THE CONSTITUTION OF INDIA
HOW IT HAS BEEN FRAMED

By

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CALCUTTA
THE WORLD PRESS PRIVATE LTD
1966

First published April 1966

PUBLISHED BY S. BHATTACHARJEE FOR THE WORLD PRESS PRIVATE LTD,
37 COLLEGE STREET, CALCUTTA-12 AND PRINTED IN INDIA BY P. K. GHOSH
AT EASTEND PRINTERS, 3 DR SURESH SARKAR ROAD, CALCUTTA-14

To the framers of our Constitution

PREFACE

For a proper understanding of our Constitution a study of its historical background is essential. In this book I have made an attempt to describe how our Constitution has been framed. I have narrated the contemporary political events in the country with a view to showing how they influenced the deliberations of the Constituent Assembly of India. I have also referred to some of the decisions of our Supreme Court and our High Courts as well as to debates in our Lok Sabha and Rajya Sabha to show why the Constitution as originally framed had to be amended as many as seventeen times. The Constituent Assembly began framing a Constitution for a united India, but ultimately it had to frame a Constitution for India with certain parts out of it, as a result of the partition of the country. The original draft of the Constitution as prepared by Sir B. N. Rau, Constitutional Adviser to the Constituent Assembly, had consisted of 243 articles and 13 Schedules. What is officially known as the Draft Constitution of India as prepared by the Drafting Committee of the Constitutent Assembly had contained 315 articles and 8 Schedules. The Constitution as it finally emerged from the deliberations of the Constituent Assembly contained 395 articles and 8 Schedules. The Constitution as it stands today contains 386 articles and 9 Schedules. I have narrated the history of the changes made in the Constitution since the stage of its original draft with an exposition of the compulsive forces which made such changes necessary. I may note here that while making brief but sufficient mention of the deliberations of the Constituent Assembly and Parliament on all important questions relating to the making of the Constitution, I have made no reference in the pages of this book to questions which are merely formal or of little moment.

I am thankful to Shri Abinash Chandra Sen Gupta, B.SC., Shri Kiron Chandra De, M.COM., DIP. LIB. and Shri Siddheswar Das for the help I have received from them in writing this book. I also take this opportunity to express my deep sense of gratitude to Professor D. N. Banerjee, formerly Surendranath Banerjee Professor and Head of the Department

of Political Science, University of Calcutta, for his invaluable suggestions in connexion with this book. In fact, it would not have been possible for me to write this book without his guidance. I also express my sense of gratitude to the World Press Private Limited for having kindly undertaken the publication of the book.

Calcutta,
April, 1966

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Chapter 1

INTRODUCTORY

I

The demand for a Constituent Assembly elected by the people to frame a constitution for India and to determine India's political destiny was first made in May, 1934, by the Indian National Congress but it was implicit in India's opposition to the Government of India Act, 1919. As the demand raised the fundamental issue of the location of sovereignty in the Indian people it was ignored by the British Government. The basis of our national demand was the inalienable sovereignty of the people of India. The concrete demand of the Congress was for convoking a Constituent Assembly for giving an institutional expression to the doctrine of the sovereignty of the people. This demand did not, in any way, endanger the peace of the world, for India had no aggressive design nor did she think of building up an empire. The aim of Indian nationalism was thus not incompatible with the requirements of internationalism. Our goal was "Purna Swaraj" and we wanted to control our destiny without any interference from others. But it was not contemplated then by our leaders that India should sever her connection with England and become an independent republic. "Swaraj", said Mahatma Gandhi in the year 1922, "will not be a free gift of the British Parliament. It will be a declaration of India's full self-expression, expressed through an Act of Parliament. But it will be merely a courteous ratification of the declared wish of the people of India. The ratification will be a treaty to which Britain will be a party. The British Parliament, when the settlement comes, will ratify the wishes of the people of India as expressed through the freely chosen representatives".[1] In pursuance of this idea the late Pandit Motilal Nehru, Leader of the Swarajya Party in the Indian Legislative Assembly, demanded in the year 1924 that[2] a

[1] Constituent Assembly Debates, 9th December, 1946, p. 5.
[2] Legislative Assembly Debates, 1924, Vol. iv, p. 367.

representative "Round Table Conference" should be summoned for framing the scheme of a constitution for India which should be placed before a newly elected Indian Legislature for approval and then should be submitted to Parliament in England to be embodied in a statute. He did not think that "anything deserves the name of a constitution for a country in the making of which the people of the country did not have a voice".[3] He argued that a representative Round Table Conference alone should have the responsibility for framing a constitution for India on the basis of responsible Government.

This demand for a Constitutent Assembly elected by the people of India was affirmed from time to time by political leaders. The failure of the Round Table Conferences in England convinced the Indians that the constitution of India must be framed by the Indians through a sovereign Constituent Assembly. In the year 1934 the Swarajya Party adopted a resolution claiming for India the right of self-determination and it was declared that the only method of applying that principle was "to convene a Constituent Assembly, representative of all sections of the Indian people, to frame an acceptable constitution".[4] In May, 1934, the All-India Congress Committee approved of the policy embodied in that resolution.[5] In December, 1936, it was declared by the Congress at its Faizpur session that a genuine democratic State in India with its political power transferred to the people as a whole could only come through a Constituent Assembly elected by adult suffrage and invested with the power to frame the constitution of the country.[6]

Three years later the Second World War broke out. On September 3, 1939, the British Government declared war against Germany. On the same day the Viceroy issued two proclamations declaring that war had broken out between His Majesty's Government and Germany and that a grave emergency existed whereby the security of India was threatened by war.[7] India was declared a belligerent country

[3] Legislative Assembly Debates, 1924, Vol. iv, p. 370.
[4] Indian Annual Register, 1931, i, p. 279.
[5] *Ibid.*, pp. 290-1, Constituent Assembly Debates, 9th December, 1946, p. 5.
[6] See Sitaramayya, *History of the Indian National Congress*, Vol. 2, p. 35.
[7] *The Gazette of India*, Extraordinary, 3rd September, 1939.

without the consent of the Indian people.[8] The Congress claimed that "the issue of war and peace for India must be decided by the Indian people".[9] In its opinion, the British Government took far-reaching measures which vitally affected Indian people and circumscribed and limited the powers of the Provincial Governments. To the leaders of the Congress the policy pursued by the British Government in regard to India seemed to demonstrate that the war was being carried on for imperialistic ends. Naturally, the Congress could not associate itself with the British Government nor could it offer any co-operation to that Government in a war which the Congress thought was meant to consolidate imperialism in India. In November, 1939, it was declared[10] by the Working Committee of the Congress that the recognition of the independence of India and of the right of the people to frame its constitution through a Constituent Assembly was essential in order to remove the "taint of imperialism from Britain's policy" and to enable the Congress to consider the question of co-operation with the British Government. It was held that the Constituent Assembly was the only "democratic method of determining the constitution of a free country" and an "adequate instrument" for solving communal and other problems. According to the Committee, the Constituent Assembly of India should be elected on the basis of adult suffrage and that the existing separate electorates should be retained for such minorities as desired them.

In the same year Mahatma Gandhi expressed his ideas on the question of Constituent Assembly in *Harijan*.[11] He thought that the Constituent Assembly, besides being "a vehicle of mass political and other education", offered a remedy for the communal and other problems. It could produce a constitution "indigenous to the country and truly and fully representing the will of the people". Such a constitution, he admitted, would not be ideal, but, in his opinion, it would be real, however "imperfect" it might be in the opinion of constitutional pundits. There were risks in such experiments but the risks should be run if we were to evolve

[8] Indian Annual Register, 1939, ii, p. 226.
[9] *Ibid.*
[10] Indian Annual Register, 1939, ii, p. 238.
[11] *Harijan*, November, 25, 1939.

something true and big. In conclusion, he observed: "Look at the question from any standpoint you like, it will be found that the way to democratic Swaraj lies only through a properly constituted Assembly, call it by whatever name you like. All resources must, therefore, be exhausted to reach the Constituent Assembly before direct action is thought of. A stage may be reached when direct action may become a necessary prelude to the Constituent Assembly. That stage is not yet."

The idea of a Constituent Assembly by this time caught the imagination of the people of India. Sir Maurice Gwyer, the then Chief Justice of the Federal Court of India, chose it as a subject of his convocation address to the Benares Hindu University. He did not deny the necessity of a Constituent Assembly for framing the constitution of India. But he stressed the desirability of entrusting the task to a smaller body. He remarked that the Constituent Assemblies elected on a wide franchise which had "sought to combine the securing of unity among diverse elements with the writing of the new constitution itself" had not had a happy result.[12] Prof. Reginald Coupland also emphasised the desirability of having a small size and the need for ensuring secrecy in the deliberations.[13] Indian public opinion, however, demanded a Constituent Assembly elected on the basis of adult suffrage but it sought to draw a line between the deliberative aspects of such an Assembly which called for a representative body of an adequate size, and the more technical aspects of actual drafting to be undertaken by a small body of experts. In the opinion of the Sapru Committee,[14] a clear line should be drawn between "the debating of issues of vital importance, the obtaining of agreement and the taking of decisions thereon, on the one side, and the actual drafting of the sections and clauses of the constitution in which those decisions are to be embodied, on the other". The former, according to the Committee, was to be the work of a deliberative body of adequate size, representative of all parts of the country and

[12] Indian Annual Register, 1939, ii, p. 503.

[13] See Coupland, *Report on the Constitutional Problem in India*, Part III, p. 35.

[14] A Committee appointed in the year 1944 with Sir Tej Bahadur Sapru as Chairman, known as Conciliation Committee, to examine the whole communal and minorities question in India from a constitutional and political point of view.

of all elements in national life and the latter was to be the work of a small committee of administrators and experts.[15]

The Indian National Congress was thus committed to the principle of framing the constitution of India through a Constituent Assembly. But until the adoption of its Lahore Resolution in March, 1940, proposing a division of India and the creation of independent States in the north-western and eastern zones of India where the Muslims were in a majority, the Muslim League had not favoured the idea of a Constituent Assembly as a proper instrument for framing the constitution of India. After the adoption of the Lahore Resolution, however, the attitude of the Muslim League seemed to have undergone a change in favour of the idea of the Constituent Assembly. But it demanded two Constituent Assemblies in accordance with its demand for two separate States in the country.

For the first time in the history of Indo-British relationship the claim of Great Britain to judge India's fitness for self-government and to frame her constitution was given up in the year 1940, when, with the approval of His Majesty's Government, Lord Linlithgow, the Viceroy of India, declared on 8th August, 1940[16], that His Majesty's Government would "most readily assent to the setting up after the conclusion of the war, with the least possible delay, of a body representative of the principal elements in India's national life in order to devise the framework of the new constitution and they will lend every aid in their power to hasten decisions on all relevant matters to the utmost degree". The framing of the constitutional scheme, it was conceded, "should be primarily the responsibility of Indians themselves and should originate from Indian conceptions of the social, economic and political structure of Indian life". The British Government could not, however, contemplate the transfer of its responsibility for the peace and welfare of India to any system of Government the authority of which was denied by "large and powerful elements in India's national life". The Viceroy also declared that His Majesty's Government had authorised him to invite a certain number of representative

[15] Constitutional proposals of the Sapru Committee, p. 304.
[16] Indian Annual Register, 1940, ii, pp. 372-3.

Indians to join the Executive Council and to establish a war advisory council. This declaration is popularly known as "August Offer". The Congress, however, rejected this "August Offer" because it did not meet its immediate demand for a national Government at the Centre and its ultimate demand for complete independence. It was also of opinion that the offer, if accepted, would prove an impediment to the "evolution of a free and united India".[17] The offer was not acceptable to the Muslim League because its demand for equal representation in the Viceroy's Executive Council with the Congress was not met by this offer.[18] The League at the same time declared that[19] it stood by its Lahore Resolution and the basic principle underlying it and that the partition of India was the only solution of the Indian constitutional problem.

The first few months of the year 1942 were a crucial time for India and indeed for the whole world. A mighty and seemingly irresistible enemy of Great Britain had suddenly appeared on the eastern horizon. Within a short time British forces had been driven out of Malaya and had to run away from Singapore. Rangoon fell on 7th March. The attitude of the Congress remained the same. It was willing to take part in organising the defence of India and to co-operate with the British Government in its war effort if the independence of India was immediately declared and a national Government established at the Centre commanding the confidence of the Central Legislature. The League, on the other hand, reiterated its demand for Pakistan as the only acceptable solution of the constitutional problem of India. These circumstances forced the British Government to make an attempt to end the regrettable deadlock in India and it sent out Sir Stafford Cripps, a member of the War Cabinet and Leader of the House of Commons in England, on a mission to negotiate a settlement with India. On his arrival in India he made a tentative declaration[20] on behalf of His Majesty's Government to end the constitutional deadlock. This "Draft Declaration" of Sir Stafford Cripps stated that on the cessation of hostilities a constitution-making

[17] *Ibid.*, p. 196.
[18] *Ibid.*, p. 245.
[19] *Ibid*, p. 213
[20] Indian Annual Register, 1942, i, pp. 220-3.

body would be set up representing the provinces of British India as well as the Indian States. It added that His Majesty's Government would undertake to "accept and implement" the constitution framed by the constitution-making body, provided that any province or provinces which were not prepared to accept the new Constitution should be entitled to form a separate Union or Unions. Further, a treaty was to be negotiated between the British Government and the constitution-making body to cover all matters arising out of the complete transfer of authority from the British to the Indian hands. The Princely States would be free to adhere or not to adhere to the new constitution. The right of the proposed Indian Union to decide in future to sever its connection with the British Commonwealth was conceded. During the interim period, however, the British Government must retain the control and direction of the defence of India. But it would be the responsibility of the Government of India with the co-operation of the "peoples of India" to organise to the full her military, moral and material resources.

The Cripps Offer was rejected by the Congress mainly because no vital change in the system of Government was contemplated by it during the interim period nor did it meet the demand for the immediate establishment of a national Government. Dr P. Sitaramayya was perfectly right when he said: "The freedom of a province to cut out of the Union, the exclusion of the States' people from the picture and the virtual reservation of Defence and War, were doubtless additional material factors", but that they "relatively occupied a secondary place."[21] The constitution of the Viceroy's Executive Council was to continue as before and all that was contemplated was to appoint some additional Indians, representing different parties, to the Executive Council. The Congress did not press for immediate legal change but it insisted that a convention should be established that the Viceroy should treat the Executive Council as a Cabinet and accept its decision as binding on him. "I wanted", says Maulana Azad, "that a convention should be created by which the Council would work like a *de facto* cabinet and the Viceroy like a constitutional head. If we were satisfied on this one point, we could accept

[21] See P. Sitaramayya, *History of the Indian Congress*, Vol. ii, p. 332.

the offer and should not insist on a *de jure* transfer of power during the war."[22] But the Congress was told that that was not possible and that the "Viceroy's power must remain unaltered not only in theory but in practice".[23] The Muslim League rejected the offer because its demand for Pakistan was not met by it.[24] The offer was not accepted by the Hindu Mahasabha because, according to it, the offer, if accepted, would destroy the unity of India.[25]

There was widespread disappointment at the failure of the Cripps' Mission and the political situation in India rapidly deteriorated. Mr Jinnah denounced the Congress for attempting to establish a Congress Raj. The Congress under the leadership of Mahatma Gandhi demanded the immediate abdication of British authority in India. On 8th August, 1942 the famous 'Quit India' resolution was passed by the Congress and on the next day Mahatma Gandhi and other leaders of the Congress were arrested and Congress organisations banned throughout the country. Almost immediately disorder broke out on a serious scale.

This unhappy situation continued for nearly three years. An attempt was made by the British Government in the year 1945 to solve the difficult Indian problem and on 14th June Lord Wavell, Governor-General of India, broadcast[26] his proposals, intended, as he said, "to ease the present political situation and to advance India towards her goal of full self-government". The Viceroy announced that it was his intention to hold a Conference at Simla to which would be invited "Indian leaders both of central and provincial politics". The purpose of the Conference would be to "take counsel" with the Viceroy with a view to the formation of a new Executive Council. It would be an "entirely Indian Council, except for the Viceroy and the Commander-in-Chief, who would retain his position as War Member". The portfolio of External Affairs would be placed in charge of an Indian Member of the Council. The Council would represent the main communities in India

[22] See Maulana Azad, *India Wins Freedom*, p. 56.
[23] See Jawaharlal Nehru, *Discovery of India*, p. 489. Sixth Edition, Published by the Signet Press, Calcutta.
[24] Indian Annual Register, 1942, i, pp. 251-3.
[25] *Ibid.*, pp. 249-51.
[26] Indian Annual Register, 1945, p. 247.

and would include "equal proportion of caste Hindus and Muslims" and would, if formed, work under the existing constitution. It was made clear that there could be no question of the Governor-General "agreeing not to exercise his constitutional power of control", but an assurance was given that the power would "of course not be used unreasonably". The formation of the Interim Government would in no way prejudice the final constitutional settlement. Neither His Majesty's Government nor Lord Wavell had lost sight of the need for a long-tern solution and the proposals were intended to pave the way for it.

High hopes were raised on all sides from the broadcast of the Viceroy, coupled with the release of the members of the Congress Working Committee. On 25th June the Conference met at Simla but it ended in failure. The Viceroy asked the parties to submit lists of persons whom they would like to be included in the proposed Executive Council. He received lists from all the parties represented at the Conference except from the European group, who decided not to send any list, and from the Muslim League. Mr Jinnah wanted an assurance from the Viceroy that all the Muslim members of the Executive Council should be chosen from the Muslim League.[27] As the Viceroy had not been able to give that assurance,[28] Mr Jinnah informed the Viceroy that he was not in a position to send the names for inclusion in the proposed Executive Council on behalf of the League, as desired by the Viceroy.[29] The Congress could not accept the position that all the Muslim members should be nominated by the League.[30] On 14th July the Viceroy declared the failure of his endeavour and in doing so he took the responsibility for the failure on himself. It may be mentioned here that if the Conference had not broken down "the Muslims, who constituted only about 25 per cent of the total population of India, would have seven representatives in a Council of fourteen."[31]

[27] Letter to Lord Wavell, dated 7th July, 1945, Indian Annual Register, 1945, ii, p. 139.
[28] Letter to Mr Jinnah, dated 9th July, 1945, Indian Annual Register, 1945, ii, p. 140.
[29] Letter to Lord Wavell, dated 9th July, 1945, Indian Annual Register, 1945, ii, p. 140.
[30] Indian Annual Register, 1945, ii, p. 129.
[31] See Azad, *India Wins Freedom*, p. 114.

In the month of July, 1945, the Labour Party in England came to power. Soon after Lord Wavell was summoned to England for consultation with His Majesty's Government and it was announced that elections to the Central and Provincial Legislatures would be held during the cold weather. Lord Wavell returned to India on 18th September. On the next day in a broadcast from New Delhi he announced that[32] His Majesty's Government was determined to go ahead and to do its utmost to promote, in conjunction with the leaders of India, the early realisation of full self-government in India. "It is the intention of His Majesty's Government", he announced, "to convene as soon as possible, a constitution-making body and as a preliminary step they have authorised me to undertake, immediately after the elections, discussions with the representatives of the Legislative Assemblies in the Provinces, to ascertain whether the proposals contained in the 1942 Declaration are acceptable or whether some alternative or modified scheme is preferable. Discussions will also be undertaken with the representatives of the Indian States with a view to ascertaining in what way they can best take their part in the constitution-making body." The Viceroy was authorised by His Majesty's Government to take steps to bring into being an Executive Council which would have the support of the main parties in India.

In the opinion of the All-India Congress Committee the proposals made by the Viceroy were "vague, inadequate and unsatisfactory"[33] as they did not contemplate immediate grant of independence to India. As a result, political situation in India began to deteriorate rapidly. At this juncture, two other important events occurred which further accentuated the situation. One was the trial of the Indian National Army prisoners in the months of November and December, 1945, at the Red Fort in Delhi which materially contributed to the growth of hatred, suspicion and conflict between the Indians and the British Government; the other was a widespread strike by the Royal Indian Navy in Bombay. That political subjection of India could not be continued any longer became obvious. On 19th February, 1946, the British Government

[32] Indian Annual Register, 1945, ii, pp. 148-9.
[33] *Ibid.*, p. 93.

announced its decision[34] to send out to India a special Mission of Cabinet Ministers consisting of the Secretary of State for India, Lord Pethick Lawrence, the President of the Board of Trade, Sir Stafford Cripps, and the First Lord of Admiralty, Mr A. V. Alexander, to discuss with the representatives of India what positive steps could be taken for giving effect to the programme outlined in the broadcast of the Viceroy on 19th September, 1945. The policy behind this decision to send a Cabinet Mission to India was explained by the Prime Minister, in the House of Commons on 15th and 16th March, 1946. He said that the idea of nationalism was "running very fast in India and indeed all over Asia".[35] The problem was of vital importance not only to India and the British Commonwealth and Empire but to the whole world.[36] His colleagues were going to India "with the intention of using their utmost endeavour to help her to attain freedom as speedily and as fully as possible". What form of Government would replace the existing regime was for the Indians to decide but it was the desire of His Majesty's Government to help India to "set up forthwith a machinery for making that decision". India would decide whether she would remain within the British Commonwealth or not. His Majesty's Government was not unmindful of the rights of the minorities who should be able to live free from fear but, the Prime Minister declared, it could not allow a minority "to place their veto on the advance of a majority".[37] It was the intention of His Majesty's Government to set up an interim Government enjoying the greatest possible support in India.

The Cabinet Mission arrived in New Delhi on 24th March, 1946.[38] After holding preliminary discussions with the Viceroy and the Provincial Governors the Mission gave interviews to the leaders of different parties and groups in India. The interviews began on 1st April, 1946. The Mission had no concrete proposals to place before the leaders and the talks were of a general and exploratory nature. The Indian National Congress and the All-India Muslim League were accepted by

[34] *The Statesman*, Calcutta, February 20, 1946.
[35] *The Statesman*, Calcutta, March 16, 1946.
[36] *The Statesman*, Calcutta, March 17, 1946.
[37] *The Statesman*, Calcutta, March 16, 1946.
[38] *The Statesman*, Calcutta, March 25, 1946.

on 16th May, 1946, issued a statement in which they set forth their proposals.

On 12th May, 1946, the Cabinet Mission presented to the Chancellor of the Chamber of Princes a "Memorandum on States' Treaties and Paramountcy"[46] stating therein that during the interim period paramountcy would remain in operation. The paramountcy would not in any circumstances be transferred to any Indian Government. It was made clear by the Mission that when an "independent Government or Governments" would come into existence the influence of the British Government with those Governments would not be such "as to enable them to carry out the obligations of paramountcy", nor could the British Government contemplate the retention of British troops in India for that purpose. His Majesty's Government would cease to exercise the powers of paramountcy. That would mean, it was stated, that all the rights surrendered by the States to the paramount power would return to them and that "political arrangements between the States on the one side and the British Crown and British India on the other will thus be brought to an end". The void would have to be filled "either by the States entering into a federal relationship with the successor Government or Governments in British India, or failing this, entering into particular political arrangements with it or them".

The Cabinet Delegation on 16th May, 1946, issued a long statement[47] containing its proposals. The proposals were described as "recommendations" as distinguished from an award. Justifying the procedure it finally adopted, the Mission stated that it was necessary to make the recommendations as to the broad basis of the future constitution of India because it had become clear to it in the course of its negotiations with the leaders of the parties that "not until that had been done was there any hope of getting the two major communities to join in the setting up of the constitution-making machinery". The Mission examined the proposal of a separate and fully independent sovereign State of Pakistan consisting of the six Provinces as claimed by the Muslim League and also con-

[46] *Ibid.*, pp. 31-32.
[47] *Ibid.*, pp. 1-7.
See also Appendix 18.

sidered the alternative of "a smaller sovereign Pakistan" confined to the Muslim majority areas alone. For administrative, economic, military and geographical reasons the claim for Pakistan was rejected and the Mission came to the conclusion that "neither a larger nor a smaller sovereign state of Pakistan" would solve the communal problem. While rejecting the League's demand for Pakistan as well the proposals of the Congress, the Mission acknowledged what it called "the very real Muslim apprehension that their culture and political and social life might become submerged in a purely unitary India in which the Hindus with their greatly superior numbers must be a dominating element". The Mission claimed that the solution it offered "would be just to the essential claims of all parties and would at the same time be most likely to bring about a stable and practicable form of constitution for All-India". In paragraph 15 of the Statement it was recommended that the constitution of India should take the following basic form[48]:—

> "(1) There should be a Union of India, embracing both British India and the States which should deal with the following subjects: foreign affairs, defence and communications; and should have the powers necessary to raise the finances required for the above subjects.
>
> (2) The Union should have an executive and a legislature constituted from British Indian and States' representatives. Any question raising a major communal issue in the legislature should require for its decision a majority of the representatives present and voting of each of the two major communities as well as a majority of all the members present and voting.
>
> (3) All subjects other than the Union subjects and all residuary powers should vest in the provinces.
>
> (4) The States will retain all subjects and powers other than those ceded to the Union.
>
> (5) Provinces should be free to form groups with executives and legislatures, and each group could determine the provincial subjects to be taken in common.
>
> (6) The constitutions of the Union and of the groups

[48] Papers relating to the Cabinet Mission to India, p. 4.

should contain a provision whereby any province could by a majority vote of its legislative assembly call for reconsideration of the terms of the constitution after an initial period of ten years and at ten-yearly intervals thereafter."

