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THE INDIAN CONSTITUTION

[*This was contributed as a special article by Sri B. N. Rau to the Independence Day issue of* The Hindu *on 15th August* 1948.]

THE DRAFT of India's new constitution was released to the public on February 26, 1948. On a rough estimate the total number of amendments or suggestions for amendment received so far is nearly 500. As the draft contains no less than 395 articles and eight schedules,* this number, though large, cannot be said to be excessive.† All the amendments will be

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* By the Constitution (First Amendment) Act, 1951 the ninth schedule was added, specifying Acts and Regulations that were validated.

† It would be of interest to reproduce here a passage from the speech of the President of the Constituent Assembly, Dr. Rajendra Prasad, at its final session on 26th November 1949:

"The method which the Constituent Assembly adopted in connection with the constitution was first to lay down its 'terms of reference' as it were in the form of an Objectives resolution which was moved by Pandit Jawaharlal Nehru in an inspiring speech and which constitutes now the preamble to our constitution. It then proceeded to appoint a number of committees to deal with different aspects of the constitutional problem. Dr. Ambedkar mentioned the names of these committees. Several of these had as their chairman either Pandit Jawaharlal Nehru or Sardar Patel to whom thus goes the credit for the fundamentals of our constitution. I have only to add that they all worked in a business-like manner and produced reports which were considered by the Assembly and their recommendations were adopted as the basis on which the draft of the constitution had to be prepared. This was done by Sri B. N. Rau, who brought to bear on his task a detailed knowledge of constitutions of other countries and an extensive knowledge of the conditions of this country as well as his own administrative experience. The Assembly then appointed the Drafting Committee which worked on the original draft prepared by Sri B. N. Rau and produced the draft constitution which was considered by the Assembly at great length at the second reading stage. As Dr. Ambedkar pointed out, there were not less than 7,635 amendments of which 2,473 amendments were moved. I am mentioning this only to show

considered by the Constituent Assembly at its next constitution-making session which is due to be held in the latter half of October next. Meanwhile, it may be useful to examine some of the more general criticisms levelled against the draft. The first criticism that requires notice is that the draft borrows largely from other constitutions and in particular from the Government of India Act, 1935, and that it does not take sufficient account of India's indigenous village system. It is said that a satisfactory Indian Constitution must start from the village as the base. Let us examine this criticism in both its aspects. It is undoubtedly true that the draft has borrowed from other constitutions and notably from the Government of India Act, 1935. But so long as the borrowings have been adapted to India's peculiar circumstances, they cannot in themselves be said to constitute a defect. Most modern constitutions do make full use of the experience of other countries, borrow whatever is good from them and reject whatever is unsuitable. To profit from the experience of other countries or from the past experience of one's own is the path of wisdom. There is another advantage in borrowing not only the substance but even the language of established constitutions; for we obtain in this way the benefit of the interpretation put upon the borrowed provisions by the courts of the countries of their origin and we thus avoid ambiguity or doubt.

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that it was not only the members of the Drafting Committee who were giving their close attention to the constitution, but other members were vigilant and scrutinising the draft in all its details. No wonder that we had to consider not only each article in the draft, but practically every sentence and sometimes every word in every article. It may interest honourable members to know that the public were taking great interest in its proceedings and I have discovered that no less than 53,000 visitors were admitted to the visitors' gallery during the period when the constitution was under consideration. In the result, the draft constitution has increased in size; and by the time it has been passed, it has come to have 395 articles and eight schedules, instead of the 243 articles and 13 schedules of the original draft of Sri B. N. Rau. I do not attach much importance to the complaint which is sometimes made that it has become too bulky. If the provisions have been well thought out, the bulk need not disturb the equanimity of our mind."

To proceed now to the other branch of the criticism, namely, that the new Indian Constitution should start with the village as the base and work upwards to the province and the Union. Let us analyse exactly what this means. A constitution deals with the organs of government, whether executive, legislative or judicial, at various levels and their relations to one another. In federal constitutions one usually, though not invariably, deals with the federal Centre and the provinces or States: for example, the Canadian and South African Constitutions deal both with the Centre and the provinces, but the Constitutions of the U. S. A. and Australia deal mainly with the Centre and hardly with the structure of the States. Is it suggested that the Indian Constitution should deal not merely with the structure of the Centre and of the provinces but should go right down to the village? In other words, is the Indian Constitution not merely to deal with the executive, legislative and judicial organs of the Centre and of the provinces or States, but also to create and deal with similar organs for the district, the sub-division, the *thana*, the *chowkidari* union and the village? For example, are we to have in the constitution itself full specifications of a district executive, a district legislature and a district judiciary? At present we have no district legislatures but only certain administrative bodies, such as district boards and municipal boards, created by provincial Acts, with a limited power of making by-laws for certain purposes; the district executive is provided for in land revenue Acts or Regulations, police Acts and so on; the district judiciary is provided for in Civil Courts Acts, the Criminal Procedure Code and the like. Is it suggested that these or similar provisions should be incorporated in the constitution itself? If we were to do this, not merely for the district but down to the village, the constitution would not only be of inordinate length but would be even more rigid than it is in the draft; for, we shall have to embody in the constitution almost all the provisions that

