

THE FIRST STEP

[In this note, Sri B. N. Rau discussed the steps to be taken pursuant to the British Prime Minister's statement of February 20, 1947, regarding the transfer of power to Indian hands by June 1948.]

THE BRITISH PRIME MINISTER's statement of February 20, 1947 in the House of Commons made it clear that power in India was to be transferred to responsible Indian hands not later than June 1948.*

Transference of power implies the existence of regular organs of government to exercise the transferred power. In other words, there must be a government of some kind, if

* [The statement, the full text of which is published as an Appendix to this volume, contains the following passage:

"It is with great regret that His Majesty's Government find that there are still differences among Indian parties which are preventing the Constituent Assembly from functioning as it was intended that it should. It is of the essence of the plan that the Assembly should be fully representative.

"His Majesty's Government desire to hand over their responsibility to authorities established by a constitution approved by all parties in India in accordance with the Cabinet Mission's plan. But unfortunately there is at present no clear prospect that such a constitution and such authorities will emerge. The present state of uncertainty is fraught with danger and cannot be indefinitely prolonged. His Majesty's Government wish to make it clear that it is their definite intention to take necessary steps to effect the transference of power to responsible Indian hands by a date not later than June 1948.

"After months of hard work by the Cabinet Mission, a great measure of agreement was obtained as to the method by which a constitution should be worked out. This was embodied in their statements of May last. His Majesty's Government there agreed to recommend to Parliament a constitution worked out in accordance with the proposals made therein by a fully representative Constituent Assembly. But if it should appear that such a constitution will not have been worked out by a fully representative Assembly before the time mentioned in paragraph 7 (June 1948), His Majesty's Government will have to consider to whom the powers of the Central Government in British India should

only a provisional government, to receive the power and there must be a constitution, if only a provisional constitution, to regulate the exercise of the power. It follows that if the final constitutional structure is not ready before the due date, we must have a provisional government functioning under a provisional constitution. It is pertinent to observe that we are still governed by the "transitional provisions" in Part XIII of the Government of India Act, 1935—twelve years after the passing of the Act—which is a warning that a provisional constitution may last longer than we now think.

What are the prospects of the final constitution being ready before June 30, 1948? There are two possibilities: either the Muslim League comes into the Constituent Assembly or it does not. If it comes in—which means that it accepts the Cabinet Mission's plan—the procedure prescribed in the plan can be followed and, with goodwill on all sides, enough of the final constitutional structure may be got ready to permit of the transfer of power by the date fixed. Something may still have to be left over, *e.g.*, the precise relationship with Indian States or some of them; but this need not prevent the transfer of power as contemplated.

There is, however, the other possibility, which at the moment seems far the more likely of the two; namely, that the Muslim League does not come into the Constituent Assembly. If so, under the statement of December 6, 1946, any constitution that may be framed by that Assembly will not be binding upon the "unwilling parts of the country". How these unwilling parts will be determined and what constitution they will have is at present unknown. One thing, however, seems to be reasonably certain, namely, that there will be some kind of division of India. If this happens, the task of framing a new constitution, even for the willing parts,

be handed over, on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing provincial governments, or in such other way as may seem most reasonable and in the best interests of the Indian people."]

with all its immense mass of details will become formidable. The defence forces will have to be divided, the all-India Civil Services will have to be redistributed, property and liabilities of all kinds will have to be apportioned. We cannot yet tell how many new sovereignties there will be: at least two, possibly more. Agreements now subsisting between the Crown and the Indian States will have to be revised and renewed between the States and some or all of the new sovereignties. There will also have to be agreements between the new parts of India *inter se* relating to defence, external affairs, communications, customs and other matters of common concern. Boundaries between the new parts will have to be determined, perhaps by a Boundary Commission. If there is to be adult franchise under the new constitution, machinery for the new legislatures will have to be got ready and a multitude of other details will have to be settled. It is doubtful, to say the least, whether all this can be completed before June, 1948.

The separation of Burma was a simpler affair, but took several years of preliminary work. A great simplifying factor in the Burma problem was that His Majesty could make readjustments from time to time by Order-in-Council even after separation. No such expedient will be available to readjust relations between the different sovereignties in India, once the Crown ceases to exercise any functions.

If, for these reasons, the final constitutional structure is not ready before the due date, what then? We shall obviously have to have a provisional constitution ready. Certain features of such a provisional constitution are inevitable:

- (1) Since, *ex hypothesi*, a constitution for a divided India is not ready, the provisional constitution will have to be for an undivided India during the transitional period, until all the details have been completed for the ultimate division, including the framing of the constitutions for the different parts, after which the final constitution will be brought into force.

- (2) Since the "unwilling parts" have not yet declared whether they would like to have independence inside or outside the Commonwealth, the provisional constitution, which, as already pointed out, has to apply to these parts, as well as others, will necessarily have to be for an independent India within the British Commonwealth: in other words, for an India with full Dominion status.
- (3) The provisional constitution must have the backing of the main elements in the country, if there is to be a peaceful transfer of power even to a provisional government. Of course, once it is made clear that the ultimate constitutional structure will proceed on the basis of a divided India and will be such as to involve no coercion of unwilling areas, agreement on the provisional structure may be easier to obtain.