The object of the Mission was, it was stated, not to lay down the details of a constitution but to set up a Constituent Assembly—a machinery whereby a constitution could be framed by Indians for Indians. The problem before the Mission was to obtain "as broad-based and accurate a representation" of the whole country as was possible. The Mission felt that election based on adult suffrage, although the "most satisfactory method", would lead to a "wholly unacceptable delay". This was not challenged by the major political parties in India. The only practical course, in the opinion of the Mission, was to utilise the recently elected Provincial Legislative Assemblies as electing bodies. The Provincial Assemblies did not, however, fairly reflect the relative size of the population of the different Provinces or, of the different elements within each Province. After considering the various methods to overcome this difficulty the Mission came to the conclusion that the "fairest and the most practicable" plan would be—

"(*a*) to allot to each province a total number of seats proportional to its population, roughly in the ratio of one to a million, as the nearest substitute for representation by adult suffrage,

(*b*) to divide this provincial allocation of seats between the main communities in each province in proportion to their population,

(*c*) to provide that the representatives allocated to each community in a province shall be elected by members of that community in its Legislative Assembly."[49]

For these purposes, the Mission recognised only three main communities in India—General, Muslim and Sikh. The "General" community included all persons who were neither Muslims nor Sikhs. Each Provincial Legislative Assembly

[49] Papers relating to the Cabinet Mission to India, pp. 4-5.

would elect the following number of representatives, each part of the Assembly (General, Muslim or Sikh) electing its own representatives by the method of proportional representation with single transferable vote[50]:—

"TABLE OF REPRESENTATION

Section A

Province—	General	Muslim	Total
Madras	45	4	49
Bombay	19	2	21
United Provinces ..	47	8	55
Bihar	31	5	36
Central Provinces ..	16	1	17
Orissa	9	0	9
Total	167	20	187

Section B

Province—	General	Muslim	Sikh	Total
Punjab	8	16	4	28
North-West Frontier Province	0	3	0	3
Sind	1	3	0	4
Total	9	22	4	35

Section C

Province—	General	Muslim	Total
Bengal	27	33	60
Assam	7	3	10
Total	34	36	70

Total for British India	292
Maximum for Indian States	93
Total	385

Note. In order to represent the Chief Commissioners' Provinces there will be added to Section A the member representing Delhi in the Central Legislative Assembly, the member representing Ajmer-Merwara in the Central Legislative Assembly, and a representative to be elected by the Coorg Legislative Council. To Section B will be added a representative of British Baluchistan."

[50] *Ibid.*, p. 5.

Lord Pethick Lawrence in his broadcast from New Delhi said that the plan would make it "possible for the Muslims to secure the advantages of a Pakistan without incurring the dangers inherent in the division of India".[51] It was laid down in paragraph 19 of the Statement[52] that after a preliminary meeting of the Constituent Assembly for the election of a Chairman and the setting up of an Advisory Committee the provincial representatives would divide up in three Sections. The Sections would proceed to settle Provincial constitutions for the Provinces included in each Section and would decide whether any group constitution should be framed. They would then reassemble for the purpose of settling the Union constitution. The Provinces would be free, after the first general election under the new constitution, to opt out of the group in which they had been placed. The proposals dealt in the main with long-term arrangements although in paragraph 23 of the Statement the Mission made it clear that it attached "the greatest importance" to the "setting up at once of an interim Government having the support of the major political parties". The Mission refrained from giving a detailed picture of the interim Government, its status and power and authority. But it was assured that the British Government "recognising the significance of the changes, will give the fullest measure of co-operation to the Government so formed in the accomplishment of its tasks of administration and in bringing about as rapid and smooth a transition as possible."[53] With regard to the Indian States it was stated that paramountcy could neither be retained by the British Crown nor transferred to the new Government. In other words, all the rights "surrendered by the States to the paramount power will return to the States". The Mission claimed that the Indian States were willing to co-operate in the new development of India, and it stated that the precise form which their co-operation would take must be a matter for negotiation.[54]

Mahatma Gandhi hailed the "State Paper" as the "best document that the British Government could have produced

[51] Indian Annual Register, 1946, i, p. 152.
[52] See Appendix 18.
[53] Papers Relating to the Cabinet Mission to India., p. 7.
[54] *Ibid.*, p. 3.

in the circumstances".[55] According to his interpretation, the grouping of Provinces was not compulsory and that the Provinces were perfectly free to form groups or not. In his opinion, "the voluntary character of the Statement" demanded that the "liberty of the individual Unit should not be impaired" and that the freedom given to a Province in paragraph 15(5) of the Statement was not taken away by paragraph 19. The Congress also held that grouping of Provinces was not compulsory. The Working Committee of the Congress in its resolution, dated 24th May, 1946, declared that in order "to retain the recommendatory character of the Statement, and in order to make the clauses consistent with each other, the Committee read paragraph 15 to mean that, in the first instance, the respective provinces will make their choice whether or not to belong to the Section in which they are placed".[56] The Cabinet Delegation could not, however, agree with the interpretation put by the Congress on paragraph 15 of the Statement of 16th May. It issued a statement on 25th May, 1946, declaring that the grouping of the Provinces was an "essential feature" of the scheme which could only be modified by agreement between the parties.[57] In reply to a letter of Maulana Azad, dated 25th May, 1946, in which he had asked for an assurance that the Interim Government would function in practice like a Dominion Cabinet, the Viceroy told the Congress President that[58] he was sure that His Majesty's Government "would treat the new Interim Government with the same close consultation and consideration as a Dominion Government".

The Council of the All India Muslim League passed a resolution on 6th June, 1946, accepting the scheme embodied in the Statement of the Cabinet Mission.[59] But at the same time the Council reiterated that "the attainment of the goal of a complete sovereign Pakistan" still remained the "unalterable objective of the Muslims in India for the achievement of which they will, if necessary, employ every means in their power, and consider no sacrifice too great". The Muslim

[55] *Harijan*, May 26, 1946, p. 152.
[56] Papers relating to the Cabinet Mission to India, p. 30.
[57] *Ibid.*, pp. 24-25.
[58] *Ibid.*, p. 35.
[59] *Ibid.*, p. 36-37.

League accepted the scheme because it thought that "the basis and the foundation of Pakistan" were inherent in the plan of the Cabinet Mission by virtue of the compulsory grouping of Provinces and in the hope that "it would ultimately result in the establishment of complete sovereign Pakistan". It was also declared by it that the Muslim League would keep in view "the opportunity and right of secession of Provinces or groups from the Union, which have been provided in the Mission's plan by implication". The Council authorised Mr Jinnah to take such action as he would think proper with regard to the formation of the Interim Government.[60]

Side by side with this question of the grouping of Provinces there loomed on the horizon the question of parity of representation in the proposed Interim Government. The Viceroy at first suggested[61] as a basis of discussion a formula of 5:5:2, five on behalf of the Congress, five to represent the Muslim League, one Sikh and one Indian Christian or Anglo-Indian. In the composition of the Cabinet suggested by the Viceroy there was to be parity between the Hindus including the Schedule Caste and the Muslims. The Congress was not prepared to accept any such proposal and was opposed to "parity" in any shape or form. The Congress thought it "a dangerous innovation which, instead of working for harmony", would be a "source of continuous conflict and trouble".[62] Mr Jinnah, on the other hand, insisted on parity of representation in the Interim Government. The Viceroy then proposed a revised formula of 6:5:3.[63] There would be six Congressmen and five Muslim Leaguers. The Congress rejected[64] the revised formula because there was parity between Caste Hindus and Muslims. A complete deadlock was thus reached. The Viceroy then in concurrence with the Cabinet Mission undertook the responsibility of presenting in specific form his own scheme and it was incorporated in the Mission's statement of 16th June.[65] The proposal put forward was for

[60] *Ibid.*, p. 37.
[61] *Ibid.*, p. 37.
[62] *Ibid.*, p. 41.
[63] *Ibid.*, p. 42.
[64] *Ibid.*, p. 42.
[65] *Ibid.*, pp. 43-44.

an Interim Government consisting of 14 members of whom 6 were to come from the Congress including a Scheduled Caste member, 5 from the Muslim League, 1 Sikh, 1 Parsi, 1 Indian Christian. The Viceroy issued invitations to the following persons:

1. Sardar Baldev Singh.
2. Sir N. P. Engineer.
3. Mr Jagjivan Ram.
4. Pandit Jawaharlal Nehru.
5. Mr M. A. Jinnah.
6. Nawabzada Liaquat Ali Khan.
7. Mr H. K. Mahatab.
8. Dr John Matthai.
9. Nawab Mohammad Ismail Khan.
10. Khwaja Sir Nazimuddin.
11. Sardar Abdul Rab Nistar.
12. Mr C. Rajagopalachari.
13. Dr Rajendra Prasad.
14. Sardar Vallabbhai Patel.

The proposal was more in the nature of an award than a recommendation because it was stated in paragraph 8 of the statement: "In the event of the two major parties or either of them proving unwilling to join in the setting up of a Coalition Government on the above lines, it is the intention of the Viceroy to proceed with the formation of an Interim Government which will be as representative as possible of those willing to accept the statement of May 16th." In reply to a letter of Mr Jinnah in which he had asked for clarification, the Viceroy told the President of the League in his letter, dated 20th June, 1946, that the "proportion of members by communities will not be changed without the agreement of the two major parties".[66] The Congress insisted on the inclusion of a Muslim member out of its allotted quota of representation in the Interim Government[67] to which the League objected.[68] The Viceroy informed the President of the Congress that it was not possible for him and the Mission to accept the demand of the Congress to include a Muslim of its own choice among the representatives of the Congress in the Interim Government.[69] On 25th June, the Working Committee of the Congress adopted a

[66] *Ibid.*, p. 47.
[67] *Ibid.*, pp. 48, 50.
[68] *Ibid.*, p. 58.
[69] *Ibid.*, p. 49.

resolution in which it declared that the Congress did not accept[70] the proposal for the formation of an Interim Government as contained in the statement of June 16, because in the formation of a provisional or other Government Congressmen could never give up the "national character" of the Congress and accept "an artificial and unjust parity or agree to a veto of a communal group". The Working Committee, however, decided that the Congress should join the proposed Constituent Assembly with a view to framing the Constitution of a free, united, and democratic India. The Working Committee, at the same time, stressed the necessity of the immediate formation of a representative and responsible national Government because, in its opinion, the continuation an "authoritarian and unrepresentative Government would "put in jeopardy the work of the Constituent Assembly". On the same day the Working Committee of the Muslim League passed a resolution declaring its intention to join the Interim Government on the basis of the statement of 16th June, and "the clarifications and assurances given by the Viceroy after consultation with the Cabinet Delegation in his letter, dated 20th June, 1946, addressed to the President of the Muslim League".[71] Thus on 25th June, 1946, the position was that the Congress accepted the scheme embodied in the Statement of 16th May, but refused to take part in the Interim Government proposed in the statement of 16th June, the Muslim League, on the other hand, accepted the scheme embodied in both the statements. Immediately the Viceroy told Mr Jinnah that a situation had been produced in which paragraph 8 of the statement of 16th June took effect and that since the Congress and the Muslim League had both accepted the Statement of 16th May, it was his intention to form a Coalition Government including the representatives of both the parties.[72] Mr Jinnah was also informed by the Viceroy that the election and the summoning of a Constituent Assembly, as laid down in the Statement of the 16th May, were going forward.

It was expected by the Muslim League that there would

[70] *Ibid.*, pp. 51-53.
[71] *Ibid.*, p. 53.
[72] *Ibid.*, p. 53.

be an Interim Government without the representatives of the Congress. In fact, Mr Jinnah in his letter, dated 26th June, 1946, addressed to the Viceroy expressed the hope that the Viceroy would go ahead with the formation of the Interim Government on the basis of the statement of June 16.[73] The Cabinet Mission, however, came forward with its statement of the 26th June, declaring that efforts should be renewed for the formation of an Interim Government in accordance with the terms of paragraph 8 of the statement of 16th June.[74] Meanwhile the election to the Constituent Assembly would proceed. It was also announced that the Cabinet Delegation would leave India on 29th June, 1946. Mr Jinnah in his statement of 27th June stated[75] that the Viceroy and the Cabinet Delegation "were in honour bound to go ahead with the formation of the Interim Government immediately with those who were willing to come into the Interim Government on the basis and principles set out in their statement of 16th June". He demanded the postponement of the election to the Constituent Assembly. He was, however, told that[76] the Viceroy would act under paragraph 8 of the statement of June 16 and that the arrangement for the election to the Constituent Assembly had already been put into operation and could not be postponed. The matters were left in that uncertain state when the legislatures entered upon the task of electing representatives to the Constituent Assembly according to the plan embodied in the Statement of 16th May.

At the session of the All-India Congress Committee, which met at Bombay on 6th July to ratify the resolution of the Working Committee accepting the proposals of the Cabinet Mission, Maulana Azad, the retiring President, reiterated that the interpretation put by the Congress on the grouping clause was the correct one.[77] Pandit Nehru, who had been elected President of the Congress, asserted that the Congress had agreed only to join the Constituent Assembly and to nothing more than that. He observed:[78]

[73] *Ibid.*, p. 54.
[74] *Ibid.*, p. 54.
[75] *Ibid.*, p. 57.
[76] *Ibid.*, p. 60.
[77] *The Statesman*, Calcutta, July 7, 1946.
[78] *The Statesman*, Calcutta, July 8, 1946.

> "There is a good deal of talk of the Cabinet Mission's long-term plan and short-term plan. So far as I can see, it is not a question of our accepting any plan, long or short. It is only a question of our agreeing to go into the Constituent Assembly. That is all—and nothing more than that. We will remain in that Assembly so long as we think it is good for India, and we will come out when we think it is injuring our cause and then offer battle. We are not bound by a single thing, except that we have decided for the moment to go to the Constituent Assembly, not certainly to deliver fine speeches but to build something to overcome some of our problems."

At a press conference held on 10th July, 1946, Pandit Nehru expressed the opinion that the grouping principle would collapse. He said;[79]

> "The big probability is from any approach to the question, there will be no grouping. Obviously Section A will decide against grouping. Speaking betting anguage, there was four to one chance of the North-West Frontier Province deciding against grouping. Then Group B collapses. It is highly likely that Assam will decide against grouping with Bengal although I would not like to say what the initial decision may be, since it is evenly balanced. But I can say with every assurance and conviction that there is going to be finally no grouping there, because Assam will not tolerate it under any circumstances whatever. Thus you see this grouping business approacheb from any point of view, does not get on at all."

Pandit Nehru also expressed the opinion[80] that the power of the Union would increase. In his opinion, Defence and Communication would have a large number of industries behind them, Foreign Affairs would include Foreign Trade Policy and the Union would raise finance by taxation which would include customs including tariff and probably income

[79] *The Statesman*, Calcutta, July 11, 1946.
[80] *Ibid.*

tax. We agree with Mr Leonard Mosley that that was a moment in the history of India when "circumspection should have been the order of the day" and that "there was much to be gained by silence" [81]

These statements of the leaders of the Congress made members of the Council of the Muslim League apprehensive. At the session of the All-India Muslim League Council held on 27th July, 1946, Mr Jinnah referred to the press conference held by Pandit Nehru and said that,[82] so far as the Muslim League was concerned, paragraphs 15 and 19 of the Statement of 16th May formed the main basis of the scheme but that the then President of the Congress (Pandit Jawaharlal Nehru) had made it clear that the Congress was not bound by paragraphs 15 and 19 of the Statement. He alleged that the Congress had "rejected not only the two basic provisions, but also the fundamentals of the scheme" embodied in the Statement of 16th May. The Council of the All-India Muslim League accordingly adopted a resolution on 29th July, 1946, declaring that[83] since the Congress had, in fact, rejected the scheme embodied in the Statement of 16th May as was evidenced by its resolution and by the statements made by the leaders of the Congress, there was no justification for abandoning the proposal contained in the statement of 16th June, namely, the formation of Interim Government. The Congress, it was alleged, was not eligible to participate in the Interim Government. The Congress had also declared that it would extend the scope, powers and the subjects of the Union Centre which were proposed to be confined to three specific subjects. The Council thought that in these circumstances the interest of the Muslims would not be safe in the Constituent Assembly and it withdrew its acceptance of the proposals of the Cabinet Mission. The Council, at the same time, called upon the "Muslim nation to resort to direct action to achieve Pakistan and assert their just rights".[84]

The Working Committee of the Congress regretted the decision of the Muslim League to withdraw acceptance of the proposals of the Cabinet Mission. In its resolution, dated

[81] See Leonard Mosley, *The Last Days of the British Raj*, p. 27.
[82] *The Statesman*, Calcutta, July 28, 1946.
[83] *The Statesman*, Calcutta, July 31, 1946.
[84] *Ibid.*

10th August, 1946,[85] it stated that though the Congress did not approve of all the proposals of the Cabinet Mission, it accepted the scheme embodied in the Statement of 16th May "in its entirety". It maintained that each province had the right to decide whether to join a group or not. The question of interpretation, however, would be decided "by the procedure laid down in the statement itself". The Committee emphasised the sovereign character of the Constituent Assembly but at the same time agreed that the Assembly would "naturally function within the internal limitations which are inherent in its task[86]"

As the League decided to stay out from the Interim Government, the Viceroy invited Pandit Nehru, President of the Congress,[87] to assist him in the formation of the Interim Government. The offer was accepted by the Congress and the personnel of the first Interim Government was announced on 24th August, 1946.[88] The new Government took office on 2nd September, 1946.[89] The Government consisted of Pandit Jawaharlal Nehru, Sardar Vallabbhai Patel, Dr Rajendra Prasad, Mr Asaf Ali, Mr C. Rajagopalachari, Mr Sarat Chandra Bose, Dr John Mathai, Sardar Baldev Singh, Sir Shaffat Ahmed Khan, Mr Jagjiban Ram, Syed Ali Zahir and Mr C. H. Bhaba. It was declared that two Muslim members would be appointed later. On 24th August, the Viceroy declared in his broadcast[90] from New Delhi that he would implement the policy of His Majesty's Government of giving the new Government "the maximum freedom in the day-to-day administration of the country" and that the offer of five seats to the Muslim League was still open. On 7th September, in his first broadcast as the political head of the Interim Government, Pandit Nehru said[91] that the Congress would go into sections and that sitting in sections the representatives would consider the question of grouping. He held out the assurance that the Congress would not by its majority coerce any community but would seek "agreed and

[85] *The Statesman*, Calcutta, August 11, 1946.
[86] *Ibid.*
[87] *The Statesman*, Calcutta, August 13, 1946.
[88] *The Statesman*, Calcutta, August 25, 1946.
[89] *The Statesman*, Calcutta, September 3, 1946.
[90] *The Statesman*, Calcutta, August 25, 1946.
[91] See Jawaharlal Nehru, *Independence and After*, p. 342.

integrated solutions" of the problems. "We are perfectly prepared to", he declared, "and have accepted, the position of sitting in sections, which will consider the question of formation of groups. I should like to make it clear, on behalf of my colleagues and myself, that we do not look upon the Constituent Assembly as an arena for conflict or the forcible imposition of one viewpoint over another. We seek agreed and integrated solutions with the largest measure of goodwill behind them. We shall go to the Constituent Assembly with the fixed determination of finding a common basis for agreement on all controversial issues." Once again there was exchange of letters between the Viceroy and Mr. Jinnah and on 13th September, 1946, Mr Jinnah informed the Viceroy of the intention of the Muslim League to join the Interim Government[92] and the names of Mr Liaquat Ali Khan, Mr I. I. Chundrigar, Mr Abdur Rab Nistar, Mr Ghaznafar Ali Khan and Mr Jogendra Nath Mondal, were sent as the representatives of the Muslim League.[93] They were then appointed members of the Interim Government and in order to "re-form the Cabinet"[94] Mr Sarat Chandra Bose, Sir Shaffat Ahmed Khan, Syed Ali Zahir tendered their resignations.

It was hoped at the time when the Muslim League joined the Interim Government that it would join the Constituent Assembly. But shortly after the representatives of Muslim League had joined the Interim Government, Mr Jinnah declared that the League would not join the Constituent Assembly and that the League adhered to its demand for Pakistan and two Constituent Assemblies.[95] While the matter stood thus the British Prime Minister invited two representatives each of the Congress and the League and in addition the Sikh member of the Interim Government to go to London for a further talk. This step was taken in view of the difficulties that had arisen in connection with the question of participation by the Muslim League in the Constituent Assembly which was summoned to meet at Delhi on 9th December, 1946. Pandit Nehru, Sardar Baldev Singh, Mr

[92] Indian Annual Register, 1946, ii, p. 274.
[93] *Ibid.*, p. 275.
[94] *Ibid.*, p. 264.
[95] *Ibid.*, p. 279.

Jinnah and Mr Liaquat Ali Khan, together with the Viceroy, went to London for discussion. The discussion, however, failed to bring about harmony between the points of view of the Muslim League and the Congress. On 6th December the British Government issued a statement which threw a veritable apple of discord into Indian politics. It was declared:[96]

> "The Cabinet Mission have throughout maintained the view that the decisions of the Sections should, in the absence of an agreement to the contrary, be taken by a simple majority vote of the representatives in the Sections. This view has been accepted by the Muslim League, but the Congress have put forward a different view. They have asserted that the true meaning of the Statement,[97] read as a whole, is that the Provinces have the right to decide both as to Grouping and as to their own constitutions.
>
> "His Majesty's Government have had legal advice which confirms that the Statement of May 16 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 16 for enabling the Indian people to formulate a 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.
>
> "It, is, however, clear that other questions of interpretation of the Statement of May 16 may arise and His Majesty's Government hope that if the Council of the Muslim League are able to agree to participate in the Constituent Assembly, they will also agree, as have the Congress, that the Federal Court should be asked to decide matters of interpretation that may be referred to them by either side and will accept such a decision, so that the procedure both in the Union Constituent Assembly and in the Sections may accord with the Cabinet Mission's Plan."

[96] *The Statesman*, Calcutta, December 8, 1946.
[97] Statement of 16th May.

It was also declared:[98]

> "Should the constitution come to be framed by a Constituent Assembly in which a large section of the Indian population had not been represented, His Majesty's Government could not, of course, contemplate—as the Congress have stated they would not contemplate—forcing such a constitution upon any unwilling parts of the country."

The Statement of 6th December suggested that the British Government which was so strongly in favour of a united India was moving towards the eventuality of a divided India. Pandit Jawaharlal Nehru and Sardar Baldev Singh returned to India highly dissatisfied and the Constituent Assembly met on 9th December, 1946.