are now spread over various local self-government Acts, land revenue Acts, police Acts, Civil Courts Acts and so forth. Any amendment of any of the provisions so incorporated would require the special procedure prescribed for amending the constitution. While it may be possible to create panchayats and similar bodies elected by adult suffrage to function as electorates for the provincial and Central legislatures, it would, to say the least, be inconvenient to endow them or other bodies at the same level with specific executive, legislative or judicial functions by provisions inserted in the constitution itself. If all that is implied in the criticism is that elections to the various legislatures named in the constitution should not be by direct adult suffrage but through intermediate bodies like the panchayats elected by the primary voters, then, all that is necessary is to insert in the constitution provisions permitting or, if the Assembly so decides, even requiring, elections to be indirect; but if the critics intend to go further, there will be the difficulties that have been pointed out already.

Another criticism that has been directed against the draft constitution relates to the part dealing with fundamental rights. It is said that these rights have been subjected to so many limitations that what is given with one hand is taken away with the other; for example, freedom of speech and expression is limited by the qualification that it shall not affect the operation of any existing law, or prevent the State from making any law, relating to libel, defamation, sedition or any other matter which offends against decency or morals or undermines the authority or foundation of the State. Critics point out that in the American Constitution there is an unqualified prohibition against any abridgement of the freedom of speech or of the press or any deprivation of liberty without due process of law and there are no irritating limitations; why, it is asked, should we not do likewise? The answer is not difficult. Although it is true that the

Constitution of the U.S.A. has not expressly imposed any limitations on free speech, the courts of the U. S. A. have done so in interpreting the constitution. The courts have developed the doctrine of what is known as the police power of the State, and in a leading case of 1925, the Supreme Court has observed:

> "The freedom of speech and of the press which is secured by the constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose. . . . That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organised government and threatening its overthrow by unlawful means."

Thus the limitations put on free speech in the draft constitution of India are no more than a paraphrase of those contained in this judgment. It may be asked why we cannot trust our courts to impose any necessary limitations instead of specifying them in the constitution itself. The explanation is that, unlike the American Constitution, the draft constitution of India contains an article which in terms states that any law inconsistent with the fundamental rights conferred by the constitution shall be void; unless, therefore, the constitution itself lays down precisely the qualifications subject to which the rights are conferred, the courts may be powerless in the matter. Of course, if any particular qualification has been expressed too broadly, there would be room for amendment.

To turn now to a criticism of a different kind. Certain lawyers object to the Part in the draft constitution dealing with "Directive Principles of State Policy", on the ground that since the provisions in that Part are not to be enforceable by any court, they are in the nature of moral precepts and the constitution, they say, is no place for sermons. But it is a fact that many modern constitutions do contain moral precepts

of this kind, nor can it be denied that they may have an educative value. It will be remembered that under previous enactments relating to the Government of India, there used to be instruments of instructions from the Sovereign to the Governor-General and the Governors and these instruments used to contain injunctions which, though unenforceable in the courts, served a useful purpose. For example, one of them specially charged and required the Governor "to take care that due provision shall be made for the advancement and social welfare of those classes who, on account of the smallness of their number or their lack of educational or material advantages or from any other cause, specially rely on Our protection". This may be compared with the article in the draft of the new constitution which requires that the State shall promote with special care the educational and economic interests of the weaker sections of the people. The former was an instruction from the legal Sovereign to the Governors appointed by him; the latter may be looked upon as a similar instruction from the ultimate sovereign, namely, the people of India speaking through their representatives in the Constituent Assembly to the authorities set up by or under the constitution.

I must, however, notice, in conclusion, what appears to me to be a valid criticism of the amending procedure embodied in the draft constitution. The present Constituent Assembly has been elected by the provincial legislative assemblies and other bodies not based on adult suffrage and some of the members have not been elected at all but nominated. According to the draft, the constitution, as enacted by the Constituent Assembly, cannot be amended by the Parliament of the Union except by a specially difficult process, requiring special majorities and in some cases special ratifications by the legislatures of the units, although the Union Parliament will be a body almost entirely elected on the basis of adult suffrage. It seems rather illogical that a constitution should be

settled by a simple majority by an assembly elected indirectly on a very limited franchise and that it should not be capable of being amended in the same way by a Parliament elected—and perhaps for the most part elected directly—by adult suffrage. The Irish Constitution, as enacted in 1937, contained a provision empowering Parliament to amend it by the ordinary law-making process during the first three years (subject to a referendum, if the President after consulting the Council of State—a kind of Privy Council—so directed). Certain Irish authorities whom I consulted on this matter in December last strongly advised that we should have a similar provision in our constitution for at least the first five years. Apart from the logical justification for such a provision, we have to bear in mind that conditions in India are rapidly changing; the country is in a state of flux politically and economically; and the constitution should not be too rigid in its initial years.