel Baker (Secretary for Commonwealth Relations), Sir Stafford Cripps, and the Privy Councillors Sir John Beaumont and Sir Madhavan Nair. Mr. Noel Baker, discussing Commonwealth relations, mentioned that the members of the Commonwealth were now completely independent in their foreign relations and, as the latest proof of this fact, he pointed out (as stated elsewhere also) that in the voting at the meeting of the United Nations on the Palestine question that year, Canada, Australia and South Africa had voted for partition, India and Pakistan had voted against partition, while the United Kingdom had remained neutral. Whatever might have been the position at one time, it was now possible for a country to be completely independent even within the Commonwealth.

Sir Stafford Cripps was interested generally about the situation in India and Burma; there was no time for discussing any constitutional details. Sir John Beaumont and Sir Madhavan Nair desired to know exactly what India's attitude would be with regard to the appellate jurisdiction of the Privy Council. As regards pending cases, there were at least 60, possibly more, appeals already filed before the Privy Council, and Sir Madhavan Nair was anxious to know as early as possible the Constituent Assembly's decision as to their disposal. As regards the age-limit of High Court judges, Sir John Beaumont said that, in his own experience, he had at least on two occasions failed to get the best men from the Bar for appointment to the Bench, because, with the present age-limit of 60, they had no chance of earning a full pension. He thought that the age-limit should be at least 65 and observed that if a judge was not too old for the Federal Court at the age of 65, there was no reason to think that he was too

old for the High Court. The volume of work before the Federal or Supreme Court, if it took over the existing Privy Council appellate jurisdiction, would hardly be less than the volume of work before any High Court. Sir Madhavan Nair had no objection to the suggestion I had in mind for empowering the Supreme Court (on the analogy of the practice in the U.S.A. and in England) to call upon any retired judge of that court (with his consent of course) to serve on any particular case. On the other hand, he thought that it would be an advantage to have the assistance of an experienced judge. A judge who was too old to be of any assistance would of course not be asked.

As the result of discussions in Washington and Ottawa, I propose the following amendments:

(1) At the beginning of clause 9 sub-clause (2) insert the words "subject to the provisions of section 10".

(2) To clause 10 add the following new paragraph:
"No law which may be made by the State in the discharge of its duty under the first paragraph of this section and no law which may have been made by the State in pursuance of the principles of policy now set forth in Chapter III of this Part shall be void merely on the ground that it contravenes the provisions of section 2, or is inconsistent with the provisions of Chapter II of this Part."

The object of these amendments is to make it clear that in a conflict between the rights conferred by Chapter II, which are for the most part rights of the individual and the principles of policy set forth in Chapter II, which are intended for the welfare of the State as a whole, the general welfare should prevail over the individual right. Otherwise it would be meaningless to say, as clause 10 does say, that these principles of policy are fundamental and that it is the duty of the State to give effect to them in its laws. In the U.S.A. Constitution there are no express directive principles of State policy, but the courts have developed what is equivalent thereto, namely,

the doctrine of the "police power" which has been defined as the power "to prescribe regulations to promote the health, peace, morals, education and the good order of the people, and to legislate so as to increase the industry of the State, develop its resources and add to its wealth and prosperity". In the exercise of this power the State may make laws for the general welfare which would otherwise be inconsistent with the American Bill of Rights. The courts in India might have been able to develop a similar doctrine but for the language of clause 9 of the draft constitution. Hence the amendments proposed:

(3) In sub-clause 1 of clause 182, add the following as item (c):

"(c) If the Council of States had declared by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that the Federal Parliament should legislate with respect to any matters enumerated in the provincial legislative list and specified in the resolution, then, to make laws for the whole or any part of the territories of the Federation with respect to that matter."

(4) In clause 182 add the following sub-clause (3A):

"(3A). A resolution passed under clause (c) of sub-section (1) may be revoked by a subsequent resolution passed by a similar majority by the Council of States."

(5) In sub-clause (4) of clause 182, after the words "proclamation of emergency," insert the words "or the passing of a resolution under sub-section (1)"; and after the words "the proclamation" insert the words "or the resolution".

(6) In clause 183, for the words "except where a proclamation of emergency has been issued under" substitute the words "except as provided in".

The object of these amendments is to remove a defect similar to that which has disclosed itself in the Canadian Constitution.

For example, under the draft Indian Constitution, agriculture, co-operative societies and the production, supply and distribution of goods are all exclusively provincial subjects. Suppose, however, that in order to raise the standard of living of the Indian people as a whole, a system of co-operative farming and of price control of agricultural products on a national scale, and not merely in a single province, becomes desirable; in that event, the Centre should not be precluded from legislating in respect of the above subjects.

As a safeguard against unwarranted encroachment on the provincial sphere, a resolution by a special majority of the Council of States, which for the most part represents the units of the Federation, would be desirable. The provision in clause 183, depending as it does upon the consent of each of the units concerned, might prove inadequate. The essence of the matter is that where legislation is called for on a national basis, the Central legislature should have power to enact it without amending the constitution. Such legislation may be needed not only in such spheres as education, co-operative farming, or public health, but also in a matter which is coming to be regarded as one of national and indeed almost international importance, namely, the safeguarding of the civil rights of all citizens: *e.g.*, removing the social disabilities of Harijans. A provision such as the one proposed would enable the Central legislature to enact such a measure. The Report of the President's Committee on Civil Rights published in the U.S.A. has recommended that the National Government of the United States must take the lead in safeguarding the civil rights of all Americans and that Congress must enact the necessary legislation.