The Cabinet Mission recognised the Sikhs as one of "three main communities"[99] in India and it claimed[100] that of the "various alternatives" open to it, the "best one from the Sikh point of view" had been chosen. But the Sikhs felt[101] that the proposals of the Cabinet Mission would leave them without adequate safeguard against a Muslim majority in the Punjab and in the north-west group. They also thought that the Advisory Committee proposed in the Cabinet Mission's Statement of 16th May,[102] was "wholly ineffective to safeguard the just rights of the Sikhs". At a representative conference of the Sikhs held on 10th June, 1946, the proposals of the Cabinet Mission were rejected.[103] The Sikhs also refused to send their representative to the Interim Government.[104] The Working Committee of the Congress, however, appealed[105] to the Sikhs to reconsider their decisions and express their willingness to take part in the Constituent Assembly. It also assured the Sikhs that the Congress would give them "all possible support in removing their legitimate grievances and in securing

[98] *The Statesman*, Calcutta, December 8, 1946.
[99] Papers Relating to the Cabinet Mission to India, p. 5.
[100] *Ibid.*, p. 61.
[101] *Ibid.*, p. 62.
[102] See Appendix 18.
[103] Papers Relating to the Cabinet Mission to India, p. 62.
[104] Indian Annual Register, 1946, i, p. 206.
[105] Indian Annual Register, 1946, ii, p. 105.

adequate safeguards for the protection of their just interests in the Punjab". In response to that appeal the Sikhs decided to join the Constituent Assembly and enter the Interim Government.[106]

The proposals of the Cabinet Mission with regard to the Indian States were the following:—

(1) Paramountcy could not be retained by the British Crown nor could it be transferred to the new Government but according to the assurance given by the Rulers that they were ready and willing to do so, the States were expected to co-operate in the new development of India.
(2) The exact form which the co-operation of the States would take must be a matter for negotiation.
(3) The States were to retain all subjects and powers other than those ceded to the Union, namely, Foreign Affairs, Defence and Communications.
(4) In the preliminary stage the States were to be represented on the Constituent Assembly by a Negotiating Committee.
(5) In the final Constituent Assembly they were to have appropriate representation not exceeding 93 seats and the method of selection was to be determined by consultation.
(6) After the Provincial and Group Constitutions had been framed by the three Sections of the Constituent Assembly, the representatives of the Sections and of the Indian States would reassemble for the purpose of settling the Union constitution.

The proposals of the Cabinet Mission were considered by the Standing Committee of the Chamber of Princes which met in the second week of June, 1946. The Committee was of opinion that the proposals of the Cabinet Mission provided the "necessary machinery for the attainment by India of independence as well as a fair basis for further negotiation". The Committee decided to set up a Negotiating Committee and authorised the Chancellor of the Chamber of Princes to

[106] *Ibid.*, ii, p. 15.

arrange discussion with the corresponding Committee to be set up by the representatives of British India in the Constituent Assembly.[107]

II

The first meeting of the Constituent Assembly of India took place in the Constitution Hall, New Delhi, on Monday, 9th December, 1946, at 11 a.m.[108] Two hundred and seven members were present but all the seventy-four Muslim League members and the Muslim representative from British Baluchistan were absent. The four Muslim members present were congressmen.[109] There was thus practically one organised political party from the very beginning of the Constituent Assembly. The members were divided provincewise as follows:[110]

Madras	43
Bombay	19
Bengal	25
United Provinces	42
Punjab	12
Bihar	30
C. P. and Berar	14
Assam	7
N. W. F. P.	2
Orissa	9
Sind	1
Delhi	1
Ajmer-Merwara	1
Coorg	1
Total	207

Dr Sachchidananda Sinha was elected temporary Chairman of the Constituent Assembly.[111] In his inaugural address he emphasised, among other things, the need for "reasonable

[107] Papers Relating to the Cabinet Mission to India, p. 64.
[108] Constituent Assembly Debates, 9th December, 1946, p. 1.
[109] *The Statesman*, Calcutta, 10th December, 1946.
[110] Constituent Assembly Debates, 9th December, 1946, pp. 8 to 14.
[111] *Ibid.*, p. 1.

agreements and judicious compromises" in framing a constitution for a country like India.[112] After the inaugural address the members of the Assembly presented their credentials and signed their names in the Register. The Assembly then adjourned till Tuesday, 10th December, 1946.[113] The Constituent Assembly of India did not commence work with any rules and regulations framed by any outside authority. Necessarily, it had to frame its own rules and on 10th December, 1946, a committee was appointed by it to frame Rules of Procedure for the Assembly as well as for its various Sections and committees.[114] Until those rules were framed the Assembly had functioned according to the Rules and Standing Orders of the Central Legislative Assembly and the Chairman had been authorised[115] to modify those rules, as he would think fit, for the transitional period. On the same day, outside the Constituent Assembly, at a meeting of the Congress Party members of the Constituent Assembly it was unanimously decided that Dr Rajendra Prasad should be the permanent Chairman of the Assembly. It was also decided to set up a committee of thirty members to advise the Congress members in the Assembly on issues that would come before the Assembly. Those thirty members would include all the members of the Working Committee of the Congress.[116] On the next day, in the Constituent Assembly, Dr Rajendra Prasad was unanimously elected permanent Chairman of the Constituent Assembly.[117] Dr Rajendra Prasad observed that he was aware that the Constituent Assembly had come into being with a number of limitations,[118] but he was of opinion that, in spite of those limitations, the Assembly was a "self-governing, self-determining independent body" and no outside authority could interfere with its proceedings, or "upset or alter or modify" its decisions, and that it was "in the power" of the Assembly to get rid of those limitations. He, however, hoped that the representatives of the Muslim League would soon join the Assembly. He also expressed the hope that the Constituent

[112] *Ibid.*, p. 4.
[113] *Ibid.*, p. 14.
[114] Constituent Assembly Debates, 10th December, 1946, p. 33.
[115] *Ibid.*, pp. 19, 21.
[116] *The Statesman*, Calcutta, 10th December, 1946.
[117] Constituent Assembly Debates, 11th December, 1946, pp. 35-6.
[118] *Ibid.*, p. 51.

Assembly of India would place before the world a model of a constitution which would "ensure to everyone freedom of action, freedom of thought, freedom of belief and freedom of worship, which will guarantee to everyone opportunities for rising to his highest, and which will guarantee to everyone freedom in all respects."

On 13th December, 1946, Pandit Jawaharlal Nehru moved his Objectives Resolution.[119] The Resolution, according to Pandit Nehru, was "in the nature of a pledge"[120] and did not contain anything which was outside the limitations laid down by the British Government or anything which was "disagreeable to any Indian". The Resolution, he said, sought to lay down certain fundamental principles upon which the future State of India was to be based. India, according to that Resolution, would be an independent sovereign Republic with autonomous units and all powers and authority of the State and its constituent units were presumed to be derived from the people. The Resolution ran as follows:[121]

> "(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;
>
> (2) WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and
>
> (3) WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the Law of the Constitution, shall possess and retain the status of autonomous Units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or

[119] Constituent Assembly Debates, 13th December, 1946, p. 57.
[120] *Ibid.*, p. 56.
[121] *Ibid.*, p. 57.

assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

(4) WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and

(5) WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilised nations; and

(8) this ancient land attains its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind."

In moving the Resolution Pandit Nehru said that it was desirable at that stage to give some indications to the people of India and to the world at large as to what was sought to be achieved in the Constituent Assembly. The Resolution, he added,[122] "seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future." He requested the members of the Constituent Assembly not to consider the Resolution "in a spirit of narrow legal wording" but to look at the "spirit behind" it.

Dr M. R. Jayakar suggested[123] that further consideration of the Resolution, which intended to lay down the "fundamentals of the Constitution", should be postponed to a later day to enable the representatives of the Muslim League and of the Indian States to participate in the deliberations of the

[122] *Ibid.* p. 58.

[123] Constituent Assembly Debates, 16th December, 1946, p. 71.

Constituent Assembly. In his opinion, the power of the Assembly to transact business at the preliminary meeting was limited by the Statement of 16th May, 1946, and those limitations being accepted, the Constituent Assembly had no power at that stage to adopt any fundamentals of the constitution however "sketchy" they might be. Accordingly, he moved the following amendment to Pandit Nehru's Resolution:

> "This Assembly declares its firm and solemn resolve that the Constitution to be prepared by this Assembly for the future governance of India shall be for a free and democratic Sovereign State; but with a view to securing, in the shaping of such a constitution, the co-operation of the Muslim League and the Indian States, and thereby intensifying the firmness of this resolve, this Assembly postpones the further consideration of this question to a later date, to enable the representatives of these two bodies to participate, if they so choose, in the deliberations of this Assembly."[124]

Dr Jayakar added that the scheme embodied in the Statement of 16th May contemplated that the Indian States, the Congress and the Muslim League should have a chance of having their say on matters relating to the framing of the constitution of India. He pointed out that the Constituent Assembly, as it was formed at that stage, was not complete.[125] The representatives of the Muslim League had not joined the Assembly and the Indian States could not come at that stage. The Negotiating Committee had been formed by the Chamber of Princes but no such Committee had yet been formed by the Constituent Assembly. He drew the attention of the members of the Constituent Assembly to the statement issued by the British Government on 6th December, 1946, and observed that the British Government would not force a constitution framed by such an Assembly upon the unwilling parts of the country. We agree that in the formulation of the objectives of the Constituent Assembly the Indian States had

[124] *Ibid.*, p. 71.
[125] *Ibid.*, p. 74.

a right to be consulted, especially as it was intended that the Indian Republic would comprise the territories that formed the Indian States. In fact, Shri C. P. Ramaswamy Ayyar, who had been the Dewan of Travancore, in a statement issued on 14th December, 1945,[126] described the Resolution as "premature". He also expressed the opinion that the Resolution was likely to retard, instead of facilitating, that process of mutual adjustment which could bring "real freedom and self-Government to India". The discussion on the Objectives Resolution began on 13th December and continued on 16th, 17th, 18th and 19th December. On 19th December, at a meeting of the Congress Party members of the Constituent Assembly it was decided that further discussion on the Objectives Resolution should be postponed until the next meeting of the Assembly.[127] On 21st December, the Chairman of the Assembly announced in the Assembly that[128] further discussion would be taken up in the month of January, 1947, when the Assembly would meet again. He hoped that meanwhile the representatives of the Muslim League would come in.

On 21st December, 1946, however, the Constituent Assembly appointed a Committee[129] to confer with the Negotiating Committee set up by the Chamber of Princes, for the purposes of (a) fixing the distribution of seats in the Constituent Assembly not exceeding 93 in number which were reserved for the Indian States, and (b) fixing the method by which the representatives of the Indian States should be returned to the Assembly. On 22nd January, 1947, that Committee was authorised by the Assembly to confer with such persons as it would think fit for the purpose of examining the special problems of Bhutan and Sikkim which did not fall within the category of the Indian States.[130] The Committee was directed to report to the Assembly the result of such negotiations.

On 21st December, 1946, Shri K. M. Munshi presented

[126] *The Statesman*, Calcutta, 16th December, 1946.
[127] *The Statesman*, Calcutta, 20th December, 1946.
[128] Constituent Assembly Debates, 21st December, 1946, pp. 158-9.
[129] *Ibid.*, p. 158.
Members of the Committee: 1. Maulana Abul Kalam Azad, 2. Pandit Jawaharlal Nehru, 3. Sardar Vallabhbhai Patel, 4. Dr B. Pattabhi Sitaramayya, 5. Shri Sankarrao Deo, 6. Shri Gopalaswamy Ayyanger.
[130] Constituent Assembly Debates, 22nd January, 1947, p. 304.

to the Assembly[131] the report of the Committee on the Rules of Procedure of the Assembly. Thereupon, the House converted itself into a Committee of the whole Assembly with a view to discussing the report *in camera* and informally. The Rules of Procedure, as accepted by the Committee of the whole Assembly, were formally adopted by the Constituent Assembly on 23rd December, 1946.[132] The President declared that there was no necessity of referring any matter to the Federal Court regarding the interpretation of the Statement of May 16.[133] The Assembly then adjourned till Monday, 20th January, 1947.

The discussion on the Objectives Resolution was resumed on 20th January, 1947.[134] On 21st January Dr Jayakar said that[135] he had suggested postponement of the discussion on the Objectives Resolution to enable the representatives of the Muslim League and of the Indian States to take part in the deliberations of the House. But the representatives of the Muslim League had not come in. So far as the representatives of the Muslim League were concerned, he said, as the Assembly had practically accepted the proposal contained in his amendment he did not want to press it. In his reply to the debate, Pandit Nehru observed[136] that sufficient opportunity had been given to the representatives of the Muslim League to join the Constituent Assembly but that they had not come in. He regretted their absence and said that the Constituent Assembly would welcome them at any future time when they might wish to come. He, however, made it clear that the work of the Constituent Assembly would not be held up in future, "whether any one comes or not". Referring to the Indian States Pandit Nehru remarked that[137] it was a defect of the scheme under which the Assembly was functioning that the representatives of the Indian States could not come in at that stage. On 22nd January the Objectives Resolution was adopted by the Constituent Assembly.[138]

[131] Constituent Assembly Debates, 21st December, 1946, p. 159.
[132] Constituent Assembly Debates, 23rd December, 1946, p. 247.
[133] Constituent Assembly Debates, 23rd December, 1947, p. 249.
[134] Constituent Assembly Debates, 20th January, 1947, p. 253.
[135] Constituent Assembly Debates, 21st January, 1947, p. 289.
[136] Constituent Assembly Debates, 22nd January, 1947, p. 299.
[137] *Ibid.*
[138] *Ibid.*, p. 304.

The proposals of the Cabinet Mission contemplated the setting up of an Advisory Committee "on rights of citizens, minorities and tribal and excluded areas" at the preliminary meeting of the Constituent Assembly after the election of the Chairman.[139] But in order to "facilitate the entry" of the representatives of the Muslim League in the Constituent Assembly and to secure their co-operation in its deliberations, the appointment of the Committee had been postponed and the Committee was actually appointed on 24th January, 1947.[140] The Advisory Committee was asked to appoint sub-committees to prepare schemes for the administration of the North-Western tribal areas, the North-Eastern tribal areas and the excluded and partially excluded areas. The Committee was directed to submit its final report to the "Union Constituent Assembly" within three months from the date of its appointment. It was, however, permitted to submit interim reports from time to time. But the Committee was directed to submit an interim report on Fundamental Rights within six weeks, and an interim report on the rights of the minorities within ten weeks, from the date of its appointment. The Cabinet Mission recommended that[141] the Union Government should deal with three specific subjects, viz., foreign affairs, defence and communications, and should have the powers necessary to raise finances required for those subjects. Accordingly, on 25th January, 1947, the Assembly appointed a Committee[142] to draw up a list of matters "included in and interconnected" with the subjects assigned to the Centre. The Committee was directed to submit its report not later than 15th April, 1947. Evidently, this step was taken to demarcate clearly the fields of jurisdiction so that the authority of the Centre might not encroach upon that of the provinces or a group, or that of the provinces or a group upon the Centre. But having regard to the specified agenda of business for the preliminary meeting[143] of the Constituent Assembly, it may be argued that it was not contemplated by the Cabinet Mission that a decision in this regard should be taken at

[139] Paragraph 19 (IV).
[140] Constituent Assembly Debates, 24th January, 1947, pp. 325-7.
[141] Paragraph 15 (1) of the Statement of 16th May, 1946.
[142] Constituent Assembly Debates, 25th January, 1947. pp. 330, 336.
[143] Paragraph 19 (IV) of the Statement of 16th May, 1946.

the preliminary meeting of the Assembly. We may mention here that on 25th January, 1947, Dr H. C. Mukherjee was elected Vice-President[144] of the Constituent Assembly of India. The Constituent Assembly adjourned to such day in the month of April as the President might fix.[145]

III

We have narrated what happened in the Constituent Assembly from the date of its commencement on 9th December, 1946, to that of its adjournment on 25th January, 1947. Before we resume our narrative about the activities of the Constituent Assembly, we may say a few words regarding the contemporary political situation in the country. The Congress considered the statement issued by the British Government on 6th December, 1946. In its opinion, the statement of the British Government, though made by way of "interpretation and elucidation", was really in addition to, and variation of, the Statement of 16th May in which the scheme of the Constituent Assembly had been embodied. It still maintained[146] that the interpretation of the British Government with regard to the method of voting in the Sections was not consistent with provincial autonomy which was one of the bases of the scheme as incorporated in the Statement of 16th May. The All-India Congress Committee met on 5th and 6th January, 1947, to consider the latest developments. The Committee adopted a resolution in which it was declared,[147] *inter alia:*

> "The A.I.C.C. is anxious that the Constituent Assembly should proceed with the work of framing a constitution for free India with the goodwill of all parties concerned and, with a view to removing the difficulties that have arisen owing to the varying interpretations, agree to advise action in accordance with the interpretation of the British Government in regard to the procedure to be followed in the sections. It must be clearly under-

[144] Constituent Assembly Debates, 25th January, 1947, p. 329.
[145] *Ibid.*, p. 341.
[146] Statement of the Working Committee, 22nd December, 1946, *the Statesman*, Calcutta, 23rd December, 1946.
[147] *The Statesman*, Calcutta, 6th January, 1947.

stood, however, that this must not involve any compulsion of a province and that the rights of the Sikhs in the Punjab should not be jeopardised. In the event of any attempt at such compulsion, a province or part of a province has the right to take such action as may be deemed necessary in order to give effect to the wishes of the people concerned."

The Working Committee of the Muslim League, in its resolution, dated 31st January, 1947,[148] alleged that the "qualifying clauses" in the resolution of the Congress, which sought to give a right of veto within the Section to a province and a part of a province and to the Sikhs in the Punjab, completely neutralised the so-called acceptance of the statement of 6th December by the Congress.[149] In its opinion, the Congress had converted the Constituent Assembly "into a rump" totally different from what the Cabinet Mission's Statement had provided for. It was further alleged that the Constituent Assembly had, at its preliminary meeting, taken certain decisions which had exceeded the limitations imposed on its powers by the Statement of 16th May and "impinged" upon the powers and functions of the Sections. The Working Committee of the League called upon[150] the British Government to declare that the plan embodied in the Statement of 16th May had failed. The Committee further held that the election to, and the summoning of, the Constituent Assembly had been *ab-initio* illegal and demanded its dissolution forthwith. We, however, think that it was not within the competence of the British Government to dissolve the Constituent Assembly. The Statement of 16th May made no provision for any action of that kind. All that the British Government could do was to advise Parliament not to implement the Constitution framed by the Constituent Assembly. The British Government found the situation very grave and realised that this state of uncertainty should in no case be allowed to continue. Therefore, on 20th February, 1947, the British Prime Minister made a statement in the House of Commons announcing the definite

[148] *The Statesman*, Calcutta, 2nd February, 1947.
[149] *Ibid.*
[150] *Ibid.*

intention of His Majesty's Government to transfer power to Indians by a date not later than June, 1948. His Majesty's Government, he said, wanted to hand over responsibility to "authorities established by a constitution approved by all parties in India" in accordance with the proposals of the Cabinet Mission. In his opinion, however, there was no "clear prospect" of the emergence of such a constitution and such authorities. There was still differences among Indian political parties and the Constituent Assembly, which was in session, was not fully representative and as such did not fulfil the requirements contemplated in the Cabinet Mission's plan. The Prime Minister further declared that if such a constitution was not framed by a fully representative Constituent Assembly before June, 1948, His Majesty's Government would have to consider "to whom the powers of the Central Government in British India should 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 interest of the Indian people "[151] It was also announced that Lord Wavell would be succeeded by Admiral the Viscount Mountbatten who would be entrusted with the task of transferring to Indian hands power "in a manner that will best ensure the future happiness and prosperity of India." Pandit Nehru described the statement of the British Government as "a wise and courageous one" and said that the work of the Constituent Assembly must be carried on with greater speed.[152] The new declaration of policy was by no means a revocation of the Cabinet Mission's plan. What was of importance from the point of view of broad principle was the pledge of the British Government to withdraw from the Indian political scene by an appointed date. The fixing of the deadline for the withdrawal of the British marked "a landmark just as the announcement made by Lord Linlithgow in 1940 stating that it was for Indians themselves to frame their own Constitution was a welcome departure from the British Government's past policy."[153]

[151] *The Statesman*, Calcutta, 21st February, 1947.
[152] *The Statesman*, Calcutta, 23rd February, 1947.
[153] See D. N. Sen, *Revolution by Consent?*, p. 218.

The Working Committee of the Congress welcomed[154] the announcement made by the British Prime Minister to transfer power by a date not later than June, 1948. It declared that the Constituent Assembly was a voluntary body and that the constitution framed by it would apply only to those areas which accepted it. At the same time, it made it clear that no province or part of a province which desired to join the Indian Union could be prevented from doing so. There should be no compulsion and the people would themselves decide their future. The Committee invited the Muslim League to nominate representatives to meet the representatives of the Congress to consider the situation that had arisen.

It may be recalled that on 21st December, 1946, the Constituent Assembly had appointed a Committee[155] to confer with the Negotiating Committee set up by the Chamber of Princes, for the purposes of (a) fixing the distribution of seats in the Constituent Assembly not exceeding 93 in number which were reserved for the Indian States, and (b) fixing the method by which the representatives of the Indian States should be returned to the Assembly. The joint meetings of the two Committees were held on 8th and 9th February and 1st March, 1947.[156] With regard to the method of distribution of the 93 seats allotted to the States, the two committees agreed[157] that seats to individual States should be allotted generally on the basis of one seat for one million of the population. fractions of three-fourths or more should be counted as one and lesser fractions should be ignored. Regarding the method of selecting representatives, it was agreed that fifty per cent of the States' representatives should be elected by the elected members of the legislatures where they existed and, where such legislatures did not exist, by the members of other electoral colleges. It was also agreed that the States would try to increase the quota of elected representatives. The agreement was ratified[158] by the General Conference of the Rulers of the Indian States held on 2nd April, 1947.

[154] Indian Annual Register, 1947, i, pp. 117-18.
[155] See page 36
[156] Constituent Assembly of India—Reports of Committees, First Series, p. 5.
[157] *Ibid.*, pp. 7,11.
[158] *Ibid.*, p. 17.

Thereupon, the representatives of the States of Baroda, Cochin, Udaypur, Jaipur, Jodhpur, Bikanir, Rewa and Patiala took their seats in the Assembly on 28th April, 1947. Subsequently, with the exception of Hyderabad, all the remaining States entitled to individual representation sent their representatives to the Constituent Assembly. Representatives were also returned in due course by groups of States which had no individual representation. The States Committee of the Constituent Assembly presented its report on 28th April, 1947.

IV

The third session of the preliminary meeting of the Constituent Assembly commenced on 28th April, 1947. Dr Rajendra Prasad, President of the Constituent Assembly, referred to the developments that were taking place in the country and expressed the apprehension[159] that the proposed Union of India might not include all its Provinces and that there was a possibility not only of the division of India but also of the division of some of its Provinces. In that case, he said, the Constituent Assembly might have to draw up a constitution based on such a division. Accordingly, the Assembly decided to postpone[160] the discussion of the report of the Union Powers Committee as it thought that rigid conformity with the Cabinet Mission's Plan might not be possible in the new situation, and permitted the Committee to submit a further report. The Assembly then proceeded to discuss the interim report on fundamental rights.[161] The dis cussion began on 29th April and continued up to 2nd May, 1947. We shall deal with this report and the discussion thereon in the Constituent Assembly later on.

It may be mentioned that a committee had been appointed by a resolution of the Constituent Assembly, dated 25th January, 1947,[162] to recommend "the order of further business" of the Assembly. Because of the changing political situation in the country, which affected the programme of the Assembly, that committee could not make any final recommendations.

[159] Constituent Assembly Debates, 28th April, 1947, p. 345.
[160] *Ibid.*, pp. 361-2.
[161] Constituent Assembly of India–Reports of Committees, First Series, pp. 18-31.
[162] Constituent Assembly Debates, 25th January, 1947, pp. 329-30.

It had suggested, however, that[163] after discussing the reports of the States Committee, Union Powers Committee and the report of the Advisory Committee on fundamental rights, the Constituent Assembly should appoint two separate committees, one to report on the main principles of the Union Constitution and the other to report on the principles of a 'model' Provincial Constitution. Accordingly, and in pursuance of a resolution of the Assembly of 30th April, 1947, these two committees were nominated by the President.[164] The committees were directed to submit their reports before the next session of the Assembly. On 2nd May the Assembly adjourned again till such time as the President might fix.