These seem to be the inescapable conditions of the problem.

Assuming then that the Muslim League does not change its decision not to participate in the Constituent Assembly, we have to take steps not only for framing a final constitution, but also for framing a provisional constitution satisfying the above conditions, in the event of the final constitution not being ready.

These conditions do not make the problem more difficult. On the contrary, they might make it easier in many respects. It is obviously easier to frame a constitution for an undivided India than for a divided India. Again, if the interim constitution provides for an India within the Commonwealth, the sovereignty of the Crown will remain for the time being, and the treaties (including engagements, sanads and other instruments) now subsisting between the Crown and the Indian States will not lapse (except perhaps as to paramountcy); the functions of the Crown arising out of them will continue, the only difference being that instead of being discharged as at

present on the advice of a Political Adviser outside the Central Government, they may have to be discharged on the advice of a responsible minister of the Central Government. We shall thus be spared the necessity for an immediate detailed revision of existing treaties or the immediate negotiation of new ones. It is possible that the Rulers may ask for certain safeguards if these functions are to be discharged on the advice of a responsible minister. It should not be difficult to arrive at a reasonable arrangement in this matter by discussion with those concerned.

The most important of the three conditions is the third one, namely, that the provisional constitution must have the backing of the main elements in the country. From this point of view, the arrangements under the existing constitution have proved to be defective. Recent events have shown that minorities in various provinces require better protection than they can get at present; and at the Centre, Muslims have often expressed their fear of being dominated by the Hindus. If the provisional constitution is to have the support of the main elements in the country, it must be such as to reduce these fears on opposite sides to a minimum. The Cabinet Mission's plan of May 16, 1946 took note of the fears of domination at the Centre (see para 12 of the statement of May 16, 1946*); and the obvious way to reduce similar fears in the provinces is to extend the same idea to the provincial sphere.

It will be remembered that the essence of the Cabinet Mission's plan is to maintain a single Centre for the administration of a minimum number of subjects on an all-India basis, while the remaining subjects are to be dealt with on a regional basis. If we follow the same plan in the provinces, we must provide that where a province contains distinct regions (whether racial or religious or linguistic), most of the

* *vide* Appendix A.

provincial subjects may be dealt with on a regional basis and only the remaining few on a provincial or joint basis.

It may be mentioned here that in certain matters a regional basis of administration obtains even in the United Kingdom, although there is a single Cabinet. All the ministers there do not exercise their functions uniformly in the different parts of the Kingdom. For what may be called national purposes (army, navy, air force, foreign relations, treasury, etc.), there are common ministers for all parts; but for other purposes there are special ministers for special regions. For example, the departments of health, agriculture, police, prisons and education for Scotland are administered by the Secretary of State for Scotland and the separation has gone so far that the main departments and an Under Secretary have their headquarters in Edinburgh, although the Secretary of State is in London. The separation is even more far-reaching in the case of the judiciary, Scotland being completely independent, except for a common Supreme Court of Appeal in the House of Lords. Even in the sphere of legislation, there is some measure of regionalism in the United Kingdom. Thus all Bills relating exclusively to Scotland are referred, after second reading, to a Grand Committee consisting of the whole body of Scottish members, with the addition of 15 others specially responsible for each Bill.

It is interesting to note that a rather similar plan appears to obtain in the Russian Constitution. The Central departments (called the People's Commissariats) are in two classes, the all-Union departments (called the all-Union People's Commissariats) and the regional departments (called the Union-Republican People's Commissariats); the subjects requiring to be dealt with on an all-Union basis are administered by the former and subjects requiring regional administration by the latter. [See articles 74-78 of the Constitution of the U.S.S.R.]

There is, therefore, nothing novel in this idea; it only needs to be adapted to Indian conditions. If we examine the matter,

we shall find that the idea can be carried out to a surprising extent, both at the Centre and in the provinces, even under the existing constitution.

Let us first consider the provincial sphere. Under section 50 of the Government of India Act of 1935, the Governor of each province has a Council of Ministers to aid and advise him in most provincial matters. Under section 59, he is required to make rules for the more convenient transaction of the business of the provincial government and for its allocation among the ministers. The rules at present in force make a subject-wise allocation on a provincial basis: that is to say, there is a minister for education for the whole province, there is another for public works, and so on. Where a province is homogeneous in character, this distribution may well be the best; but not if the province contains two or more sharply-contrasted regions. For simplicity, suppose there are only two such regions: a predominantly Muslim region A and a predominantly non-Muslim region B. For many provincial subjects, such as education, agriculture, local self-government, the two regions may have divergent interests and needs; let us call these "regional subjects". There may, however, be a few subjects as to which their interests or needs cannot be divided, *e.g.*, finance or irrigation from common rivers or the High Court; we may refer to these as "joint subjects". In these circumstances, the Governor may find it possible and more convenient to make a regional allocation of the business relating to regional subjects: that is to say, he may within one and the same Cabinet have one set of ministers exclusively to advise him on the regional subjects of A; another set of ministers exclusively to advise him on the regional subjects of B; and both sets of ministers together, in other words, the entire Cabinet, to advise him on joint subjects. Which are to be joint subjects and which regional in a given province will depend upon local circumstances and how exactly joint subjects marked for the entire Cabinet are to be dealt with is a matter for local

