

THE CONSTITUENT ASSEMBLY: PROCEDURE

[Sri B. N. Rau saw Dr. Rajendra Prasad on March 9, 1947, as the President was anxious to discuss what should be done in view of the British Prime Minister's statement of February 20, 1947, and the subsequent developments. He recorded the following note after the discussion.]

ASSUMING that the Muslim League does not change its decision not to participate in the Constituent Assembly, the position will be that any constitution that may be framed by the 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 in view of the statements of December 6, 1946* and February 20, 1947, the debates in the Houses of Parliament and the Congress

* The relevant passages from the British Government's statement of December 6, 1946 are reproduced below:

"The main difficulty that has arisen has been over the interpretation of paragraph 19 (v) and (viii) of the Cabinet Mission's statement of May 16th relating to the meetings in sections which run as follows:

"Paragraph 19 (v).—'These sections shall proceed to settle provincial constitutions for the provinces included in each section and shall also decide whether any group constitution shall be set up for those provinces and if so with what provincial subjects the group should deal. Provinces shall have power to opt out of groups in accordance with provisions of sub-clause (viii) below.'

"Paragraph 19 (viii).—'As soon as new constitutional arrangements have come into operation, it shall be open to any province to elect to come out of any group in which it has been placed. Such a decision shall be taken by the new legislature of the province after the first general election under the new constitution.'

"The Cabinet Mission have throughout maintained the view that decisions of sections should, in the absence of agreement to the contrary, be taken by simple majority vote of representatives in the sections. This view has been

Working Committee's resolution; namely, that there will be some kind of division of India. If so, the task of framing a new constitution, with all its immense mass of details, will be a formidable one, as already stated.

The separation of Burma was a simpler affair, but I remember working unofficially on some of the details as early as 1934, although the actual separation did not take effect until 1937. A great simplifying factor in the Burma problem was (as mentioned in my earlier note), that His Majesty could make re-adjustments from time to time by Order-in-Council if any unforeseen difficulties arose after separation (see sections 158-160 of the Government of India Act, 1935, and sections 134-137 of the Burma Act). No such expedient will be possible now.

If the final constitutional structure is not ready before the due date, we shall have to have a provisional constitution and a provisional government. We may, if we choose, have a chapter headed "Transitional Provisions" in the new constitution and put the provisional constitution into the chapter. In fact, we are still governed by the "Transitional Provisions" in Part XIII of the Government of India Act, 1935, which is a warning that a provisional constitution may last longer than we think.

Let us now consider the nature of this provisional constitution. *Ex hypothesi*, the ultimate constitution providing for all the parts of a divided India may not be ready on the due date; if it is ready, there is of course no difficulty. But we are

accepted by the Muslim League but the Congress have put forward a different view. They have asserted that the true meaning of the statement read as a whole is that provinces have a right to decide both as to grouping and as to their own constitution.

"His Majesty's Government have had legal advice which confirms that the statement of May 16th means what the Cabinet Mission have always stated was their intention. This part of the statement as so interpreted must therefore be considered an essential part of the scheme of May 16th for enabling the Indian people to formulate a new constitution which His Majesty's Government would be prepared to submit to Parliament. It should therefore be accepted by all parties in the Constituent Assembly."

proceeding on the assumption that it may not be ready in the time prescribed. What then? Obviously, if a constitution for a divided India is not ready, we shall have to have a provisional constitution for an undivided India. In other words, the provisional constitution will have to be that of a single federation embracing the whole of what is now British India. This is the first point.

Another point also seems inevitable. Since the "unwilling parts" have not yet declared whether they would like to have independence within or without the British Commonwealth, the provisional constitution, which, as already pointed out, has to apply to these parts as well as others, will necessarily have to be that of a Federation enjoying independence within the British Commonwealth—in other words, enjoying full Dominion status.

The third point that emerges from the debates in Parliament is that even for the transfer of power to a provisional government, His Majesty's Government will require a fair measure of agreement between the different parties in India. Presumably, that agreement will be easier to obtain, so far as the Muslim League is concerned, if an ultimate division of India is provided for and if it is made clear that the provisional government is only for the interim period, during which the ultimate constitution is being hammered out. Be that as it may, His Majesty's Government obviously expect some degree of agreement, judging from Sir Stafford Cripps's remark in the House of Commons:

"In our statement of December 6, we stressed the fact that if a large section of the Indian population had not been fully represented in the Constituent Assembly, we could not accept the forcing of *unwilling provinces* into a united Indian Government if they have not been represented in the making of the constitution. To that principle, which has the assent of the Congress, we understand, we adhere and if it should eventuate that a large group of provinces—but not all—

agree upon the form of constitution, then it may be necessary to hand over power separately in areas which have not been fully represented.

"We shall have to consider in what way this can best be done to meet the best interests of the Indian people. The position is, however, sufficiently uncertain at this stage to make it impossible now to forecast what will be the wisest action to take when the time comes to make a decision. The only way to remove this uncertainty is to get agreement of the Indian communities as to what it is they wish us to do. We can hardly be accused of vagueness or uncertainty when the Indian communities themselves cannot come to any common agreement."

In other words, the uncertainty as to the transfer of power in the absence of an agreed final constitution is to be removed by agreement, which can only mean that there must be at least an agreed provisional constitution.

We shall, therefore, have to face the difficulty of framing an agreed provisional constitution as for a single Federation with Dominion status. The Muslims fear Hindu domination at the Centre, while the Hindus and the Sikhs fear Muslim domination in some of the existing provinces. Whatever provisional constitution may be devised will, therefore, have to be such as to reduce these fears on opposite sides to a minimum.

And such a provisional constitution will have to be got ready before June 1948. It follows, therefore, that side by side with the framing of the ultimate constitutional structure, we shall have to take even more urgent steps towards framing a satisfactory provisional constitution.

For the purpose of facilitating the framing of the final constitution, it may be of assistance if a questionnaire bearing on the salient features of the constitution were sent round to all the members of the various legislatures. They would be requested to send in their answers before April 10, 1947, so

that we might be in a position to tabulate the answers before the next session of the Constituent Assembly. I have already taken in hand the preparation of such a questionnaire and hope to issue it in the course of the next few days. As most of the legislatures would be in session, we should be able to get into touch with the members quickly and they would have about a fortnight in which to send in their answers. It is, of course, possible that a good many members will not be able, or will not care, to answer the questions; even so, the answers of the others may supply us with sufficient material in the light of which to prepare a draft of the new constitution. A draft so prepared is more likely to find acceptance when it is subsequently circulated to the provinces and we may thus save valuable time.

I am also trying to prepare the outlines of a provisional constitution fulfilling as far as possible the various conditions mentioned above.

The President's idea is that at the end of the next session of the Constituent Assembly, it should divide up into sections and the sections should frame the provincial constitutions for each of the provinces included therein before, say, the end of June. Assam may take a little longer because of the preliminary touring in the tribal and excluded areas that will be required. Sections B and C will be functioning under obvious difficulties and the constitutions they frame for some of their provinces may not be regarded as valid. But, in any case, it may help the sections in their task to have before them the answers to the questionnaire. Assuming that the sections will be ready with their drafts of the provincial constitutions before the end of June or the middle of July, it may be possible to have the complete constitution, including the Union portion, before the end of September. It may also be possible to have a draft of the provisional constitution ready before the same date. These are all rough forecasts which have emerged from this morning's discussion with the President.