V

We have stated before that Lord Mountbatten, the last of the British Governors-General in India, was entrusted with the task of transferring to Indian hands power 'in a manner that will best ensure the future happiness and prosperity of India."[165] But the task was by no means an easy one. Lord Mountbatten arrived in New Delhi on 22nd March, 1947.[166] Immediately thereafter, he began holding discussions with Indian leaders with a view to obtaining an agreement for the solution of the constitutional problem of India. But there was hardly any possibility of agreement between the Congress and the Muslim League on the Cabinet Mission's Plan of 16th May, 1946, which contemplated a united India. On the other hand, communal tension in the country was rising and the economic condition of the people was steadily deteriorating. The majority of the representatives of Bengal, the Punjab and Sind as well as the representative of British Baluchistan, who were members of the Muslim League, did not join the Constituent Assembly. There was also a crisis[167] within the Interim Government and the Congress and the minority members demanded the resignation of the representatives of the Muslim League from the Interim Govern-

[63] Constituent Assembly of India—Reports of Committees, First Series, p. 26.
[64] Constituent Assembly Debates, 30th April, 1947, p. 461.
[65] See page 41.
The Statesman, Calcutta, 23rd March, 1947.
See Alan Campbell-Johnson, *Mission with Mountbatten*, p. 44.

ment.[168] It had already been declared by the British Government that if a constitution based on the Cabinet Mission's Plan was not likely to be worked out by a fully representative Constituent Assembly, His Majesty's Government would consider to whom power should be handed over, 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 might seem "most reasonable and in the best interest" of the people of India. Lord Mountbatten became convinced, after his discussions with the leaders of India, that the June 1948 time-limit, "far from being long enough", was already "too remote a deadline".[169] He sensed the danger of a "political collapse". He also became convinced that there was no prospect of an agreed solution on the basis of the Cabinet Mission's Plan. An alternative plan had to be found. As the leaders of India finally failed to agree on the Cabinet Mission's Plan, a partition of the country became the inevitable alternative. Hence, His Majesty's Government issued a fresh statement on 3rd June, 1947. The plan embodied in that statement came to be known as the Mountbatten Plan.

It was stated[170] that His Majesty's Government had hoped that it would be possible for the major parties in India to cooperate in the working of the Cabinet Mission's Plan, but the hope had not been fulfilled. It had always been the desire of His Majesty's Government that powers should be transferred in accordance with the wishes of the Indian people themselves. The task would have been facilitated if there had been agreement among Indian political parties. In the absence of such agreement the task of finding out a method by which the wishes of the Indian people could be ascertained had "devolved" on His Majesty's Government. His Majesty's Government made it clear that it had no intention of attempting to frame any ultimate constitution for India, because that was a matter for the Indians themselves. Nor was there anything in the Plan to prevent negotiation between different communities for a united India. It was also not the

[168] See V. P. Menon, *The Transfer of Power in India*, pp. 335-6.
[169] See Alan Campbell-Johnson, *Mission with Mountbatten*, p. 55.
[170] Indian Annual Register, 1947, i, pp. 143-6.

intention of the British Government to interrupt the work of the existing Constituent Assembly. At the same time, it was clear that any constitution framed by the Constituent Assembly could not apply to those parts of the country which were unwilling to accept it. The problem was how to settle "the best practical method" of ascertaining the wishes of the people of such areas on the issue whether their constitution should be framed by the existing Constituent Assembly, or by a new and separate Constituent Assembly consisting of the representatives of those areas which might decide not to participate in the existing one. The procedure proposed was to this effect: the Provincial Legislative Assemblies of Bengal and the Punjab (excluding the European Members) would meet in two parts, one representing the Muslim majority districts and the other the rest of the province. If a simple majority of either part decided in favour of partition of the Province, division would take place and arrangements would be made accordingly. Before the question of partition was, however, decided, it was desirable for the representatives of each part to know in advance which Constituent Assembly the province as a whole would join in the event of the two parts deciding to remain united. Therefore, it was proposed that, if any member of either part of the Legislative Assembly so demanded, a meeting would be held of all the members of the Legislative Assembly (other than Europeans) at which a decision would be taken on the issue. In the event of partition being decided upon, each part of the Legislative Assembly would, on behalf of the areas represented by it, decide whether its constitution should be framed by the existing Constituent Assembly, or by a new and separate Constituent Assembly. The Legislative Assembly of Sind (excluding the European members) would also at a special meeting decide whether its constitution should be framed by the existing, or a new and separate, Constituent Assembly. His Majesty's Government recognised the special position of the North-West Frontier Province and declared that, in view of its special position, it would be necessary to give it an opportunity of reconsidering its position in the event of the whole or any part of the Punjab declaring against joining the existing Constituent Assembly. Therefore, it was proposed that a referendum would be made

to the electors of the Legislative Assembly to choose between the existing Constituent Assembly and a new and separate one. With regard to British Baluchistan, it was stated that the Governor-General was examining how best British Baluchistan, in view of its geographical situation, could be given a similar opportunity of reconsidering its position.

Though Assam was predominantly a non-Muslim province, the district of Sylhet, which was contiguous to Bengal, was predominantly Muslim. If it should be decided to partition Bengal, a referendum would be held in the district of Sylhet to decide whether the district should continue to form part of Assam or should be amalgamated with the new province of East Bengal.

If partition of Bengal and the Punjab should be decided upon, the statement added, it would be necessary to hold fresh elections in order to choose representatives for the respective Constituent Assemblies on the scale of one for every million of the population, according to the principle contained in the Cabinet Mission's Plan. Similar elections would be held for Sylhet in the event of it being decided that this district should form part of East Bengal.

The number of representatives to which each area would be entitled would be as follows :

Province	General	Muslims	Sikhs	Total
Sylhet District	1	2	Nil	3
West Bengal	15	4	Nil	19
East Bengal	12	29	Nil	41
West Punjab	3	12	2	17
East Punjab	6	4	2	12

His Majesty's Government made it clear that the decisions announced above related only to British India and that its policy towards former Indian States contained in the Cabinet Mission Memorandum of 12th May, 1946[171], remained unchanged.

His Majesty's Government expressed full sympathy with the desire of the major political parties for the earliest possible transfer of power, and it was announced that His Majesty's Government was willing to hand over power even earlier

[171] See page 30.

than June, 1948. Accordingly, it was proposed to introduce legislation during the current session of Parliament for the transfer of power in 1947 on a Dominion Status basis to one or two successor authorities, according to the decisions taken under the Plan. That would be without prejudice to the right of the Constituent Assemblies to decide in due course whether the parts of India which they represented should remain within the British Commonwealth.

Thus, the Mountbatten Plan contemplated the division of India and the division of Bengal and the Punjab in certain circumstances. The Plan was accepted by all the political parties in India.[172] It was thus agreed in principle that India would be divided and that Bengal and the Punjab would be partitioned.

In pursuance of the provisions of the statement of 3rd June, 1947, the Bengal Legislative Assembly met on 20th June, 1947, to decide the issue of partition of Bengal. It decided in favour of joining a new Constituent Assembly. The members representing non-Muslim majority districts then met and decided that Bengal should be partitioned and that the constitution of the non-Muslim areas should be framed by the existing Constituent Assembly.[173] In the Punjab the members of the Assembly representing non-Muslim areas decided on 23rd June, 1947, that the non-Muslim areas should join the existing Constituent Assembly.[174] On 26th June, 1947, Legislative Assembly of Sind decided to join a new Constituent Assembly.[175] In the referendum held in Sylhet the majority of the voters voted in favour of joining East Bengal.[176] A referendum was also held in the North-West Frontier Province. The majority of the voters were in favour of joining a new Constituent Assembly.[177] In order to effect the transfer of power the Indian Independence Bill[178] was passed

[172] Indian Annual Register, 1947, i, pp. 123 and 257. The resolution of the Congress Working Committee accepting the principle of partition of the country was adopted by the A.I.C.C., 157 voting for, and 15 against—(See Pyarelal, *Mahatma Gandhi—the Last Phase*, pp. 251-6).

[173] Indian Annual Register, 1947, i, p. 266.

[174] *Ibid.*, p. 268.

[175] *Ibid.*, p. 270.

[176] See V. P. Menon, *The Transfer of Power in India*, p. 388.

[177] See *Ibid.*, p. 389.

[178] Before the Bill was introduced in Parliament copies of the Bill had been given to the leaders of India and they were allowed to study it—See Leonard Mosley, *The Last Days of the British Raj*, p. 155.

by the British Parliament. The Bill provided that as from 15th August, 1947, "two independent Dominions shall be set up in India, to be known respectively as India and Pakistan." The Bill received the Royal assent on 18th July, 1947. Partition of India was thus accomplished.

VI

The new situation required reorientation of the programme of the Constituent Assembly. It was no longer necessary for the Assembly to split up into Sections to consider the question of groups as laid down in the Cabinet Mission's Plan. The provisions of the double majority[179] in the Assembly in regard to the major communal issues were no longer operative. The powers of the Union were no longer restricted to three subjects only. The Order of Business Committee, to which we have already referred, had considered this new situation and had recommended[180] that the Assembly should take decisions on the reports of the Union Powers Committee and the Provincial Constitution Committee in its next session and that the work of drafting the Constitution Bill should be taken up at once by a Drafting Committee. The Committee had also suggested that the recommendations of the Advisory Committee, which had not yet been considered by the Assembly, should be incorporated by the Drafting Committee in the Constitution Bill.

The next session of the Constituent Assembly commenced on 14th July, 1947. It did not accept the suggestions of the Order of Business Committee for incorporation of the recommendations of the Advisory Committee in the Constitution Bill. It directed the Advisory Committee to formulate the general principles to be adopted in the Constitution in relation to minorities and decided that those principles should first be approved by the Assembly and then incorporated in the Draft Bill.[181]

The Assembly then proceeded to discuss the reports of the Provincial Constitution Committee and the Union Con-

[179] Paragraph 19 (VII) of the Statement of 16th May, 1946.
[180] Constituent Assembly of India—Reports of Committees, First Series, p. 32.
[181] Constituent Assembly Debates, 14th July, 1947, pp. 552, 554.

stitution Committee, appointed in pursuance of the resolution adopted by the Assembly on 30th April, 1947.[182] The Provincial Constitution Committee had recommended[183] the setting up of Cabinet system of Government in the Provinces and the Union Constitution Committee had also recommended[184] the setting up of Cabinet system of Government at the Centre. It may be noted here that Shri B. N. Rau, Constitutional Adviser to the Constituent Assembly, had prepared an independent memorandum on "A Model Provincial Constitution"[185] and had submitted it to the Provincial Constitution Committee for its consideration. He had also prepared another independent memorandum on "Union Constitution"[186] and had submitted it to the Union Constitution Committee. He had suggested the setting up of Cabinet system of Government both in the Provinces and at the Centre. The Constituent Assembly generally accepted the recommendations of these Committees. We shall deal with these reports later on. After discussing the reports of these two Committees the Assembly adjourned till 14th August, 1947.

On 14th August, 1947, at the stroke of the midnight hour, when the world was sleeping India awoke to "life and freedom". She became an independent country. As the clock struck twelve in the night, the members of the Assembly stood up and took the following pledge:[187]

> "At this solemn moment when the people of India, through suffering and sacrifice, have secured freedom, I,...., a member of the Constituent Assembly of India, do dedicate myself in all humility to the service of India and her people to the end that this ancient land attain her rightful and honoured place in the world and make her full and willing contribution to the promotion of world peace and the welfare of mankind."

[182] See page 44.
[183] Constituent Assembly of India—Reports of Committees, First Series, pp. 35-45.
[184] *Ibid.*, pp. 43-65.
[185] See B. N. Rau, *India's Constitution in the Making*, pp. 141-52.
[186] *Ibid.*, pp. 62-96.
[187] Constituent Assembly Debates, 14th August, 1947, p. 10.

The President, Dr Rajendra Prasad, then proposed that it should be intimated to the Viceroy—

(a) that the Constituent Assembly of India had assumed power for the governance of India, and
(b) that the Constituent Assembly of India had endorsed the recommendation that Lord Mountbatten be Governor-General of India from 15th August, 1947.

He also proposed that the message should be conveyed forthwith to Lord Mountbatten by the President of the Constituent Assembly and Pandit Jawaharlal Nehru. The proposals were accepted by the Assembly. The transfer of power in India was thus completed.

On 15th August, 1947, Lord Mountbatten was sworn in as the first Governor-General of free India and he addressed the Constituent Assembly of India on the same day. During his address he paid[188] tributes to the wisdom, tolerance and friendly help of the leaders of India which, he observed, had enabled the transfer of power to take place ten and a half months earlier than had originally been intended. He said, among other things, that the plan embodied in the statement of 3rd June, 1947, had been evolved, at every stage, by a process of "open diplomacy" with the leaders of India. Referring to the Indian States, Lord Mountbatten said that within less than three weeks practically all the Indian States, geographically linked with the Indian Dominion, had joined the Indian Dominion. There had thus been established "a unified political structure" in the new Dominion of India. The President of the Constituent Assembly, Dr Rajendra Prasad, observed that[189] while the achievement of the Indians was in no small measure due to their own sacrifices and sufferings, it was also the "result of world forces and events" and that it was "the consummation and fulfilment of the historic traditions and democratic ideals of the British race whose farsighted leaders and statesmen saw the vision and gave the pledges which are being redeemed today." The President paid tribute to Lord Mountbatten who, he said, played an

[188] Constituent Assembly Debates, 15th August, 1947, p. 15.
[189] *Ibid.*, p. 20.

important part in bringing about the transfer of power. The President welcomed the representatives of the Indian States which had acceded to India. He expressed the hope that the Rulers of the States would follow the example of the King in England and would become constitutional rulers.[190]

It may be recalled that the Union Powers Committee had presented its report on 28th April, 1947. But because of the changes that had been developing in the political situation of the country, the Constituent Assembly had thought that rigid conformity with the Cabinet Mission's Plan might not be possible and had, therefore, postponed the discussion on that report. The Assembly had also permitted that Committee submit a supplementary report.[191] That supplementary report was presented to the Constituent Assembly on 20th August, 1947.[192] The discussion on the report continued up to 26th August, 1947, but no final decision was taken. We shall have occasions to refer to this report when we shall deal with the question of relationship between the Indian Union and its constituent States as settled by the Constituent Assembly.

On 27th August, 1947, Sardar Vallabhbhai Patel presented to the Constituent Assembly the report[193] of the Advisory Committee on rights of the minorities. The report was discussed by the Assembly on 27th and 28th August, 1947. The report dealt with the "political safeguards" of the minorities. The main recommendations of the Committee were accepted by the Assembly. We shall refer to the report and the discussions thereon when we shall deal with minorities.

On 29th August, 1947, the Constituent Assembly appointed a Drafting Committee[194] with Shri Alladi Krishnaswami Ayyar, Shri N. Gopalaswami Ayyangar, Dr B. R. Ambedkar, Shri K. M. Munshi, Saiyid Mohd. Saadulla, Shri B. L. Mitter and Shri D. P. Khaitan as members, "to scrutinise the draft of the text of the Constitution of India prepared by the Constitutional Adviser[195] giving effect to the decisions taken already in the Assembly and including all matters which

[190] *Ibid.*, p. 22.
[191] See page 43.
[192] Constituent Assembly of India—Reports of Committees, First Series, p. 66.
[193] Constituent Assembly of India—Reports of Committees, Second Series, pp. 30-34.
[194] Constituent Assembly Debates, 29th August, 1947, pp. 319, 336.
[195] Shri B. N. Rau.

are ancillary thereto or which have to be provided in such a Constitution, and to submit to the Assembly for consideration the text of the draft Constitution as revised by the Committee."[196]

The Drafting Committee was thus asked to prepare the draft embodying not only the principles which had been accepted by the Assembly but also matters which had not been considered by it.

The Drafting Committee completed its work within a period of less than six months and on 21st February, 1948, Dr B. R. Ambedkar, Chairman of the Drafting Committee, submitted to the President of the Constituent Assembly the draft of the new Constitution as settled by the Committee.[197] The Committee actually sat for 141 days[198] to prepare the draft. The Draft Constitution was published for general information, and comments and suggestions were invited[199] from the Provincial Governments, the public, representative associations and also from the members of the Constituent Assembly. Those comments and suggestions were duly considered by the Drafting Committee. On 4th November, 1948, Dr B. R. Ambedkar introduced the Draft Constitution in the Constituent Assembly.[200] After a general discussion which may be called the First Reading of the Constitution Bill, there commenced a Second Reading or a consideration of the articles of the Draft Constitution. The Second Reading commenced on 15th November, 1948[201], and ended on 17th October, 1949.[202] The Third Reading of the Constitution Bill commenced on 17th November, 1949[203], and the Constitution was passed on 26th November, 1949[204].

[196] Constituent Assembly Debates, 29th August, 1947, p. 336.
[197] See Draft Constitution of India, p. iii.
[198] Constituent Assembly Debates, 25th November, 1949, p. 972.
[199] Constituent Assembly Debates, 4th November, 1948, p. 17.
[200] *Ibid.*, p. 31.
[201] Constituent Assembly Debates, 15th November, 1948, p. 397.
[202] Constituent Assembly Debates, 17th October, 1949, p. 457.
[203] Constituent Assembly Debates, 17th November, 1949, p. 607.
[204] Constituent Assembly Debates, 26th November, 1949, p. 995.

CHAPTER II

PREAMBLE

I

In this chapter we propose to deal with the deliberations of the Constituent Assembly with regard to the Preamble to the proposed Constitution of India.

II

The Preamble to the Draft Constitution was considered not on 15th November, 1948, after the general discussion on the Draft Constitution was over—though the Draft Constitution started with it—but on 17th October, 1949, the date on which the Second Reading of the Constitution Bill was concluded.[1]

The preamble stated as follows:

> "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity;
>
> and to promote among them all
>
> FRATERNITY assuring the dignity of the individual and the unity of the Nation;
>
> IN OUR CONSTITUENT ASSEMBLY this..... ..... of ..... (day of May, 1948 A.D.), do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

[1] Constituent Assembly Debates, 17th October, 1949, pp. 429-56, 457.

The Preamble was, as rightly observed by Shri Alladi Krishnaswami Ayyar[2], "mainly founded on the Objectives Resolution" adopted by the Constituent Assembly on 22nd January, 1947. The Objectives Resolution declared that India was to be an Independent Sovereign Republic.[3] But the Drafting Committee had adopted the phrase "Sovereign Democratic Republic" because, in its opinion[4], independence was usually implied in the word "Sovereign" and as such there was nothing to be "gained" by the word "Independent". We agree. But the expression "Sovereign Democratic Republic" also appears to us to be tautological because the word "Republic" means "a state in which the supreme power rests in the people and their elected representatives or officers, as opposed to one governed by a King or a similar ruler."[5] Hence, the word "democratic" appears to us to be superfluous. Perhaps the word was used in its economic and social sense.

The Committee had added a clause about fraternity in the Preamble, though it did not occur in the Objectives Resolution, because the Committee had felt that the need for "fraternal concord and goodwill" in India had been greater at that period of Indian history than before and that this particular aim of the new Constitution should be emphasised by mentioning it in the Preamble. The Preamble was adopted on 17th October, 1949[6]. It was adopted in the form in which it had been drafted by the Drafting Committee.

The Preamble indicates the source from which our Constitution derives its authority and also states the objects which our Constitution seeks to promote.[7] It was observed by Pandit Thakur Dass Bhargava[8] that the Preamble to our Constitution was "the most precious part" of our Constitution, that it was the "soul of the Constitution", that it was "a key to the Constitution" and that it was a "proper yardstick with which one can measure the worth of the Constitution." "I would like", he added, "that we examine all the provisions

[2] Constituent Assembly Debates, 23rd November, 1949, p. 834.
[3] See page 33.
[4] Draft Constitution, p. iv.
[5] *New English Dictionary*, Murray, Oxford.
[6] Constituent Assembly Debates, 17th October, 1949, p. 456.
[7] See Durga Das Basu, *Commentary on the Constitution of India*, Third Edition, Vol. I, p. 43.
[8] Constituent Assembly Debates, 18th November, 1949, p. 684.

of the Constitution by this touch-stone of the Preamble and thus decide whether the Constitution is good or bad." The Preamble to a Statute, says Maxwell[9], "has been said to be a good means of finding out its meaning, and, as it were, a key to the understanding of it", and that the Preamble may "legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt." But the Preamble "cannot either restrict or extend the enacting part, when the language and the object and scope of the Act are not open to doubt."[10] It may be noted that our Supreme Court has observed[11] that "the declaration made by the people of India in exercise of their sovereign will" in the Preamble to our Constitution is "a key to open the mind of the makers" of the Constitution which may indicate the "general purposes" for which the framers of our Constitution made several provisions in the Constitution. But it has also been observed that the Preamble is not "a part of the Constitution".

The Constituent Assembly did not adopt an independent article declaring that all powers were derived from the people though this was stated in the Objectives Resolution adopted by the Constituent Assembly in January, 1947. But, in our opinion, the expression "We the people of India" implies that our Constitution was "duly enacted and adopted by the people of India, acting in its aggregate and sovereign capacity through the Constituent Assembly of India."[12] During the discussion of the Preamble in the Constituent Assembly, Shri Kamath rightly observed:[13] "Here we are not individuals. Here we are all the people of India.... All that we have done in this House has been done on behalf of and for the people of India." It is true that our Constitution was framed by the Constituent Assembly which was not fully representative of the nation. We have stated before that

[9] *Maxwell on Interpretation of Statutes*, Tenth Edition, 1953 by Granville Sharp and Brian Galpin, p. 44.

[10] *Ibid.*, p. 44.

[11] Special Ref. No. I of 1959 by President of India u/a 143 of the Constitution, A.I.R., 1960, S. C. 845 (856).

[12] See D. N. Banerjee, *Our Fundamental Rights—Their Nature and Extent*, p. 7.

[13] Constituent Assembly Debates, 17th October, 1949, pp. 438-9.

that position had been accepted by the major political parties of India.[14] It is equally true that our Constituent Assembly did not make any provision for ratification of the Constitution framed by it by the people of India, or by the constituent units, as was done in the United States of America. But we should remember that the position of the constituent States of the proposed Indian Union was not the same as the position of the constituent States of the American Federal Union. Secondly, all the nine pre-existing Indian States mentiond in the First Schedule to the proposed Constitution[15] had signified their acceptance of the proposed Constitution before it was finally adopted by the Constituent Assembly.[16] Thirdly, the electorate and all the political parties in India have taken part in the last three general elections held on the basis of an adult suffrage and this participation has "indirectly established beyond doubt the acceptance of the Constitution" by the people of India. It has been observed by the Calcutta High Court[17] that the Constitution of India can be said "to have been framed by the people of India for the people of India as a whole and in whom the real sovereignty rests" and that the Constitution "is a creation of the people of India and not the States, the States themselves being created by the people of India."

[14] See page 16.

[15] Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab States Union, Rajasthan, Saurashtra, Travancore-Cochin and Vindhya Pradesh.

[16] Constituent Assembly Debates, 26th November, 1949, p. 983. See V. P. Menon, *The Story of the Integration of the Indian States*, pp. 467-70.

[17] *Hem Chandra Sen Gupta and others* vs. *Speaker of the Legislative Assembly, West Bengal and others*, 60 C.W.N., 555 (560).

CHAPTER III

SOME PRELIMINARY OBSERVATIONS

I

We now propose to deal with the decisions of the Constituent Assembly of India in regard to the salient features of the new Constitution of India as framed by it. In this connexion we shall take up what appear to us to be the principal articles in the Draft Constitution. For reasons of space we are omitting reference to what seem to us to be articles of minor importance in the Draft Constitution. In this chapter we shall refer to the deliberations of the Constituent Assembly with regard to the proposed Indian Union and its territory.

II

Article 1 of the Draft Constitution stated as follows :

"1. (1) India shall be a Union of States.

(2) The States shall mean the States for the time being specified in Parts I, II and III of the First Schedule.

(3) The territory of India shall comprise—

(*a*) the territories of the States;

(*b*) the territories for the time being specified in Part IV of the First Schedule; and

(*c*) such other territories as may be acquired."

This article was taken up for discussion on 15th November, 1948. In this article India was described as a "Union of States". For the sake of uniformity the Drafting Committee had thought[1] it desirable to describe the Units of the proposed Indian Union in the new Constitution as "States", whether they had been previously known as Governor's

[1] Reports of Committees of the Constituent Assembly of India, Third Series, p. 172.