discussion. If the number of joint subjects is small, they may all be dealt with by a single sub-committee of the Cabinet consisting, let us say, of the Prime Minister and the Deputy Prime Minister, cases going to the entire Cabinet only where these two differ. If the Prime Minister is of region A, the Deputy Prime Minister should be of region B and *vice versa*. There are variants of this plan possible; the Governor can frame his rules to suit the requirements of his particular province so as to secure the maximum of regional autonomy. If there is any area in the province which is neither markedly Muslim nor markedly non-Muslim, it can be treated as "joint territory" and any business relating thereto as a "joint subject". As already indicated, there will be a single Cabinet with a Prime Minister and a Deputy Prime Minister, subject to a convention that if the Prime Minister is a Muslim, the Deputy Prime Minister will be non-Muslim and *vice versa*. There will also be a single legislature for the whole province; but a convention should be established that when legislation relating exclusively to a regional subject of one of the regions A or B is under consideration, the members representing territorial constituencies of the other region should abstain from voting.

Let us next consider the Central Government. Here, the plan that has come nearest to acceptance by all parties is the Cabinet Mission's plan of May 16, 1946, and the question, therefore, is how far that plan can be carried out under the existing constitution. Like the Governors in the provinces, the Governor-General at the Centre has power to make rules for the more convenient transaction of business in his Council (see section 40 of the Government of India Act in the ninth schedule to the Act of 1935). He may, in framing these rules, treat the groups referred to in the Cabinet Mission's plan, or any other groups that may be more acceptable, as distinct regions. The essence of the plan, as already stated, is that certain subjects, broadly categorised as defence, foreign affairs and communications together with incidental finance

—for the present we may include all finance under this head—should be treated on an all-India basis and the rest on a regional basis. At present, the Centre deals with these other subjects also on an all-India basis: *e.g.*, there is a single member for education for the whole of India, a single member for labour for the whole of India and so on. There are doubtless advantages in this kind of centralisation; but the Cabinet Mission's plan has recommended a different course in order to secure regional autonomy to the largest possible extent, and we are now trying to see how far this plan can be carried out under the existing constitution. To carry it out, we shall have to divide the existing Central departments into two classes:

- (1) All-India departments, comprising the subjects connected with defence, foreign affairs and communications and, provisionally, including all finance.
- (2) Regional departments comprising the rest.

Certain members of the Cabinet will be in charge of (1) for the whole of British India; the rest will form what we may call the Ministry of the Interior, of which there will be a branch for each region. Each branch of the Ministry of the Interior will deal with the regional departments for that particular region. Thus, there will be a single minister for defence for the whole of British India as at present; but instead of there being a single minister for education and one for agriculture and one for public health—for the whole of British India in each case—there may be one minister in charge of all the three subjects for the territories of Group A, another minister in charge of all the three subjects for Group B, and another minister in charge of all the three subjects for Group C. The total number of ministers need not be increased, if this is considered undesirable; only their duties will be allocated differently. A redistribution of work on these lines can be made under the existing constitution; it would correspond roughly to the division of work in the U.K. Cabinet with respect to England and Scotland and to the division of work

under the Russian Constitution between the All-Union People's Commissariats and the Union-Republican People's Commissariats. There will, of course, as in the provinces, be a single Cabinet with a single Prime Minister and a Deputy Prime Minister; when the Prime Minister is a non-Muslim, the Deputy Prime Minister will be a Muslim and *vice versa*. As in the provincial sphere, a convention should be established that when legislation in respect of a regional subject appertaining exclusively to one of the regions is under consideration, members representing territorial constituencies of the other regions should not vote.

If the Central and provincial departments are so arranged as to secure the maximum of regional autonomy, the fear of domination of one region by another would be reduced to a minimum. And since this can be done even under the existing constitution, the provisional constitution that we have envisaged need not, in this respect, contain much that is new.

Indeed, a redistribution of departments, both at the Centre and in the provinces on the lines suggested above, may be immediately advisable. As already pointed out, this can be done under the existing constitution and it will have the following advantages:

- (1) It may succeed in healing the existing differences, whether at the Centre or in the provinces.
- (2) It will reveal the difficulties, if any, in more far-reaching schemes of partition or separation, including the Cabinet Mission's plan.
- (3) If the redistribution proves inconvenient in any particular, it can be immediately amended by amending the rules of business; if necessary it can be entirely scrapped and the *status quo ante* restored.

The redistribution will not require the immediate splitting up of the Secretariat or of the subordinate administrative machinery.