Provinces, or Chief Commissioners' Provinces, or Indian States. The Committee, however, had admitted that some difference would undoubtedly remain between the Units of the Indian Union even in the new Constitution and, in order to mark that difference, it had divided the States into three classes enumerated in Part I, Part II and Part III of the First Schedule. They corresponded respectively to the pre-existing Governor's Provinces, Chief Commissioners' Provinces and Indian States. The Committee had preferred to follow the language of the Preamble to the British North America Act, 1867,[2] and had used the term "Union" instead of "Federation". In its opinion, there were "advantages in describing India as a Union" although its Constitution might be federal. An interesting discussion took place over an amendment moved by a member suggesting that in clause (1) of article 1, the words "secular, Federal, Socialist" should qualify the description of India as a "Union of States".[3] Opposing the amendment, Dr Ambedkar said that[4] the Constitution should not "tie down" the people of the country to live in a particular type of society. A constitution, according to him, was "merely a mechanism for the purpose of regulating the work of the various organs of the State" and was not "a mechanism whereby particular members or particular parties are installed in office." He observed that what should be the policy of the State, how should the society be organised in its social and economic side, were matters which should be decided by the people themselves according to time and circumstances. It could not be laid down in the Constitution itself, because, in his opinion, that would be "destroying democracy altogether". If it was stated in the Constitution, he added, that the social organisation of the State should take a particular form, that would take away the liberty of the people to decide what should be the social organisation in

[2] Preamble to the British North America Act, 1867:
"Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom:
And Whereas such a Union would conduce to the welfare of the Provinces and promote the interests of the British Empire...."

[3] Constituent Assembly Debates, 15th November, 1948, p. 399.

[4] *Ibid.*, p. 402.

which they might wish to live. The amendment was not accepted by the House.[5] A sharp debate developed over a relatively unimportant point which forced Pandit Nehru to express an opinion. This occurred when Shri H. V. Kamath[6] and Shri Ghanshyam Singh Gupta[7] suggested that in clause (1) of article 1, for the word "States", the word "Pradeshas" should be substituted. Their argument was that the word "State" denoted sovereignty and that the word "State" was used in the Draft Constitution to convey more than one meaning. Pandit Nehru opposed[8] the amendment. He expressed the opinion that the word "Pradesh" lacked specific connotation and that the word "State" was "infinitely more precise" and more "definite". The suggestions of Shri Kamath and Shri Singh Gupta were not accepted by the Assembly. There were other amendments to article 1 for changing the name of India to Bharat, Bharat-Varsha and Hindusthan which were not discussed on 15th November, 1948, and further consideration of article 1 was held over.[9]

The discussion was resumed on 17th September, 1949.[10] Meanwhile, it had been decided by the Congress party members of the Assembly[11] that India under the proposed Constitution should also be known by its ancient name, Bharat. When the discussion was resumed the Assembly accepted an amendment moved by Dr Ambedkar and for clauses (1) and (2) of article 1 of the Draft Constitution, the following clauses were substituted, namely:—[12]

> "(1) India, that is, Bharat shall be a Union of States.
>
> (2) The States and the territories thereof shall be the States and their territories for the time being specified in Parts I, II and III of the First Schedule."

[5] *Ibid.*, p. 403.
[6] *Ibid.*, p. 404.
[7] *Ibid.*, p. 406.
[8] *Ibid.*, p. 411.
[9] Constituent Assembly Debates, 17th November, 1948, p. 432.
[10] Constituent Assembly Debates, 17th September, 1949, p. 1669.
[11] *The Statesman*, Calcutta, 16th November, 1949.
[12] Constituent Assemby Debates, 18th September, 1949, p. 1691.

Article 1 of the Draft Constitution, as adopted by the Constituent Assembly, became article 1 of the Constitution of India. This article was amended in the year 1955 by the Constitution (Seventh Amendment) Act, 1955. See post. See also Appendix 7.

The word "Bharat" originated from Sanskrit and was sanctified by usage and the decision of the Assembly was consistent with popular sentiment.

The Assembly adopted article 2 of the Draft Constitution which sought to authorise Parliament to admit by law into the Indian Union, or establish, new States on such terms and conditions as it would think fit. We find similar provisions in the Constitutions of the United States of America[13] and Australia.[14]

Article 3 of the Draft Constitution sought to make provision for formation of new States and alteration of areas, boundaries or names of the existing States. It laid down as follows:—

"3. Parliament may by law—

(*a*) form a new State by separation of territory from a State or by uniting two or more States or parts of States;
(*b*) increase the area of any State;
(*c*) diminish the area of any State;
(*d*) alter the boundaries of any State;
(*e*) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except by the Government of India and unless—

(*a*) either—

(*i*) a representation in that behalf has been made to the President by a majority of the representatives of the territory in the Legislature of the State from which the territory is to be separated or excluded; or

(*ii*) a resolution in that behalf has been passed by the Legislature of any State whose boundaries or name will be affected by the proposal to be contained in the Bill; and

[13] Art. IV, Section 3.

[14] Section 121. Section 121 permits the Parliament of the Commonwealth to admit to the Commonwealth, or establish, new States. This power has not been exercised—See Jennings and Young, *Constitutional Laws of the British Empire*, p. 213.

(*b*) where the proposal contained in the Bill affects the boundaries or name of any State, other than a State for the time being specified in Part III of the First Schedule, the views of the Legislature of the State both with respect to the proposal to introduce the Bill and with respect to the provisions thereof have been ascertained by the President; and where such proposal affects the boundaries or name of any State for the time being specified in Part III of the First Schedule, the previous consent of the State to the proposal has been obtained."

The Drafting Committee was of opinion that in the case of any State other than a State specified in Part III of the First Schedule to the Draft Constitution (i.e. pre-existing Indian States), previous consent of the State was not necessary and that it would be enough if the views of the Legislature of the State were obtained by the President.[15] During the discussion of that article opinion was sharply divided in the Assembly on a fundamental point concerning the relationship between the Centre and the Indian States under the new Constitution. An amendment to article 3 of the Draft Constitution, moved by Dr Ambedkar, provided the occasion. Dr Ambedkar suggested a relaxation of the conditions under which Parliament could discuss a proposal for increasing or decreasing the area of a pre-existing Indian Province or Indian State, altering its name or boundaries and forming a new State. Dr Ambedkar suggested that for the existing proviso to article 3, the following proviso should be substituted, namely:[16]

"Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless—

(*a*) where the proposal contained in the Bill affects the boundaries or name of any State or States for the time being specified in Part I of the First Schedule, the views of the Legislature of the State, or as the

[15] Foot-note at page 3 of the Draft Constitution.
[16] Constituent Assembly Debates, 17th November, 1948, p. 439.

case may be, of each of the States both with respect to the proposal to introduce the Bill and with respect to the provisions thereof have been ascertained by the President; and

(*b*) where such proposal affects the boundaries or name of any State or States for the time being specified in Part III of the First Schedule, the previous consent of the State, or as the case may be, of each of the States to the proposal has been obtained."

In the original draft the power to introduce the relevant Bill was given exclusively to the Government of India. Under the proposed amendment any such Bill, whether it was brought by the Government of India or by any private member, should have the recommendation of the President. There was not much opposition to that amendment but the provision in the article and in the suggested amendment that previous consultation in the case of the provinces or consent in the case of the Indian States was compulsory before such a Bill could be recommended for introduction in either House of Parliament, caused a storm of protest owing to the implied distinction between the different Units of the proposed Indian federation.[17] Dr Ambedkar[18] pointed out that at that moment the members of the Assembly were bound by the terms of the agreement arrived at between the Negotiating Committee appointed by the Constituent Assembly and the States' Negotiating Committee. He said that there was a distinct provision in that agreement that nothing in it would entitle the Indian Union to encroach upon the territories of the Indian States. In his opinion, the House "would do well in respecting that undertaking." The amendment of Dr Ambedkar was accepted by the Assembly and the article, as amended, was adopted by the Assembly on 18th November, 1948.[19] The consideration of the article was, however, reopened on 13th October, 1949. By that time practically the process of integration of the former Indian States with the Indian Union was completed. It was decided

[17] Constituent Assembly Debates, 17th November, 1948, p. 441.
[18] Constituent Assembly Debates, 18th November, 1948, pp. 458-9.
[19] *Ibid.*, p. 465.

that both in the case of pre-existing Indian Provinces and former Indian States the views of the Legislatures should be ascertained.[20] Article 4 of the Draft Constitution, as adopted by the Constituent Assembly, stated that any law referred to in articles 2 and 3 should contain such provisions for the amendment of the First Schedule as might be necessary to give effect to the provisions of such law but that no such law should be treated as Constitutional amendment for the purpose of article 304. We shall see later on that article 304 prescribed special procedure for amendment of the Constitution.

Thus, legally speaking, even if the legislature of a State expresses its views against the proposal to introduce the Bill and also against the provisions thereof, Parliament may pass a law increasing or decreasing the area of such State.[21] This, we submit, is not proper. We think that it would have been better if provisions were made by the Constituent Assembly to the effect that consent of the people of the State or, at any rate, consent of the Legislature of that State should be necessary for making such a law by Parliament. That would have been consistent with the Objectives Resolution already adopted by the Constituent Assembly which stated, among other things, that "all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people."[22] We may mention in this connexion that under the Constitution of the United States of America, no new State can be "formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress."[23] Under the Constitution of Australia, the Commonwealth Parliament can alter the boundaries of a State with the consent of the Legislature of that State and with the approval of the electors of such State.[24] We think that the provisions of Constitutions of the United States of America and Australia in this respect are

[20] Constituent Assembly Debates, 13th October, 1949, p. 215.
[21] See Alan Gledhill, *The Republic of India*, p. 72.
[22] See page 34.
[23] Art. IV, Section III.
[24] Section 123.

better than those of the provisions of our Constitution. We also agree with Prof. Alan Gledhill that "while a rearrangement of Indian territory based on linguistic and economic considerations might well be advantageous, a projected rearrangement for purely political reasons might raise the question whether the Constitution adequately protected State rights."[25]

Article 3 of the Draft Constitution, as adopted by the Constituent Assembly, became article 3 of the Constitution of India. The proviso to this article was amended in the year 1955 by the Constitution (Fifth Amendment) Act, 1955.[26] Under the original proviso, no Bill for the purpose of forming a new State, increasing or diminishing the area of any State or altering the boundaries or name of any State, could be introduced in Parliament unless the views of the Legislature of the State concerned both with respect to the proposal to introduce the Bill and with respect to the provisions thereof had been ascertained by the President. The substituted proviso states that no such Bill shall be introduced in Parliament unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States "specified in Part A or Part B of the First Schedule",[27] the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified has expired. The object of the Constitution (Fifth Amendment) Bill, 1955, was, as stated by Shri C. C. Biswas,[28] the then Minister of Law, Government of India, to prevent a State "to take up a non-cooperative attitude and thereby impede implementation of the Bill for the formation of new States or for alteration of boundaries" of a State. In fact, the proviso to article 3 was amended with a view to passing an Act implementing the recommendations of the States Reorganisation Commission.[29] In the Statement of Objects and

[25] See Alan Gledhill, *The Republic of India*, p. 72.
[26] See Appendix 5.
[27] The words and letters "specified in Part A or Part B of the First Schedule" were omitted by the Constitution (Seventh Amendment) Act, 1956. See Appendix.
[28] Lok Sabha Debates, 30th November, 1955, column 824.
[29] See post.

Reasons[30], which was published along with the Constitution (Fifth Amendment) Bill, 1955, it was stated that the intention of the proviso was to "ensure that the Legislatures of all the States affected by a reorganisation proposal have a reasonable opportunity of expressing their views." It was observed by Shri Biswas:[31] "I made it quite clear that it is only as a safeguard against any possible contingency which may hold up the passing of a Bill for forming a new State because of the intransigence of any particular State. I referred to S.R.C. Report only by way of illustration, because that is of immediate consequence." Another member[32] remarked that the Bill sought to curtail "very drastically, the powers conferred upon the State Legislatures to deliberate upon a very important measure such as the change of boundaries which may be effected (*sic*) by the report of the States Reorganisation Commission. Even though there is no mention of the report of the States Reorganisation Commission in this Bill, that is the immediate provocation for the Bill."[33]

[30] *The Gazette of India*, Extraordinary, Part II, Section 2, November 21, 1955, p. 695.

[31] Lok Sabha Debates, 30th November, 1955, column 867.

[32] Shri H. V. Kamath, See Lok Sabha Debates, 30th November, 1955, column 841.

See also the speech of Shri G. B. Pant, the then Minister o Home Affairs, Lok Sabha Debates, 13th December, 1955, column 2463.

[33] It may be interesting to note what actually happened in our Parliament in connection with this matter. Originally the provisions for amendment of article 3 of the Constitution were included in clause 2 of the Constitution (Fifth Amendment) Bill, 1955 (*The Gazette of India*, Extraordinary, Part II, Section 2, November 21, 1955). The provisions were subsequently included in clause 2 of the Constitution (Seventh Amendment) Bill, 1955 (*The Calcutta Gazette*, Part VI, March 8, 1956, p. 73). On 30th November, 1955, the then Minister of Law, Government of India, moved a motion for referring the Constitution (Seventh Amendment) Bill, 1955 to a Select Committee. The Lok Sabha divided on that motion. 246 members voted for it and 2 members voted against it. The motion was declared by the Speaker as not carried in accordance with rule 169 of the Rules of Procedure and Conduct of Business in the House of the People (Lok Sabha Debates, Part II, 30th November, 1955, columns 822-3, 873-6, 890, 902). Rule 169 lays down that if the motion in respect of a Bill seeking to amend the Constitution is that it be referred to a Select Committee of the House then the motion shall be deemed to have been carried if it is passed by a majority of the total membership of the House and by a majority of not less than two-thirds of the members present and voting. The provisions of the Constitution (Seventh Amendment) Bill, 1955, were then included in the Constitution (Eighth Amendment) Bill, 1955 and this Bill was introduced in Lok Sabha on 9th December, 1955 (Lok Sabha Debates, 9th December, 1955, columns 1945-6). The provisions of the Constitution (Eighth Amendment) Bill, 1955 were the same with those of the provisions of the Constitution (Seventh Amendment) Bill, 1955 except that the words "or within such further period as the President may allow and the period so specified or allowed has expired" were added at the end. Rule 321 of the Rules of Procedure

Article 3 deals with "the internal adjustment *inter se* of the territories of India". The power to cede any territory to a foreign country cannot be read in article 3. An agreement with a foreign country which involves a cession of a part of the territory of India in favour of a foreign State cannot be inplemented by Parliament by passing a law under article 3 of the Constitution.[34] Parliament may, however, pass a law amending article 3 so as to cover cession of any part of the territory of India in favour of a foreign State. So far as acquisition of a foreign territory is concerned, such acquisition can be made by India in exercise of its inherent right as a sovereign State. Such territory would automatically become part of the territory of India. After such territory is acquired and "factually made a part of the territory of India the process of law may assimilate it either under Art. 2 or under Art. 3(a) or (b)"[35] of the Constitution of India.

and Conduct of Business in the House of the People states that "a motion must not raise a question substantially identical with one on which the House has given a decision in the same Session." The Lok Sabha had, therefore, to decide that Rule 321 "in its application to the motion that leave be granted to introduce a Bill further to amend the Constitution of India, namely, the Constitution (Eighth Amendment) Bill, 1955, should be suspended." (Lok Sabha Debates, 9th December, 1955, column 1945). The Constitution (Eighth Amendment) Bill, 1955 was passed on 13th November, 1955 (Lok Sabha Debates, 12th December, 1955, columns 2254-68, Lok Sabha Debates, 13th December, 1955, columns 2419-78).

[34] Special Ref. No. I of 1959 by President of India u/a. 143 of the Constitution, A. I. R., 1960, S. C., 845 (860).

[35] *Ibid.*, p. 858.

CHAPTER IV

FUNDAMENTAL RIGHTS

I

In this chapter we shall take up the question of fundamental rights under the proposed Constitution of India.

II

Before we refer to the decisions of the Constituent Assembly with regard to fundamental rights, we may mention that the idea of fundamental rights was present in Indian polity in a very vague form even before the adoption of the new Constitution of India.[1] But the demand for the inclusion of a declaration of fundamental rights in the Constitution Act was not favoured by the Joint Parliamentary Committee[2] in its report on which the Government of India Act, 1935, was based. In its opinion, a mere declaration of rights was of little practical value. The Indian Delegation demanded that the Constitution Bill should contain certain fundamental rights. Referring to that demand the Joint Parliamentary Committee observed that[3] "the most effective method of ensuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional instrument. But there are also strong practical arguments against the proposal, which may be put in the form of a dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the Legislature and to create a grave risk that a large number of laws may be declared invalid by the Courts because inconsistent with one or other of the rights so declared."

It may be noted here that the American view is different

[1] See Section 96 of the Government of India Act, 1915 and Sections 298 and 299 of the Government of India Act, 1935.

[2] See the Report of the Joint Committee on Indian Constitutional Reform, Vol. I.

[3] See *Ibid.*, Vol. I, para 366.

and that the Constitution of the United States of America affords perhaps the best example of a democratic constitution in which the idea of fundamental rights has been developed. The Constitution of the United States of America, as originally drafted, however, did not contain a full-fledged bill of rights. In the opinion of Alexander Hamilton[4], such bills of rights "are not only unnecessary" but "would be even dangerous" because, he thought, they would contain "various exceptions to powers not granted, and on this very account would afford a colourable pretext to claim more than were granted". Thomas Jefferson, however, held a different view. In his opinion[5], although a bill of rights "is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious". "A brace the more", he said, "will often keep up the building which would have fallen with that brace the less. There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate, and reparable. The inconveniences of the want of a declaration are permanent, afflictive, and irreparable. They are in constant progression from bad to worse. The executive, in our governments, is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period."

The Jeffersonian point of view "ultimately prevailed, and the result was the adoption in 1791 of the first ten amendments to the Constitution of the United States as originally drafted by the Philadelphia Convention in 1787."[6] We may mention that this period practically coincided with the period of the French Revolution. In the year 1789 the National Assembly of France adopted the famous Declaration of Rights of Man and Citizen and this Declaration greatly influenced

[4] See *The Federalist* (Max Beloff's Edition, Oxford, 1948) No. 84, p. 439.

[5] See Cooley, *A Treatise on the Constitutional Limitations*, 8th Edition, Vol. I, p. 535.

[6] See D. N. Banerjee, *Our Fundamental Rights*, p. 33.

the framers of the American Constitution. The framers of our Constitution shared the American view[7] and, therefore, incorporated in our Constitution a list of fundamental rights. We agree with Prof. D. N. Banerjee[8] when he says that "the history of our country, the composition of its population, ideological differences among the different sections of the population, our social traditions, and the requirements of true democracy, all necessitated it" and that our bill of rights "does credit to the patriotism, political sagacity, and the constructive abilities of the framers of our Constitution".

III

We may now refer to the deliberations of the Constituent Assembly with regard to fundamental rights.

The Advisory Committee "on rights of citizens, minorities and tribal and excluded areas" to which we have already referred, recommended,[9] in its interim report that fundamental rights should be divided into two parts—one part consisting of justiciable rights and the other part consisting of non-justiciable rights. The interim report dealt with justiciable fundamental rights and the Committee prepared a list of such justiciable rights. The Committee pointed out that the right of the citizen to be protected in certain matters was "a special feature of the American Constitution". It recommended that in the portion of the Constitution Act dealing with the powers and jurisdiction of the Supreme Court suitable and adequate provisions should be made to define the scope of the remedies for the enforcement of these fundamental rights. The main recommendations of the Committee were accepted by the Constituent Assembly in the third Session of the preliminary meeting which commenced on 28th April, 1947, and continued up to 2nd May, 1947,[10] and the decisions of the Assembly were incorpo-

[7] See in this connection *The State of West Bengal* vs. *Subodh Gopal Bose and others*, The Supreme Court Reports, 1954, Vol. V, parts VI and VII, June and July, 1954, pp. 615-16.

[8] See D. N. Banerjee, *Our Fundamental Rights*, p. 36.

[9] Constituent Assembly of India, Reports of Committees, First Series, pp. 18-25.

[10] Constituent Assembly Debates, 28th April, 1947, 29th April, 1947, 30th April, 1947, 1st May, 1947, 2nd May, 1947.

rated by the Drafting Committee in Part III of the Draft Constitution.

IV

On 25th November, 1948, the Constituent Assembly of India began discussing articles in Part III of the Draft Constitution dealing with fundamental rights. Dr B. R. Ambedkar, Chairman of the Drafting Committee, moved an amendment to article 7 dealing with the definition of the word "State", which was accepted by the Assembly. The amended article[11] stated that the word "State" should include the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India "or under the control of the Government of India". The words "or under the control of the Government of India" were added because it was thought[12] that, apart from the territories which formed part of India, there might be other territories which might not form part of India but might be under the control of the Government of India "under a mandate or trusteeship" and that there should not be any discrimination, so far as the citizens of India and the residents of those territories were concerned, in respect of fundamental rights. The expression "local authority" according to the General Clauses Act, 1897, means "a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund".[13] The expression "other authorities" refers to authorities "exercising Governmental functions".[14] Necessarily, it refers to public authorities and not private authorities.

On 30th November, 1948, the Constituent Assembly adopted article 10[15] of the Draft Constitution conferring

[11] Article 7 of the Draft Constitution, as amended, became article 12 of the Constitution of India.

[12] Constituent Assembly Debates, 25th November, 1948, pp. 607, 611.

[13] Section 3 (31) of the General Clauses Act, 1897.

[14] *University of Madras* vs. *Shantha Bai.* A.I.R., 1954 Madras 67 (68). It has been held in this case that the Madras University is not covered by the words "the State".

[15] Constituent Assembly Debates, 30th November, 1948, p. 704.
Article 10 of the Draft Constitution became article 16 of the Constitution of

equality of opportunity in matters of employment under the State on all citizens and permitting the State to make reservation of appointments or posts in favour of any "backward class of citizens" who, in the opinion of the State, were not adequately represented in the services under the State. It may be mentioned here that the word "backward" had been introduced by the Drafting Committee. The word did not exist in clause (5) of the report of the Advisory Committee on Fundamental Rights as adopted by the Constituent Assembly in the April-May session in the year 1947.[16] Justifying the insertion of the word "backward" in article 10 of the Draft Constitution, Dr Ambedkar, Chairman of the Drafting Committee, said that[17] the Drafting Committee had to safeguard the principle of equality of opportunity and, at the same time, satisfy the demand of communities which had not been adequately represented in the services under the State. In the opinion of the Drafting Committee, unless some such qualifying word as "backward" was used the exception in favour of reservation would "ultimately eat up the rule altogether". Members of the backward classes of the Assembly hailed the provisions of article 10. We may mention that the expression "backward class of citizens" is vague and that it was not defined in the Draft Constitution, nor has it been defined in the new Constitution of India. Thus, it is within the power of the State to declare from time to time who are the "backward class of citizens". During discussion in the Constituent Assembly, one member[18] rightly pointed out that in the absence of a clear definition the expression was liable to different interpretations by different persons and would "lead to a lot of litigation". Dr Ambedkar's reply[19] was that the Drafting Committee had left the matter to be decided by the local Government. He added that if the local Government included in that category of reservation a large number of seats one could very well go to the Supreme Court and argue that the reservation was of "such a magnitude

India. Clause (3) of this article was amended by the Constitution (Seventh Amendment) Act, 1956. See Appendix 7.

[16] Constituent Assembly Debates, 30th April, 1947, p. 438.

[17] Constituent Assembly Debates, 30th November, 1948, p. 702.

[18] Shri T. T. Krishnamachari, Constituent Assembly Debates, 30th November, 1948, p. 699.

[19] Constituent Assembly Debates, 30th November, 1948. p. 702.

that the rule regarding equality of opportunity has been destroyed and the Court will then come to the conclusion whether ...the State Government has acted in a reasonable manner". But it may reasonably be argued that in the absence of any definite criteria it would be difficult for the court to help in this matter. The article, however, did not empower the State to reserve posts on communal lines.

On 29th November, 1948, the Constituent Assembly adopted[20], amidst shouts of "Mahatma Gandhi Ki Jai", article 11 of the Draft Constitution which provided for the abolition of untouchability. Article 12 stated: "No title shall be conferred by the State." It was decided[21] by the Assembly that "no title, not being a military or academic distinction", should be conferred by the State. But it is not clear which "honours and dignities" were "intended to be covered" by the word "title".[22]

Article 13[23] of the Draft Constitution guaranteed seven fundamental rights, viz., (1) freedom of speech and expression, (2) freedom of assembly, (3) freedom of association, (4) freedom of movement, (5) freedom of residence and settlement, (6) freedom to acquire, hold and dispose of property, and (7) freedom of profession, occupation, trade or business. The extent of the guarantee was, however, defined by limitations contained in the article itself. The article consisted of two parts—(i) the declaration of the rights in clause (1) consisting of seven sub-clauses; and (ii) the limitations contained in the five clauses, (2) to (6), each clause regulating one or more of the sub-clauses of clause (1). Thirty-four amendments were moved which sought to modify the article. The amendments were moved on 1st December and the general discussion took place on 2nd December, 1949. The main criticism was against the restrictions imposed on the rights. It was alleged that the rights given in one part of the article were taken away in another part. The main suggestions were: (1) that clauses (2) to (6), which sought to impose limitations on the rights,

[20] Constituent Assembly Debates, 29th November, 1948, p. 669.
Article 11 of the Draft Constitution became article 17 of the Constitution of India.

[21] Constituent Assembly Debates, 1st December, 1948, p. 711. This article became article 18 of the Constitution of India.

[22] See Alan Gledhill, *Fundamental Rights in India*, p. 53.

[23] See Appendix 19.

should be deleted from the article and there should be only one proviso, namely, that no citizen in the exercise of such right, "shall endanger the security of the State, promote ill-will between the communities or do anything to disturb peace and tranquillity in the country";[24] (2) that the article should include freedom of press and secrecy of postal, telegraphic and telephonic communications,[25] among the rights to be given to the citizens; (3) that the individual should have, in addition to other freedoms, the freedom "of thought and worship; of press and publication",[26] (4) that the citizens should have the right[27] "to keep and bear arms"; and (5) that the citizens should have the right to follow the personal law of the group or community to which he belonged.[28] Shri K. M. Munshi observed that[29] the word "sedition" mentioned in clause (2) of article 13[30] created considerable doubts in the minds of the people and that the word had been interpreted during the British regime very widely. He pointed out that the public opinion had considerably changed and said that a distinction should be drawn between criticism of Government and "incitement which would undermine the security or order" on which civilized life was based. In his opinion, criticism of Government could not be sedition because that was the very essence of democracy. He, therefore, pleaded for the deletion of the word "sedition" from clause (2) of article 13. He also suggested that for the words "undermines the authority or foundation of the State", the words "which undermines the security of, or tends to overthrow, the State" should be substituted. His object was, as he said, to remove the word "sedition" which was of "doubtful and varying import" and to introduce words which were considered to be the "gist of an offence against the State".[31]

[24] Constituent Assembly Debates, 1st December, 1948, p. 727.
[25] *Ibid.*, p. 712.
[26] *Ibid.*, p. 715.
[27] *Ibid.*, p. 718.
[28] *Ibid.*, p. 721.
[29] *Ibid.*, p. 731.
[30] Clause (2) of article 13 stated as follows:
"(2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency or morality or undermines the authority or foundation of the State."
[31] Constituent Assembly Debates, 1st December, 1948, pp. 731-2.

Clauses (3) to (6) empowered the State to impose, under certain circumstances, "restrictions" on the exercise of the rights mentioned in clause (1). Pandit Thakur Dass Bhargava moved an amendment suggesting the insertion of the word "reasonable" before the word "restrictions" occurring in clauses (3) to (6) of article 13. The addition of the word "reasonable", he claimed, would make it a matter for the court to decide whether an Act was in the interest of the public and whether the restrictions imposed by the legislature were reasonable.[32] Justifying the provisions of clauses (3) to (6) of article 13, Shri T. T. Krishnamachari observed[33] that there could be no absolute right and that every right had to be abridged in some manner or other under certain circumstances. In his opinion, the Drafting Committee had chosen the "golden mean" of providing a proper enumeration of those rights which were considered essential for the individual and at the same time putting such checks on them as would ensure that the "State...which we are trying to bring into being....will continue unhampered and flourish". Dr Ambedkar said in reply to the debate that[34] the expression "freedom of speech and expression" included the freedom of press and publication. He could not agree with the suggestion of Shri Kamath that the citizens should have the right to keep arms. Referring to the suggestion that the citizens should have the right to follow the personal law of the group or community to which he belonged, Dr Ambedkar said that the matter had already been fully debated when the members had discussed the directive principles[35] enjoining the State to bring about a uniform civil code.

During his reply Dr Ambedkar did not refer to the criticism about the restrictions on fundamental rights. But he had referred to that criticism while introducing the Draft Constitution in the Constituent Assembly on 4th November, 1948. He had then said that[36] the critics had relied on the Constitution of the United States of America and the bill of rights embodied in the first ten amendments to that Constitution

[32] *Ibid.*, p. 739.
[33] Constituent Assembly Debates, 2nd December, 1948, p. 771.
[34] *Ibid.*, pp. 780-781.
[35] Directive Principles were decided earlier, See next chapter.
[36] Constituent Assembly Debates, 4th November, 1948, pp. 40-41.

in support of their theory and had held the view that fundamental rights in the American bill of rights had been real because they had not been riddled with "limitations and exceptions". Dr Ambedkar had remarked that the fundamental rights guaranteed by the Constitution of the United States of America had not been absolute. In support of his contention he had quoted[37] the following extract from the judgement of the Supreme Court of the United States of America in *Gitlow* vs. *New York*[38], in which the issue had been the constitutionality of a New York "criminal anarchy" law which had purported to punish utterances calculated to bring about violent change :

> "It is a fundamental principle, long established, that 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, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."[39]

Dr Ambedkar had also said that in the United States of America the fundamental rights, as enacted by the Constitution, had been no doubt absolute.[40] Congress, however, had soon found it absolutely necessary to qualify those fundamental rights by limitations. When the question had arisen as to the constitutionality of those limitations before the Supreme Court, it had been contended that the Constitution had given no power to the United States Congress to impose such limitations, and the Supreme Court had invented the doctrine of "police power" and had refuted the advocates of absolute fundamental rights by the argument that every State had inherent in it police power which was not required to be conferred by the Constitution. Dr Ambedkar had also quoted the following extract from the judgement of the Supreme Court of the United States of America in the same case:

[37] *Ibid.*, p. 40.
[38] 69 Law Edition 1138.
[39] Constituent Assembly Debates, 4th November, 1948, p. 40.
[40] *Ibid.*, p. 40.

"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".[41]

Speaking about the provisions of the Draft Constitution he had said that instead of formulating fundamental rights in absolute terms and depending upon the Supreme Court of India "to come to the rescue of Parliament by inventing the doctrine of police power", the Draft Constitution had permitted the State directly to impose limitations upon the fundamental rights. "What one does directly", he had concluded, "the other does indirectly. In both cases, the fundamental rights are not absolute."[42]

The main changes made in article 13 of the Draft Constitution were the omission of the word "sedition" in clause (2) and the insertion of the word "reasonable" before the word "restrictions" in clauses (3) to (6). Article 13 was adopted on 2nd December, 1948. The article was, however, reconsidered on 17th October, 1949.[43] On that date the words "contempt of Court" were inserted after the word "defamation" in clause (2). Article 13 of the Draft Constitution, as adopted by the Constituent Assembly, became article 19 of the Constitution of India.

Now what is the meaning of the phrase "reasonable restrictions"? It has been held by the Supreme Court of India that the phrase "connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness".[44] It has also been held that "the determination by the legislature of what constitutes a reasonable restric-

[41] *Ibid.*, p. 41.
[42] *Ibid.*, p. 41.
[43] Constituent Assembly Debates, 17th October, 1949, p. 402.
[44] See *Chintaman Rao* vs. *The State of Madhya Pradesh*, 1950 Supreme Court Reports, p. 763.

tion is not final or conclusive; it is subject to the supervision" by the Supreme Court of India.[45] It may be mentioned in this connection that the Supreme Court of the United States of America also held that[46] "determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the Courts". In another case our Supreme Court held that[47] it was not possible to "formulate an effective test" which would enable the Court "to pronounce any particular restriction to be reasonable or unreasonable *per se*. All the attendant circumstances must be taken into consideration and one cannot dissociate the actual contents of the restrictions from the manner of their imposition or the mode of putting them into practice. The question of reasonableness of the restrictions imposed by a law may arise as much from the substantive part of the law as from its procedural portion."

Clause 1(a) of article 19 lays down that all citizens have the right to freedom of speech and expression. Clause (2) stated: "Nothing in sub-clause (a) of clause (1) shall effect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State." Thus, "public order" was not made one of the purposes for which restrictions could be imposed on the freedom of speech. Incitement to an offence was not made one of the grounds for imposing restrictions. The Supreme Court of India relied upon the deletion of the word "sedition" from the Draft Constitution and held[48] that "criticism of Government exciting disaffection or bad feelings towards it is not to be regarded as a justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security of, or tend to overthrow, the State". The Patna High Court held[49] that "if a person were to go on inciting

[45] See *Ibid*, p. 765.

[46] *Meyer* vs. *Nebraska*, 262 United States 390 (1042).

[47] *N. B. Khare* vs. *The State of Delhi*, 1950 Supreme Court Reports, p. 519 (532).

[48] *Romesh Thappar* vs. *The State of Madras*, 1950 Supreme Court Reports, Vol. I, Part VI, pp. 601-3.

[49] *In the matter of the Bharati Press: Sm. Shaila Devi* vs. *the Chief Secretary to the Government of Bihar*, A.I.R., 1951, Patna 12, at page 21.

murder or other cognizable offences either through the press or by word of mouth, he would be free to do so with impunity inasmuch as he would claim the privilege of exercising his fundamental right of freedom of speech and expression. Any legislation which seeks or would seek to curb this right of the person concerned would not be saved under Art. 19 (2) of the Constitution and would have to be declared void. This would be so, because such speech or expression on the part of the individual would fall neither under libel nor slander nor defamation nor contempt of Court nor any matter which offends against decency or morality or which undermines the security of or tends to overthrow the State." The Supreme Court made a distinction between legislation for the maintenance of "security of the State" and legislation in the interest of "public order", and held that unless a law restricting freedom of speech and expression was directed "solely against" the undermining of the security of the State or the overthrow of it, such law could not fall within the reservation under article 19(2), although the restrictions which it sought to impose might have been conceived "generally in the interest of public order".[50]

These decisions of the Supreme Court of India necessitated[51] amendment of clause (2) of article 19 of the Constitution, and the Constitution (First Amendment) Act, 1951, was passed in June, 1951.[52] It may be mentioned here that while explaining the reasons for amending the Constitution, Dr Ambedkar, who was then Minister of Law, Government of India, referred to these decisions of the Supreme Court and observed that[53] according to the decisions of the Supreme Court it was open to any person "to incite, encourage, tend to incite or encourage the commission of any offence of murder or any cognisable offence involving violence" and that "the only consequence" that would follow from these decisions "is that we shall never be able to make a law which would restrict the freedom of speech in the interests of public order and that

[50] *Romesh Thappar* vs. *The State of Madras*, S.C.R. (1950), p. 602-3.
[51] See Statement of Objects and Reasons, *The Gazette of India*, Part II, Section 2, May 19, 1951, page 357.
[52] See Appendix 1.
[53] Parliamentary Debates (India), Official Report, 18th May, 1951, columns 9008-9010.

we shall never be able to make a law which would put a restraint upon incitement to violence". Clause (2), as amended by the Constitution (First Amendment) Act, 1951, stands as follows:

> "(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

Under the amended clause (2) of article 19, reasonable restrictions imposed on the right to freedom of speech and expression in the interest of "friendly relations with foreign State" and of "public order" are valid. The decisions of the Supreme Court, in so far as it sought to draw a distinction between "security of the State" and "public order", has been nullified from the point of view of the exercise of the freedom of speech and expression. Again, by the insertion of the words "incitement to an offence", the scope of the restrictions has been widened and in the exercise of the freedom of speech a citizen cannot claim immunity from liability in respect of any offence. The implications of the expression "in the interests of the security of the State" is much wider than the expression "any matter which undermines the security of, or tend to overthrow, the State" and the expression "in the interest of friendly relations with foreign State" is "too wide and too elastic in its connotation". However, the words "in so far as such law imposes reasonable restrictions" provide a safeguard against any misuse of power under clause (2) of article 19, as amended. Any such law has been made justiciable and a competent court may declare such law as unconstitutional if such law does not fulfil the requirements of reasonable restrictions on freedom of speech. Hence, it is difficult to agree with the views of the critics that our fundamental right of freedom of speech and expression is "neither fundamental nor right".[54]

[54] See D. N. Sen, *From Raj to Swaraj*, p. 98.

Sub-clauses (d), (e) and (f) of clause (1) of article 13 of the Draft Constitution of India, as adopted by the Constituent Assembly, conferred upon the citizens of India the right to move freely throughout India, to reside and settle in any part of the territory of India and to acquire, hold and dispose of property. Clause (5) of that article laid down: "Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe." The word "State" includes, as we have already stated before,[55] "the Government and Parliament of India and the Government and the Legislature of each of the States" etc. Hence, different laws may be passed by different State Legislatures. There is thus the danger of the growth of provincialism and "inter-State ill-will". Parliament of India alone should have been given the power to make laws in these matters. Or, alternatively, provisions to the effect that no such law should have effect unless it has received the assent of the President should have been incorporated in order to secure uniformity of legislation throughout the country.

It has been stated before[56] that Dr Ambedkar, Chairman of the Drafting Committee, quoted extracts from the judgement of the Supreme Court of the United States of America in *Gitlow* vs. *New York* in order to show that in the United States of America fundamental rights are not absolute. It may be mentioned that it was also held in *Gitlow* vs. *New York* that freedom of speech and press "does not protect disturbances of the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government, or to impede or hinder it in the performance of its governmental duties. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organised society being essential to the security of freedom and the stability of the State. And a State may

[55] See page 71.
[56] See pages 76-7.

penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. In short, this freedom does not deprive a State of the primary and essential right of self-preservation, which, so long as human governments endure, they cannot be denied."[57] It was also held by the Supreme Court of the United States of America in another case that[58] in the United States neither property rights nor contract rights "are absolute, and equally fundamental with either is the right of the public to regulate such rights in the common interest, subject to constitutional restraints".

Article 19 of our Constitution "gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law, so that they may not conflict with public welfare or general morality".[59] It was observed by Mukerjea J. of our Supreme Court in *A. K. Gopalan* vs. *State of Madras* that[60] what our Constitution "attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control". Speaking about our new Constitution Das J. has observed in *State of Bihar* vs. *Kameswar Singh*,[61] that our Constitution "has not ignored the individual but has endeavoured to harmonise the individual interest with the paramount interest of the community" and that "a fresh outlook which places the general interest of the community above the interest of the individual pervades our Constitution".

It may be mentioned here that clauses (2), (3) and (4) of article 19 were amended in the year 1963 by the Constitution (Sixteenth Amendment) Act, 1963.[62] According to the provisions of this Act, reasonable restrictions can also be imposed on the freedom of speech and expression, freedom of assembly and freedom of movement in the interest of the "sovereignty and integrity of India". The amendments of these clauses were thought to be "absolutely necessary" be-

[57] 69 Law Edition 1146.
[58] *Leo Nibbia* vs. *New York*, 78 Law Edition 940.
[59] *A. K. Gopalan* vs. *the State of Madras*, 1950 Supreme Court Reports, p. 254.
[60] *Ibid.*
[61] 1952 Supreme Court Reports 889, at pp. 996-7.
[62] See Appendix 16.

cause it was found that the words of these clauses did not "cover a power designed to curb activities which seek to challenge the sovereignty and integrity of India".[63] The amendments were made, as observed by Shri A. K. Sen,[64] Minister of Law, Government of India, to empower the State to impose restrictions on the activities of those "individuals or organisations who want to make secession from India or disintegration of India as political issues for the purpose of fighting elections".[65] It may be noted here that the Constitution (Sixteenth Amendment) Bill, 1963 was passed unanimously by Parliament.[66]

We may now pass on to article 15 of the Draft Constitution.

Article 15 was the subject of a sharp controversy in the Constituent Assembly even among the members of the Drafting Committee. The article laid down that no person "shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India". The article as originally suggested by the Advisory Committee on Fundamental Rights and as adopted by the Constituent Assembly during April-May session in the year 1947, stated: "No person shall be deprived of his life or liberty without due process of law, nor shall any person be denied equality before the law within the territories of the Union."[67] The Drafting Committee had substituted[68] the expression "except according to the procedure established by law" for the words "without due process of law" because, in its opinion, the former expression was "more specific". Such expression, it may be mentioned, can be found in the Japanese Constitution.[69] When article 15 came

[63] See the speech of Shri A. K. Sen, Minister of Law, Government of India, Lok Sabha Debates, May 2, 1963, columns 13409-11.

[64] Lok Sabha Debates, January 22, 1963, columns 5759-5764.

[65] The Constitution (Eighteenth Amendment) Act was passed with a view to giving effect to the recommendations of the Committee on National Integration and Regionalism appointed by the National Integration Council. See Statement of Objects and Reasons, *the Gazette of India*, Extraordinary, Part II, Section 3, January 21, 1963. See also the speech of Shri A. K. Sen, Minister of Law, Government of India, Lok Sabha Debates, January 22, 1963, columns 5760-1.

[66] Lok Sabha Debates, May 2, 1963, columns 13498-500.

[67] Constituent Assembly Debates, 30th April, 1947, p. 457. See also Constituent Assembly of India, Reports of Committees, First Series, pp. 22, 29.

[68] See Draft Constitution of India, p. 8, footnote.

[69] Art. XXXI of the Japanese Constitution of 1946 says—

up for discussion on 6th December, 1948, Pandit Thakur Dass Bhargava sought, through an amendment,[70] to restore the article in the form it had been adopted by the Constituent Assembly in the April-May session in the year 1947. He suggested that for the words "except according to procedure established by law", the words "without due process of law" should be substituted. Among supporters of that move was Shri K. M. Munshi, himself a member of the Drafting Committee. Another member of the Drafting Committee, Shri Alladi Krishnaswami Ayyar, opposed him. Supporters of the amendment argued that the words "according to procedure established by law" placed a disproportionate emphasis on procedural exactitude at the cost of substantive law. They feared that courts of law would be helpless in cases where unfair arrests demanded judicial intervention as long as the executive authorities had abided by the procedure laid down by the statute[71] for such actions. Shri K. M. Munshi, supporting the amendemnt of Shri Bhargava, said that[72] by the amendment the court was empowered to examine not merely whether convictions had been in accordance with law or proper procedure had been adopted, but also whether "the procedure as well as the substantive part of the law are such as would be proper and justified by the circumstances of the case". For the successful working of democracy, he said, "a balance must be struck between individual liberty on the one hand and social control on the other". In his opinion, the majority in a legislature was more anxious to establish social control than to preserve individual liberty. Hence, some scheme must be devised "to adjust the needs of individual liberty and the demands of social control".[73] The object of the amendment, he said, was to strike that balance. Under the proposed amendment, the Government would have to go to a court of law to justify the necessity of a particular measure infringing the personal liberty of the individual. Shri Alladi Krishnaswami Ayyar, another member of the Drafting Committee, opposed[74]

"No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

[70] Constituent Assembly Debates, 6th December, 1948, p. 846.

[71] See Alan Gledhill, *Fundamental Rights in India*, p. 83.

[72] Constituent Assembly Debates, 6th December, 1948, pp. 851-2.

[73] *Ibid.*, p. 852

[74] *Ibid.*, p. 853

the amendment. Justifying the article as drafted by the Drafting Committee, he said that some "ardent democrats" might have a "greater faith in the judiciary than in the conscious will expressed through the enactment of a popular legislature." The Drafting Committee, he remarked, in suggesting the words "procedure established by law" for the words "due process of law", was possibly "guilty of being apprehensive of judicial vagaries in the moulding of law". He, however, observed that the Committee had only made the suggestion and that it was for the House to come to the conclusion whether the suggestion was proper taking into consideration "the security of the State, the need for the liberty of the individual and the harmony between the two".[75] The article was not discussed on the next day, i.e., on 7th December, 1948. On 13th December, Dr Ambedkar, Chairman of the Drafting Committee, replied to the debate. He confessed that he[76] was in a "difficult position" with regard to the article and the amendment moved by Pandit Bhargava. Explaining what the expression "due process of law" meant, Dr Ambedkar said that the expression raised the question of relationship between the legislature and the judiciary. He emphasised that every law in a federal constitution, whether made by the central Parliament or by the legislature of a State, was always subject to examination by the judiciary from the point of view of the authority of the legislature making the law. But, in his opinion, the expression "due process of law" gave the judiciary an additional power to question the law made by the legislature on the ground whether the law was in keeping with certain fundamental principles relating to the rights of the individual. In other words, he said, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was a good law. The law might be perfectly good and valid so far as the authority of the legislature was concerned. But it might not be a good law, that is to say, it might violate certain fundamental principles and the judiciary would have

[75] *Ibid.*, p. 854
[76] Constituent Assembly Debates, 13th December, 1948, p. 999.

the "additional power of declaring the law invalid".[77] Dr Ambedkar further said that there were two points of view on the question of that additional power of the judiciary. One was that the legislature might be trusted not to make any law which would curtail the fundamental rights of the individual and consequently there was no danger arising from the introduction of the expression "due process of law". The other view was that it was not possible to trust the legislature, because "the legislature is likely to err, is likely to be led away by passion, by party prejudice, by party considerations, and the legislature may make a law which may abrogate what may be regarded as the fundamental principles which safeguard the individual rights of a citizen".[78] He admitted that it was very difficult to come to any definite conclusion, because there were dangers on both sides. He could not altogether rule out the possibility of a legislature "packed by party men" making laws which might "abrogate or violate" certain fundamental principles affecting the life and liberty of an individual. At the same time, he could not see how "five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the Legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad". He observed that "it is rather a case where a man has to sail between Charybdis and Scylla". He did not express any definite opinion and preferred to leave the matter to be decided by the House. The House decided to reject the amendment of Pandit Thakur Dass Bhargava and it adopted[79] the article as drafted by the Drafting Committee.[80]

It may be stated here that the Fifth Amendment to the Constitution of the United States of America states that no person shall be "deprived of his life, liberty or property without due process of law". The Constitution of the United States of America has not, however, defined the expression "due process". "Due process" has both a procedural and a substan-

[77] *Ibid.*, p. 1000.
[78] *Ibid.*, pp. 1000-1.
[79] *Ibid.*, p. 1001.
[80] First part of article 15 became article 21 and the second part became article 14 of the Constitution of India.

tive meaning. According to Professor Willis[81], the requirements of procedural due process are: (1) a notice, (2) an opportunity to be heard, (3) an impartial tribunal, and (4) an orderly course of procedure. Substantive due process means that not only the proper procedure should be followed but the law itself must be reasonable. This due process clause has enabled the Supreme Court of the United States of America to examine the validity of the laws passed by the Legislature not only from the point of view of the competence of the Legislature but also from the point of view of the inherent goodness of law. By adopting article 15 of the Draft Constitution, our Constituent Assembly gave the legislature the final word to determine law. Kania C. J. of our Supreme Court observed that[82] "the deliberate omission of the word 'due' from article 21 lends strength to the contention that the justiciable aspect of 'law', i.e. to consider whether it is reasonable or not by the Court, does not form part of the Indian Constitution". In our opinion, the doctrine of "due process of law" is a better safeguard against arbitrary action of Government, so far as the life and personal liberty of the individual are concerned, than what was provided for in article 15 of the Draft Constitution as adopted by the Constituent Assembly.

It may be mentioned here that though the Assembly agreed that instead of the words "due process", the words "according to procedure established by law" should be inserted in article 15, a large number of members including Dr Ambedkar were not satisfied[83] with the wording of article 15 of the Draft Constitution. It was felt that article 15 gave full powers to Parliament to make laws for the arrest of any person under any circumstances which Parliament might lay down. Hence, on 15th September, 1949, Dr Ambedkar moved that after article 15 the following new article be substituted, namely:-[84]

> "15A. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult a legal practitioner of his choice.

[81] See Willis, *Constitutional Law of the United States*, 1936, pp. 662-75.
[82] *A. K. Gopalan* vs. *The State of Madras*, Supreme Court Reports, 1950, p. 113.
[83] Constituent Assembly Debates, 15th September, 1949, p. 1497.
[84] *Ibid.*, pp. 1496-7.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in this article shall apply—

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested under any law providing for preventive detention:

Provided that nothing in sub-clause (b) of clause (3) of this article shall permit the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are or have been or are qualified to be appointed as judges of a High Court has reported before the expiration of the said period of three months that there is, in its opinion sufficient cause for such detention, or

(b) such person is detained in accordance with the provisions of any law made by Parliament under clause (4) of this article.

(4) Parliament may by law prescribe the circumstances under which and the class or classes of cases in which a person who is arrested under any law providing for preventive detention may be detained for a period longer than three months and also the maximum period for which any such person may be detained."

While moving the amendment Dr Ambedkar said that by introducing article 15A, the Drafting Committee was making "compensation" for what had been done in passing article 15. "In other words", he added, "we are providing for the substance of the law of 'due process' by the introduction of article 15A."[85]

It was thus provided that in the case of persons who would be arrested and detained under the ordinary law, as distinct

[85] *Ibid.*, p. 1497.

from the law dealing with preventive detention, the accused person should be informed of the grounds of his arrest. But no such provision was made in the case of a person who would be arrested and detained under any law providing for preventive detention. In order to remove this discrimination, Dr Ambedkar, on 16th September, 1949, moved that after clause (3) of article 15A, the following clause be inserted, namely:—[86]

> "(3a) Where an order is made in respect of any person under sub-clause (b) of clause (3) of this article the authority making an order shall as soon as may be communicated to him the grounds on which the order has been passed and afford him the earliest opportunity of making a representation against the order.
>
> (b) Nothing in clause (3a) of this article shall require the authority making any order under sub-clause (b) of clause (3) of this article to disclose the facts which that authority considers to be against public interest to disclose."

The amendment of Dr Ambedkar was accepted by the Assembly.[87] In clause (1) for the words "the right to consult a legal practitioner", the words "the right to consult and be defended by a legal practitioner" were substituted and in clause (3) for the words "Nothing in this article", the words "Nothing in clauses (1) and (2) of the article" were substituted.[88] Article 15A was added to the Constitution on 16th September, 1948.[89]

Clauses (1) and (2) of article 15A lay down the procedure that must be followed when a person is arrested. The clauses ensure four things: (a) right to be informed of the grounds of arrest, (b) right to be defended by a legal practitioner of his choice, (c) right to be produced before a magistrate within a period of twenty-four hours, and (d) right to be released beyond the said period except by an order of the

[86] Constituent Assembly Debates, 16th September, 1949, p. 1560.
[87] *Ibid.*, p. 1570.
[88] *Ibid.*, pp. 1557, 1570.
[89] *Ibid.*, p. 1570.
Article 15A became article 22 of the Constitution of India.

magistrate. These four "procedural requirements", as observed by Das J.[90] of our Supreme Court, "are very much similar to the requirements of the procedural due process of law as enumerated by Willis."

Article 15A also relates to preventive detention and the only limitation put upon the legislative power is that it must provide some procedure and at least incorporate in the law the minimum requirements laid down in the article. There is no limitation as regards substantive law. Hence, a preventive detention law which provides some procedure and complies with the requirements of article 15A is a good law. It must be stated that preventive detention is a serious invasion of personal liberty. But the Constituent Assembly of India accepted preventive detention as the subject matter of peace-time legislation as distinct from emergency legislation. The incorporation of the provisions of preventive detention in the chapter of the Constitution which guarantees fundamental rights to citizens appears to be rather anomalous. It is, indeed, "a novel feature to provide for preventive legislation in the Constitution".[91] There is no such provision in the Constitution of any other country.

Article 19 of the Draft Constitution was adopted on the 6th December, 1948.[92] Under that article[93] every citizen was entitled to freedom of conscience and the right "freely to profess, practise and propagate religion" subject to certain specified reserve powers under the State. The Sikhs were under that article entitled to wear kirpans. Three other articles concerning religious freedom, namely, articles 20, 21 and 22, were adopted on the 7th December, 1949.[94] The first provided for the freedom to manage religious affairs and to own, acquire and administer properties for religious or charitable purposes. The second gave the citizens freedom as to payment of taxes for the promotion and maintenance of any particular religion or religious denomination. The third forbade religious instruction being given in any educational institution "wholly maintained out of State funds", but permitted certain other institu-

[90] *A. K. Gopalan* vs. *The State of Madras*, 1950 Supreme Court Reports, p. 325.
[91] *Ibid.* p. 288.
[92] Constituent Assembly Debates, 6th December, 1948, p. 840.
[93] This article became article 25 of the Constitution of India.
[94] Constituent Assembly Debates, 7th December, 1948, pp. 864, 866 and 888.

tions to impart religious instruction, if they desired, provided that no student was compelled to take part in such religious instruction.[95]

Article 23 sought to give cultural and educational rights to minorities. Clause (1) of article 23 laid down that "any section of the citizens residing in the territory of India or any part thereof having a distinct language, script and culture of its own shall have the right to conserve the same". It may be mentioned that the clause, as adopted by the Constituent Assembly in the April-May session in the year 1947, stated that minorities in every Unit "shall be protected in respect of their language, script, and culture, and no laws or regulations may be enacted that may operate oppressively or prejudicially in this respect".[96] That was also the recommendation of the Advisory Committee on fundamental rights.[97] Shri Z. H. Lari pleaded[98] for the restoration of the clause in the form it had been adopted by the Constituent Assembly in the year 1947. In his opinion, the clause, as drafted by the Drafting Committee, stated a "truism" and contained no fundamental right at all. He and Maulana Hasrat Mohani[99] charged the Drafting Committee for having altered the original proposition agreed upon by the Assembly. Justifying the change introduced by the Drafting Committee, Dr Ambedkar claimed that[100] the Drafting Committee had improved upon the original clause. In his opinion, the protection granted in the original article was "very insecure". In article 23 the Drafting Committee had converted that into a Fundamental Right,[101] so that if a State made any law which was inconsistent with the provisions of that article, then that much of the law would be invalid by virtue of article 8 which the Assembly had already adopted.[102]

Another controversy arose over the amendments of two Muslim members suggesting extension of the scope of the article. According to the proposed amendments moved by

[95] These articles became articles 26, 27 and 28 of the Constitution of India.
[96] Constituent Assembly Debates, 1st May, 1947, pp. 497, 504.
[97] Reports of Committees, First Series, p. 24.
[98] Constituent Assembly Debates, 7th December, 1948, p. 893.
[99] Constituent Assembly Debates, 8th December, 1948, p. 917.
[100] *Ibid.*, p. 923.
[101] *Ibid.*
[102] Article 8 stated that laws made in contravention of fundamental rights shall, to the extent of contravention, be void (Constituent Assembly Debates, 29th November, 1948, p. 646).

Shri Z. H. Lari[103] and Kazi Syed Karimuddin[104], "any section of the citizens residing in the territory of India or any part thereof having a distinct language and script shall be entitled to have primary education imparted to its children through the medium of that language and script in case of substantial number of such students being available". The claim was strongly resisted by a succession of speakers. Shri K. Santhanam[105] opposed the amendments as being "not practicable", because under the proposed amendments any one could go to the Supreme Court and claim that his child must get education in a particular language. He, however, stated that the provisions suggested by the movers of the amendments "must be kept in mind as a general policy". Pandit Hirday Nath Kunzru,[106] however, not only supported the amendments as reasonable but also pleaded for their acceptance as he thought that the proposal embodied a "just" minority demand. According to him, that demand should not be considered as "extravagant". Dr Ambedkar[107], in his reply to the debate, admitted that primary education must be imparted in a child's mother tongue and went so far as to assure the Assembly that the Government could not possibly depart from that fundamental principle. He, however, did not accept the amendments because, in his opinion, the word "substantial" had a vague connotation which would give rise to difficulties. The amendments moved by Shri Lari and Shri Karimuddin were not accepted by the Assembly.[108]

The Assembly also decided that[109] no citizen "shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them" and that "all minorities whether based on religion, community or language shall have the right to establish and administer educational institutions of their choice".[110]

[103] Constituent Assembly Debates, 8th December, 1948, p. 900.
[104] *Ibid.*, p. 903.
[105] *Ibid.*, pp. 908-910.
[106] *Ibid.*, p. 920.
[107] *Ibid.*, p. 924.
[108] *Ibid.*, p. 926.
[109] Constituent Assembly Debates, 8th December, 1949, p. 925.
[110] Article 23 of the Draft Constitution which became articles 29 and 30 of the Constitution of India.

It may be mentioned here that though the amendments of Shri Z. H. Lari and Kazi Syed Karimuddin were rejected by the Constituent Assembly on 8th December, 1948, similar provisions were incorporated in the Constitution later on. On 14th September, 1949, the Assembly adopted[111] a new article[112] which stated: "Where on a demand being made in that behalf the President is satisfied that a substantial proportion of the population of a State desires the use of any language spoken by them to be recognised by that State, he may direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify." On 29th December, 1953, Government of India appointed a Commission, known as the States Reorganisation Commission, to examine the question of the reorganisation of the States in the Indian Union "objectively and dispassionately" so that the welfare of the people of each constituent unit, as well as of the nation as a whole, was promoted. The report was submitted on 30th September, 1955. In the opinion of the Commission[113], the safeguards for minorities incorporated in the new Constitution proved "inadequate and ineffective against the cultural oppression of linguistic minorities and their economic exploitation". The Committee came to the conclusion that the right of the minorities to have education in their mother tongue at the primary stage, "subject to a sufficient number of students being available", should be placed on a more stable footing than what was provided in the Constitution. Hence, the Commission suggested that constitutional recognition should be given to that right of the minorities and that the Union Government should be given the power to issue "appropriate directives" for the enforcement of that right on "the lines of the provisions contained in Article 347[114] of the Constitution". Practically as a result of this report of the States Reorganisation Commission the Constitution (Seventh Amendment) Act, 1956, was passed. By this Act two new articles, namely, articles 350A and 350B, have been inserted in the Constitution which lay down that the State should endeavour to provide adequate

[111] Constituent Assembly Debates, 14th September, 1949, p. 1488.
[112] Article 301E. This became article 347 of the Constitution of India.
[113] Report of the States Reorganisation Commission, 1955, paragraphs 767-76.
[114] i.e. article 301E of the Draft Constitution.

facilities for instruction in the mother tongue at the primary stage of education to children belonging to minority groups and that the President of India may issue such directions to any State as he may consider necessary or proper for securing the provision of such facilities. It is also provided that a special officer shall be appointed by the President to investigate "all matters relating to the safeguards provided for linguistic minorities" under the Constitution and to report to the President upon such matters and that the President "shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned".

These articles show that sufficient provisions have been made in the new Constitution for the protection of educational and cultural rights of the linguistic minorities. But there is another aspect of the matter which deserves serious consideration, namely, should a linguistic minority be permitted to live perpetually as foreigners, as it were, in the midst of local population? We think that sufficient protection should be given to the linguistic minorities but at the same time these minorities should be helped to get assimilated with the people of the locality in which they may reside. The minorities should gradually merge with the people of the locality. The historical process of assimilation should not be interfered with.[114A]

Article 24 of the Draft Constitution dealt with the right to property. Clause 19 of the report of the Advisory Committee on fundamental rights, as adopted by the Constituent Assembly in its April-May session of the year 1947, stated that no property, movable or immovable should be taken or acquired for public use, unless the law provided for the payment of compensation for the property taken or acquired and specified the principles on which and the manner in which the compensation was to be determined.[115]

The article as drafted by the Drafting Committee stated:

> "24. (1) No person shall be deprived of his property save by authority of law.

[114A] See in this connexion the Report of the States Reorganisation Commission, 1955, paragraph 768.

[115] Constituent Assembly Debates, 2nd May, 1947, pp. 505, 518.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for the payment of compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined.

(3) Nothing in clause (2) of this article shall affect—
(a) the provisions of any existing law, or
(b) the provisions of any law which the State may hereafter make for the purpose of imposing or levying any tax or for the promotion of public health or the prevention of danger to life or property."

The article came up for discussion on 9th December, 1948[116]. The discussion was, however, postponed in order to give an opportunity to the Drafting Committee to consider the various amendments that had been tabled and to arrive "at a compromise". The discussion was resumed on 10th September, 1949. Contrary to customary procedure, Pandit Jawaharlal Nehru on that day moved an amendment to the effect that for article 24 the following article should be substituted, namely:-[117]

"24 (1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of

[116] Constituent Assembly Debates, 9th December, 1948, p. 930.
[117] Constituent Assembly Debates, 10th September, 1949, p. 1191.

compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined.

(3) No such law as is referred to in clause (2) of this article made by the Legislature of a State shall have effect unless such law having been reserved for the consideration of the President has received his assent.

(4) If any Bill pending before the Legislature of a State at the commencement of this Constitution has, after it has been passed by such Legislature, received the assent of the President, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article.

(5) Save as provided in the next succeeding clause, nothing in clause (2) of this article shall affect—

(a) the provisions of any existing law, or

(b) the provisions of any law which the State may hereafter make for the purpose of imposing or levying any tax or penalty or for the promotion of public health or the prevention of danger to life or porperty.

(6) Any law of a State enacted, not more than one year before the commencement of this Constitution, may within three months from such commencement be submitted by the Governor of the State to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or sub-section (2) of section 299 of the Government of India Act, 1935."

This re-drafted article, Pandit Nehru said,[118] was "the result of a great deal of consultation" and "of the attempt to bring together and compromise various approaches" to the question of acquisition of property. He claimed that the re-drafted article was a "fair compromise between the individual right and the right of the community". He made it clear that there was "no question of any expropriation without com-

[118] *Ibid.*, pp. 1192-6.

pensation". Anticipating the criticism that clause (2) of the proposed article made compensation a justiciable issue, Pandit Nehru said that the decision of the legislature in that matter would be supreme except where there was a "fraud upon the Constitution" and that the judiciary would come in "to see if there has been a fraud on the Constitution".[119] Clause (4) of the article was intended primarily to deal with the Bill seeking to abolish zamindaries pending before the Legislature of the United Provinces[120] and clause (6) was intended to deal with the Acts of the Legislatures of Madras and Bihar which had the same object in view. It may be stated here that the Congress Assembly Party had already accepted the new article.[121]

Controversy arose mainly with regard to two questions, namely, whether in case of acquisition of property compensation should be paid and whether payment of compensation should be made a justiciable issue. With regard to the first question, two different views were expressed. According to one view compensation should be paid for such acquisition.[122] In the opinion of a member, payment of fair compensation was "so just, so fair and so reasonable that it would not have required any argument to support the idea".[123] The other view was that there should be no compensation[124]—at least no compensation for the acquisition of certain types of properties.[125] It was argued that man had no "natural right in property"[126] and that the community reserved to itself the right to limit the individual's right to property in the social and economic interest of the people. It was also said that in the interest of social progress "the institution of property" should pass on "from being the concern of the individual, from being the right of the individual, to being the concern and right of the society as a whole".[127] It was argued that full compensation for the acquisition of the property would

[119] *Ibid.*, p. 1193.
[120] Constituent Assembly Debates, 12th September, 1949, p. 1272.
[121] *The Statesman*, Calcutta, 9th September, 1949.
[122] Constituent Assembly Debates, 10th September, 1949, pp. 1208, 1233, 1253.
[123] Constituent Assembly Debates, 12th September, 1949, p. 1277.
Constituent Assembly Debates, 10th September, 1949, p. 1233.
[124] Constituent Assembly Debates, 10th September, 1949, pp. 1199, 1215.
[125] *Ibid.*, p. 1215.
[126] *Ibid.*, p. 1200.
[127] Constituent Assembly Debates, 12th September, 1949, p. 1269.

"make impossible any large project of social and economic amelioration to be materialised" and that even partial compensation would have no justification when "general transformation of economic structure on socialistic lines takes place".[128] With regard to the other question, namely, whether payment of compensation should be made a justiciable issue, two different views were expressed. According to one view, there should be no scope for any judicial review and that Parliament should be fully empowered to take over property after fixing compensation.[129] It was even suggested that a law making provision for compensation should not be called in question in any court "either on the ground that compensation provided for is inadequate or that the principles and the manner of compensation specified are fraudulent or inequitious".[130] Supporters of this view argued that courts should not be made a "super-Legislature" or a "third revising Chamber more powerful than both the Chambers of Parliament". It was remarked by a member that the article, if adopted by the Assembly, would be the "darkest blot" in the Constitution because, in his opinion, it would take away the sovereignty of Parliament.[131] Others claimed that the whole issue of compensation should be made a justiciable one. They pleaded for the deletion of clauses (2) to (6), and particularly, clauses (4) and (6) from the article. It was alleged that there was "little of justiciability"[132] in article 24, as moved by Pandit Nehru, because after the legislature laid down the principles, they would become unalterable and could not be questioned in any court of law. One member apprehended that the article would be "a *Magna Charta* in the hands of the capitalists of India".[133] Replying to the debate Shri K. M. Munshi, a member of the Drafting Committee, said that[134] the question of justiciability had been unnecessarily brought into the controversy because, in his opinion, in a civilised country every article of a written Constitution and every law made by Parliament was justiciable

[128] Constituent Assembly Debates, 10th September, 1949, p. 1200.
[129] *Ibid.*, pp. 1201-3.
[130] *Ibid.*, p. 1260.
[131] *Ibid.*, p. 1203.
[132] *Ibid.*, p. 1227.
[133] *Ibid.*, p. 1199.
[134] Constituent Assembly Debates, 12th September, 1949, p. 1300.

in the sense that the courts could examine each of them to decide that the law-making authority had acted within the ambit of its powers and to ascertain the meaning and effect of its provisions. The amendment of Pandit Nehru was adopted by the Constituent Assembly with minor changes on 12th September, 1949.[135]

Article 24 of the Draft Constitution, as adopted by the Constituent Assembly, became article 31 of the Constitution of India. It recognised the sanctity of private property and laid down that a person could not be deprived of his property merely by an executive order. It may be noted here that clauses (1) and (2) of article 31, as originally adopted by the Constituent Assembly, corresponded to sub-sections (1) and (2) of section 299 of the Government of India Act, 1935. The provisions regarding public purpose and compensation are the same in both clause (2) of article 31 and sub-section (2) of section 299.

We may refer in this connection to the observation of the Joint Parliamentary Committee, referred to before, on the question of acquisition of property and payment of compensation for such acquisition. The Committee observed[136] that "legislation expropriating, or authorising the expropriation of, the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is determined, either in the first instance or on appeal, by some independent authority". We have already stated that the Government of India Act, 1935, was based on the report of the Joint Parliamentary Committee. From the observation of the Joint Parliamentary Committee, as quoted above, it is clear that sub-section (2) of section 299 of the Government of India Act, 1935, was intended to secure fulfilment of two conditions subject to which alone legislation authorising the acquisition of private property should be lawful. Clause (2) of article 31, which was largely modelled on sub-section (2) of section 299 of the Government of India Act, 1935, also provided for both the conditions, namely, the existence of a public purpose and the obligation to pay compensation. In this connection we may mention that the

[135] *Ibid.*, p. 1311.
[136] Paragraph 369 of the report.

Supreme Court of India held[137] that "the existence of a public purpose as a pre-requisite to the exercise of the power of compulsory acquisition is an essential and integral part of the provisions of art. 31(2)". It was also held by our Supreme Court that[138] the principles referred to the clause (2) of article 31 "must ensure that what is determined as payable must be 'compensation', that is, a just equivalent of what the owner has been deprived of" and that "whether such principles take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected, is a justiciable issue to be adjudicated by the Court". This decision of the Supreme Court led to the amendment of original clause (2) of article 31 by the Constitution (Fourth Amendment) Act, 1955[139] and for clause (2) the following clauses were substituted namely:-

> "(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.
>
> (2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

While the Constitution (Fourth Amendment) Bill, 1954, was discussed in our Parliament,[140] Prime Minister Jawaharlal

[137] *The State of Bihar* vs. *Kameswar Singh and others*, Supreme Court Reports, 1952, pp. 891, 902 and 989-90.

[138] *The State of West Bengal* vs. *Mrs. Bela Banerjee and others*, Supreme Court Reports, 1954, pp. 558-65.

[139] See Appendix 4.

[140] See The Lok Sabha Debates, 14th and 15th March, 11th and 12th April, 1955, the Parliamentary Debates, Rajya Sabha, 17th and 19th March and 19th and 20th April, 1955.

Nehru, Minister of Law, Shri Hari Vinayak Pataskar, Minister of Commerce and Industry, Shri T. T. Krishnamachari and Minister of Home Affairs, Shri Govind Ballabh Pant supported the provision of non-justiciability of the quantum of compensation. It was argued by them, (1) that "it is impossible to carry out any measure of social legislation if the market value for the property acquired is to be paid especially when large schemes of social reforms are to be launched",[141] (2) that amendment of article 31 became necessary in order to create a "socialist pattern of society" and to realise the ideal of a "welfare State" in India, (3) that the amendment was in accordance with the wishes of the authors of our Constitution, but the language of the clause "did not fully convey" those wishes because of the defects in drafting the clause,[142] and (4) that the amendment sought to remove "an inherent contradiction in the Constitution between fundamental rights and the Directive Principles of State Policy".[143]

It is difficult to agree with the argument that the amendment was in accordance with the wishes of the authors of the Constitution. We may refer to the speech delivered by Dr Ambedkar in our Rajya Sabha in connexion with the Constitution (Fourth Amendment) Bill, 1954. He said[144]: "Article 31 with which we are dealing now in this amending Bill is an article for which I, and the Drafting Committee, can take no responsibility whatsoever. We do not take any responsibility for that. That is not our draft. The result was that the Congress Party, at the time when article 31 was being framed, was so divided within itself that we did not know what to do, what to put and what not to put. There were three sections in the Congress Party. One section was led by Sardar Vallabhbhai Patel, who stood for full compensation, full compensation in the sense in which full compensation is enacted in our Land Acquisition Act,[145] namely, market price plus 15 per cent

[141] See The Parliamentary Debates, Rajya Sabha, 20th April, 1955, column 5301.

[142] See The Parliamentary Debates, Rajya Sabha, 19th April, 1955, and Lok Sabha Debates, 14th March, 1955.

[143] Lok Sabha Debates, 14th March, 1955, column 1956.

[144] See Parliamentary Debates, Rajya Sabha, 19th March, 1955, columns 2450-2.

[145] Land Acquisition Act, 1894.

solatium. That was his point of view. Our Prime Minister (Pandit Jawaharlal Nehru) was against compensation. Our friend, Mr. Pant,[146] who is here now—and I am glad to see him here—had conceived his Zamindary Abolition Bill before the Constitution was being actually framed. He wanted a very safe delivery of his baby. So he had his own proposition. There was thus this tripartite struggle, and we left the matter to them to decide in any way they liked. And the merely embodied what their decision was in article 31. The article 31, in my judgement, is a very ugly thing, something which I do not like to look at.... Even then we have made that article as elastic as we possibly could in the matter of compensation." In fact, Shri Govind Ballabh Pant, Minister of Home Affairs, admitted in Rajya Sabha on 17th March, 1955, that article 24 of the Draft Constitution, which became article 31 of the Constitution of India, had been "the subject of a prolonged controversy" and that the article "was by itself a sort of compromise article".[147]

It was also argued that there was an inherent contradiction between the fundamental rights and the Directive Principles of the State Policy and that it was for the Parliament "to remove that contradiction and make the fundamental rights subserve the Directive Principles of State Policy".[148] We shall refer to the Directive Principles of State Policy in the next chapter. We may only mention that the importance of the Directive Principles was exaggerated here. With regard to the relationship between the fundamental rights and the Directive Principles, our Supreme Court observed[149] that the "Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights". In the opinion of the Supreme Court, that was "the correct way in which the provisions found in Parts III and IV (of the Constitution) have to be understood". This is the constitutional position of the fundamental rights *vis-à-vis* the Directive Principles of the State Policy.

[146] Shri Govind Ballabh Pant, the then Minister of Home Affairs, Government of India.

[147] See the Parliamentary Debates, Rajya Sabha, 17th March, 1955, columns 2229-30.

[148] See Lok Sabha Debates, 14th March, 1955, column 1956.

[149] *The State of Madras* vs. *Srimathi Champakam Dorairajan*, and *the State of Madras* vs. *C. R. Srinivasan*, Supreme Court Reports, 1951, p. 531.

We may point out that under original clause (2) the quantum of compensation was "a justiciable issue to be adjudicated by the Court", but under the amended clause (2) the jurisdiction of the court in respect of the quantum of compensation payable under it had been ousted. It may reasonably be argued that the fundamental right to property "as originally guaranteed by the Constitution and as expounded by our Supreme Court, has been, in effect, largely abrogated by the new clause (2)".[150]

We may now state the reasons for the insertion of the new clause (2A) by the Constitution (Fourth Amendment) Act, 1955. The Supreme Court of India declared in *Dwarkadas Shrinivas of Bombay* vs. *The Sholapur Spinning and Weaving Co. Ltd., and others*,[151] that the Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance, 1950, and the Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950, which had replaced the Ordinance,[152] had, in effect, authorised "a deprivation" of the property of the Company without compensation, and as such, violated the fundamental right of the Sholapur Spinning and Weaving Company under clause (2) of article 31 of the Constitution, and were, therefore, unconstitutional. It was held that whenever there was "a deprivation"[153] within the meaning of clause (1) of article 31, compensation must be paid under clause (2). In order to meet the situation created by the decisions of the Supreme Court in this case, new clause (2A) was inserted. In the Statement of Objects and Reasons[154], which was published along with the Constitution (Fourth Amendment) Bill, 1954, it was stated, *inter-alia*—

> "Recent decisions of the Supreme Court have given a very wide meaning to clauses (1) and (2) of article 31. Despite the difference in the wording of the two clauses, they are regarded as dealing with the same subject. The deprivation of property referred to in clause (1) is

[150] See D. N. Banerjee, *Our Fundamental Rights*, p. 330.

[151] Supreme Court Reports, 1954, pp. 674 (679).

[152] Under the Ordinance the Mills of the Company could be managed and run by the Directors appointed by the Central Government.

[153] For meaning of "deprivation" see *The State of West Bengal* vs. *Subodh Gopal Bose and others*., Supreme Court Reports, 1954, pp. 589 and 618.

[154] See *The Calcutta Gazette*, Extraordinary, 27th December, 1954, Part VI.

to be construed in the widest sense as including any curtailment of a right to property. Even where it is caused by a purely regulatory provision of law and is not accompanied by an acquisition or taking possession of that or any other property right by the State, the law, in order to be valid according to these decisions, has to provide for compensation under clause (2) of the article. It is considered necessary, therefore, to re-state more precisely the State's power of compulsory acquisition and requisitioning of private property and distinguish it from cases where the operation of regulatory or prohibitory laws of the State results in "deprivation of property' This is sought to be done in clause 2 of the Bill."

While explaining the reasons for inserting the new clause, Shri Govind Ballabh Pant, Minister of Home Affairs, referred to the decisions of the Supreme Court in *Dwarkadas Shrinivas of Bombay* vs. *The Sholapur Spinning and Weaving Co. Ltd. and others* and said:[155] "Hon. Members may be aware of other decisions that were taken by the Court in the Sholapur case which is well known. They held that the law which enable(d) the Government to take charge of a factory which had been mismanaged or closed, temporarily, in order to set matters right and to convert it into a going and profitable concern was *ultra vires*. This goes against the social purpose. At a time like this when we are striving for the promotion and establishment of a Welfare State, we have to see that production is increased and unemployment is diminished. If those in charge of any undertaking are unable to discharge their responsibility, then the State steps in in order to serve the needs of the community and also to save them against themselves. I do not think that there can be any question of payment of compensation in such case".

The new clause means that if a law does not provide for the transfer of the ownership or the right to possession of any property to the State, or to a Corporation owned and controlled by the State, it will not come within the scope of clause (2) of article 31, and hence the question of payment of compensation will not arise even though under the law a

[155] Parliamentary Debates, Rajya Sabha, 17th March, 1955, columns 2234-35.

person may be deprived of his property. In our opinion, the new clause (2A) has far-reaching and "dangerous implications", because, under the provisions of this clause a person may be deprived of his property without payment of compensation, even though such deprivation is not for a public purpose.

Clauses (4), (5) and (6) of article 24 of the Draft Constitution, which became clauses (4), (5) and (6) of article 31 the Constitution of India, provided for exceptions to clause (2) of that article. In this connexion it may be mentioned that two other articles, viz. articles 31A and 31B, were inserted in the Constitution by the Constitution (First Amendment) Act, 1951.[156] These two articles also provide for exceptions to clause (2) of article 31. The articles were added to the Constitution with a view to securing "the constitutional validity of zamindari abolition laws in general and certain specified State Acts in particular".[157] By this Constitution (First Amendment) Act, 1951, a new Schedule, namely, the Ninth Schedule has been added to the Constitution and eleven State Acts and two State Regulations have been specified therein. It is stated in the new article 31B that none of the Acts and Regulations specified in the Ninth Schedule "shall be deemed to be void, or ever to have become void", on the ground that such Act or Regulation "is inconsistent with, or takes away or abridges" any of the rights conferred by, any provisions of Part III of the Constitution, and that "notwithstanding any judgement, degree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force".

This, we submit, is a very drastic provision. During the consideration of the Constitution (First Amendment) Bill in our Parliament, Dr Ambedkar, the then Minister of Law, Government of India, observed[158] that "sentimentally" there might be objection to the insertion of article 31B, but "from the practical point of view" there was no reason why Parliament should not declare the Acts specified in the Schedule as valid. But the objection was not merely sentimental. Article

[156] See Appendix 1.

[157] See The Statement of Objects and Reasons, *The Gazette of India*, May 19th, 1951 Part II, Section 2 page 357.

[158] Parliamentary Debates, Official Report, 18th May, 1951, columns 9027-28.

31B "strikes at the roots of the principle that the Constitution should be paramount law, not susceptible of *ad hoc* and *ex post facto* amendment. A precedent has been established for a parliamentary majority to play havoc with the Fundamental Rights, to make way for a policy it favours"[159].

In the year 1955 article 31A was again amended, with retrospective effect, and the scope of the Ninth Schedule was widened by the Constitution (Fourth Amendment) Act, 1955.[160] By this Act seven more State Acts were specified in the Ninth Schedule. Sub-clauses (b) and (d) of clause (1) of article 31A have been inserted presumably to counteract the effects of the decisions of the Supreme Court in *Dwarkadas Shrinivas of Bombay* vs. *The Sholapur Spinning and Weaving Company Ltd., and others.*[161] With regard to sub-clause (c) of clause (1), it may be mentioned that it was held by the Calcutta High Court[162] that mere amalgamation of the existing companies in the interest of the general public without interfering with the rights and privileges of shareholders was not an unreasonable restriction on the rights guaranteed by sub-clause (f) of clause (1) of article 19. Sub-clause (c) of clause (1) of article 31A precludes any such question even though the rights and privileges may be affected by such amalgamation. The amalgamation cannot also be challenged on the ground of contravention of article 14 or 19 of the Constitution. By the Constitution (Seventeenth) Amendment Act, 1964, a number of State Acts, Rules, and Regulations have been specified in the Ninth Schedule.[163] From what we have shown above, we may reasonably conclude that as a result of the changes made in the Constitution by the Constitution (First Amendment) Act, 1951, and the Constitution (Fourth Amendment) Act, 1955, our Fundamental Right to property, unlike our other Fundamental Rights, has become "legally speaking, whatever might be the socio-political justification" of such changes, almost "a myth".[164]

Let us now pass on to article 25 of the Draft Constitution

[159] See Alan Gledhill, *Fundamental Rights in India*, p. 118.
[160] See Appendix 4.
[161] See The Supreme Court Reports, 1954, pp. 674-738.
[162] See *Narayanprasad* vs. *Indian Iron and Steel Co.*, A.I.R., 1953, Cal. 695.
[163] See Appendix 17.
[164] See D. N. Banerjee, *Our Fundamental Rights*, p. 396.

which mentioned legal remedies in case of encroachment on fundamental rights by the State.

The Advisory Committee on fundamental rights, etc., had recommended,[165] among other things, that "suitable and adequate" provisions should be made in the Constitution to define the scope of the remedies for the enforcement of the fundamental rights. The Constituent Assembly had realised that to make the fundamental rights realities "the legal procedure for their enforcement was of utmost importance"[166] and, therefore, had accepted[167] in May 1947 the recommendations of the Advisory Committee. The decisions of the Constituent Assembly in this regard had been incorporated by the Drafting Committee in article 25 of the Draft Constitution which stated as follows:

> "25. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders in the nature of the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
>
> (3) Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2) of this article.
>
> (4) The rights guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

During the consideration of that article[168] there was unanimous approval of clause (1) under which a citizen was entitled to move the Supreme Court for the enforcement of fundamental rights, but opinion was divided on clause (4) which referred to conditions under which such rights might be suspended. Sub-clause (4) stated that the rights "guaranteed by this

[165] Reports of Committees, First Series, p. 19.
[166] See Alan Gledhill, *Fundamental Rights in India*, p. 3.
[167] Constituent Assembly Debates, 2nd May, 1947, pp. 520, 522.
[168] Constituent Assembly Debates, 9th December, 1948, pp. 930-55.

article shall not be suspended except as otherwise provided for by this Constitution". Article 280, which provided for such suspension, stated: "Where a Proclamation of Emergency is in operation, the President may by order declare that the rights guaranteed by article 25 of this Constitution shall remain suspended for such period not extending beyond a period of six months after the proclamation has ceased to be in operation as may be specified in such order." Opposition to clause (4) of article 25 was based mainly on the fear that it would give the State extensive authority to neutralise the fundamental rights guaranteed in Part III of the Draft Constitution. Shri Tajamul Hussain through an amendment suggested that clause (4) should be deleted altogether.[1] Shri Karimuddin moved an amendment suggesting that the rights guaranteed under article 25 should be suspended only "in case of rebellion or invasion and when State of Emergency is proclaimed under Part XI of this Constitution".[170] Opposing the amendment of Shri Hussain, Dr Ambedkar said that[171] the guarantee to individual freedom was based on the State's own existence as an effective machinery, but when that existence was in danger it might be necessary to restrict the freedom of the individual. Referring to the amendment of Shri Karimuddin, Dr Ambedkar said that[172] the amendment was not necessary at all because there was "really no practical difference" between the provisions contained in article 275 of the Draft Constitution and the amendment proposed by Shri Karimuddin. Clause (1) of article 275 laid down that if "the President is satisfied that a grave emergency exists whereby the security of India is threatened, whether by war or by domestic violence, he may by proclamation, make a declaration to that effect". The power to issue a proclamation of emergency was confined to cases when there was war or domestic violence. The amendments of Shri Hussain and Shri Karimuddin were rejected[173] by the Assembly and article 25 was adopted with minor changes on 9th December, 1948.[174]

[169] *Ibid.*, p. 935
[170] *Ibid.*, p. 935
[171] *Ibid.*, p. 950
[172] *Ibid.*, p. 951
[173] *Ibid.*, p. 955
[174] *Ibid.*, p. 955

Article 25 of the Draft Constitution, as adopted by the Constituent Assembly, became article 32 of the Constitution of India. It provides, as observed by Patanjali Sastri J.[175], "a 'guaranteed' remedy for the enforcement" of the fundamental rights and that "this remedial right is itself made a fundamental right by being included in Part III" of the Constitution. The Supreme Court of India is constituted the "protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights". The article has also made provision for what is known as judicial review of legislation and executive action in respect of matters relating to fundamental rights. In the Constitution of the United States of America there is no express provision for such judicial review of legislation and executive action. The doctrine of judicial review has been deduced from the the Constitution of the United States of America as an implied doctrine. In this respect the difference between our Constitution and the Constitution of the United States of America is that what is explicit in our Constitution is implicit in the Constitution of the United States of America. In our opinion, the authors of our Constitution acted wisely when they provided for the judicial review of legislation and executive action in respect of matters relating to the fundamental rights in our Constitution.

It may be mentioned here that the Constituent Assembly of India took certain other decisions with regard to our fundamental rights. It prohibited[176]—(a) discrimination by the State against any citizen on grounds only of religion, race, caste, sex or any one of them,[177] (b) traffic in human beings and enforced labour,[178] and (c) employment of children in factories.[179] The Assembly empowered Parliament to modify

[175] *Romesh Thapper* vs. *The State of Madras*, The Supreme Court Reports, 1950, p. 597. See in this connection Alan Gledhill, *Fundamental Rights in India*, p. 4.

[176] Constituent Assembly Debates, 29th November, 1948, p. 664. 3rd December, 1948, p. 814, p. 815.

[177] This became article 15 of the Constitution of India. This article was amended in the year 1951 by the Constitution (First Amendment) Act, 1951. The amended article empowers the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. See Appendix 1.

[178] This became article 23 of the Constitution of India.

[179] This became article 24 of the Constitution of India.

the rights in their application to the members of the Armed Forces.[180] The Assembly also decided that the State should not make any law which "takes away or abridges the rights" conferred by Part III of the Constitution. It was further decided that "any law made in contravention" of this provision should, to the extent of contravention, be void.[181]

Before we conclude this Chapter we may mention that the Constituent Assembly of India made detailed provisions regarding fundamental rights in our Constitution, unlike those in the Constitution of the United States of America. This was necessary because of the peculiar social and economic conditions of the people of India. Reference may be made in this connection to the provisions regarding abolition of untouchability, backward classes, prohibition of discrimination on grounds only of religion, caste, race, etc. From what we have stated we may say that the Constituent Assembly struck a balance between the British theory of legislative supremacy and the American theory of judicial supremacy and evolved a principle of its own combining the elements of both legislative supremacy and judicial supremacy.

[180] Constituent Assembly Debates, 9th December, 1948, p. 955. This became article 33 of the Constitution of India.

[181] Constituent Assembly Debates, 29th November, 1948, p. 646. This became article 13 of the Constitution of India.

CHAPTER V

DIRECTIVE PRINCIPLES OF STATE POLICY

I

We shall now refer to the deliberations of the Constituent Assembly of India with regard to Directive Principles of State Policy.

II

It has been stated before that the Advisory Committee on rights of citizens, minorities and tribal and excluded areas recommended[1] that rights of citizens should be divided into two parts—one part consisting of justiciable rights and the other part consisting of non-justiciable rights. The Committee in its interim report recommended certain justiciable rights. We have dealt with these rights in the preceding chapter. On 30th August, 1947, the Advisory Committee presented[2] its "supplementary report on Fundamental Rights". The report[3] contained certain "directives of State policy" which, the Committee stated, though not cognizable by any court of law, were nevertheless fundamental in the governance of the country, and the application of those principles in the making of laws "shall be the duty of the State". Those "directives" laid down certain ideals, particularly economic, which the State should follow. They also contained certain directions to the future legislature and the future executive as to how they should exercise their legislative and executive powers. Those principles were not discussed by the Constituent Assembly in August, 1947 session. The recommendations of the Advisory Committee were, however, incorporated by the Drafting Committee in Part IV of the Draft Constitution.

[1] See page 70.
[2] Constituent Assembly Debates, 30th August, 1947, p. 361.
[3] Reports of Committees, Second Series, pp. 46-48.

III

On the 19th November, 1948, the Constituent Assembly proceeded to discuss articles in Part IV of the Draft Constitution dealing with Directive Principles of State Policy. Kazi Syed Karimuddin and Shri H. V. Kamath moved two amendments to the heading of that chapter, the former seeking deletion of the word "Directive" from the heading[4] and the latter seeking replacement of the word "Directive" by the word "Fundamental".[5] The idea was to make those principles also justiciable rights. Shri M. Ananthasayanam Ayyangar and Dr Ambedkar opposed the amendments. Shri Ayyangar pointed out the impracticability of getting the Directive Principles enforced in a court of law. In the very nature of things, he said, they were only directives and could not be justiciable at all. Dr Ambedkar said that[7] the word "Directive" should be retained in the heading, because the intention was that the Constituent Assembly should give certain directions to the future legislature and the future executive as to the manner in which they should exercise their legislative and executive powers. The amendment of Kazi Syed Karimuddin was defeated and Shri Kamath withdrew his amendment. It was decided that the provisions contained in Part IV of the Draft Constitution "shall not be enforceable in any court", but the principles therein laid down should nevertheless be regarded "fundamental in the governance of the country" and that it should be the "duty of the State to apply these principles in making laws".[8] Article 30 of the Draft Constitution laid down that the State[9] "shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life". Two amendments were moved to that article. The first, moved by Shri Damodar Swarup Seth,[10] stated that the

[4] Constituent Assembly Debates, 19th November, 1948, p. 473.
[5] *Ibid.*, p. 474.
[6] *Ibid.*, p. 475.
[7] *Ibid.*, p. 476.
[8] Article 29 of the Draft Constitution which became article 37 of the Constitution of India.
[9] "the State" had the same meaning as in Part III of the Draft Constitution.
[10] Constituent Assembly Debates, 19th November, 1948, p. 486.

State should endeavour to promote "the welfare, prosperity, and progress of the people by establishing and maintaining democratic socialist order". The second, moved by Shri Naziruddin Ahmad,[11] sought to delete the words "strive to" from the article with a view to making it obligatory to promote the ideals propounded in the article. Shri Seth said that the article, as it stood, was "somewhat indefinite and vague" and did not give a clear indication of the economic nature of the social order sought to be established. Mahboob Ali Baig Sahib Bahadur opposed[12] the original article and the amendment of Shri Seth on the ground that they sought to "import into the constitution certain principles of a particular political school". In his opinion, such principles should not be incorporated in a constitution. Shri Mahavir Tyagi said that[13] the article should be made "very strong and unequivocal" and that the "halting" phrases in it should be eliminated. Dr Ambedkar, replying to the debate, observed[14] that the proposed Constitution was not a mechanism for capturing power. The proposed Constitution sought to establish political democracy and to lay down an ideal before those who would be forming the Government. That ideal was economic democracy. Every Government should strive to bring about economic democracy. The words "strive to" were, therefore, necessary. The amendments moved by Shri Seth and Shri Naziruddin Ahmad were not accepted by the Assembly,[15] and article 30 was adopted by it.[16]

It was decided[17] by the Assembly that the State should, in particular, direct its policy towards securing[18]—(i) that the citizens, men and women equally, had the right to an adequate means of livelihood; (ii) that the ownership and control of the material resources of the community were so distributed as best to subserve the common good; (iii) that the operation of the economic system did not result in the

[11] *Ibid.*, p. 487.
[12] *Ibid.*, pp. 488-9.
[13] *Ibid.*, pp. 492-3.
[14] *Ibid.*, p. 494.
[15] *Ibid.*, pp. 495-6.
[16] Article 30 of the Draft Constitution became article 38 of the Constitution of India.
[17] Constituent Assembly Debates, 22nd November, 1948, p. 520.
[18] This became article 39 of the Constitution of India.

concentration of wealth and means of production to the common detriment; (iv) that there was equal pay for equal work for both men and women; (v) that the strength and health of workers, men and women, and the tender age of children were not abused and citizens were not forced by economic necessity to enter avocations unsuited to their age or strength; and (vi) that childhood and youth were protected against exploitation and against moral and material abandonment. It was also decided[19] that the State should take steps to organise village panchayats and "endow them with such powers and authority as may be necessary to enable them to function as units of self-government".[20]

Articles 32 and 33 were adopted without any debate.[21] These two articles[22] laid down that the State should make provision for "securing the right to work, to education and to public assistance in case of unemployment, old age, sickness, disablement, and other cases of undeserved want", and for "securing just and humane conditions of work and for maternity relief". Article 34 laid down that "the State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities". The Assembly decided[23] that direction should also be given to the State "to promote cottage industries on individual or co-operative basis in rural areas".[24]

Article 35 of the Draft Constitution provided for a uniform civil code for the whole country. Four Muslim members of the Assembly opposed the proposal and sought through amendments to exclude the personal law of every community, particularly the Muslim, from the operation of that article. Their arguments were: (i) that the right of a group or community to follow its personal law was a fundamental right

[19] New article 31A—see Constituent Assembly Debates, 22nd November, 1948, p. 527.

[20] This became article 40 of the Constitution of India.

[21] Constituent Assembly Debates, 23rd November, 1948, p. 530.

[22] Articles 32 and 33 became articles 41 and 42 of the Constitution of India.

[23] Constituent Assembly Debates, 23rd November, 1948, pp 535-6.

[24] Article 34 of the Draft Constitution became article 43 of the Constitution of India.

and that India being a secular State nothing should be done to interfere with the way of life and the religion of the people;[25] (ii) that every religious community had certain religious laws and certain civil laws "inseparably connected with the religious beliefs and practices" and those religious and "semi-religious" laws should be excluded while framing the uniform civil code;[26] and (iii) that the article as it stood conflicted with the provisions of other articles of the Draft Constitution, because freedom of religion and freedom to propagate religion had been guaranteed in the Constitution and article 35 sought to annul what had been conceded. The anomaly should, therefore, be removed.[27] The suggestion was opposed by Shri K. M. Munshi, Shri Alladi Krishnaswami Ayyar and Dr Ambedkar, three members of the Drafting Committee. Shri Munshi said that[28] no where in advanced Muslim countries the personal law of each minority was recognised "as so sacrosanct as to prevent the enactment of a Civil Code". The Drafting Committee, he said, had wanted to divest religion from personal law and social relations and from laws governing inheritance, succession and marriage. In his opinion, uniformity of law was also necessary for "national consolidation". Shri Alladi Krishnaswami Ayyar said that[29] article 35 sought to enforce a uniform civil code. There was no intention to invade the domain of religion. Dr Ambedkar said[30] that there were countless enactments in India which would show that the country had practically a civil code, "uniform in its content and applicable to the whole of the country". In support of his contention he referred to the Transfer of Property Act, 1882, and the Negotiable Instruments Act, 1881. Only in the field of marriage and succession, he said, the civil law was not uniform. He pointed out that the personal law of the Muslims was also not uniform throughout India and that the Constituent Assembly was only attempting to establish unity of personal law in the country by article 35. Dr Ambedkar also observed that

[25] Constituent Assembly Debates, 23rd November, 1948, p. 540.
[26] *Ibid.*, p. 541.
[27] *Ibid.*, p. 542.
[28] *Ibid.*, pp. 547-8.
[29] *Ibid.*, p. 549.
[30] *Ibid.*, pp. 550-1.

personal law was never in the purview of religion and as such there was no question of any danger to the religion. Article 35 of the Draft Constitution[31] was adopted on 23rd November, 1949, without any amendment.[32]

Directives were issued to the State: (a) to provide for free and compulsory primary education for all children until they completed the age of fourteen years;[33] (b) to promote educational and economic interests of the Scheduled Castes and the Scheduled Tribes and other weaker sections of the people;[34] (c) to raise the level of nutrition and the standard of living of the people, to improve public health, and "to bring about prohibition of the consumption of intoxicating drinks and drugs which are injurious to health except for medicinal purposes";[35] (d) to protect, preserve and maintain monuments and places and objects of national importance;[36] and (e) to promote international peace and security.[37]

Two more articles, namely, 38-A and 39-A, were added to the Constitution. In article 38-A directives were issued to the State "to organise agriculture and animal husbandry on modern and scientific lines" and, in particular, to take steps for preserving and improving the breeds of cattle and prohibiting the slaughter of cow and other useful cattle, specially milch and draught cattle and their young stocks.[38]

On 24th November, 1948, Dr Ambedkar moved an amendment seeking to add a new article after article 39. The amendment stated that "the State shall take steps to secure that, within a period of three years from the commencement of this Constitution, there is separation of the judiciary from

[31] Article 35 became article 44 of the Constitution of India.
[32] Constituent Assembly Debates, 23rd November, 1948, p. 552.
[33] Article 36, Constituent Assembly Debates, 23rd November, 1948, p. 540. This became article 45 of the Constitution of India.
[34] Article 37, Constituent Assembly Debates, 23rd November, 1948, p. 553. This became article 46 of the Constitution of India.
[35] Article 38, Constituent Assembly Debates, 24th November, 1948, pp. 555, 566, 568. This became article 47 of the Constitution of India.
[36] Article 39, Constituent Assembly Debates, 24th November, 1948, p. 581. This became article 49 of the Constitution of India.
[37] Article 40, Constituent Assembly Debates, 25th November, 1948, p. 606. This became article 51 of the Constitution of India.
[38] Constituent Assembly Debates, 24th November, 1948, p. 581. This became article 48 of the Constitution of India.

the executive in the public services of the State".[39] While moving the amendment he said that it had been the desire of the people of India for a long time that there should be separation of the judiciary from the executive, but the British Government did not bring about that separation. Time came when the reform should be introduced. He also said that as there would be certain difficulties in carrying out that reform, it was provided that the reform should be carried out within a period of three years. On 25th November, however, Dr. Ambedkar moved an amendment[40] suggesting the deletion of the time-limit. The new amendment suggested that "the State shall take steps to separate the judiciary from the executive in the public services of the State". Supporting the re-drafted article he said[41] that the period of three years was reasonable in the case of certain former Indian Provinces where the administrative machinery was well established. But in the pre-existing States it might not be possible to bring out the desired result within that period. In his opinion, the article would serve the purpose if it merely contained a "mandatory" provision imposing an obligation both on the Provincial and the State Governments so that where it was possible the reform should be effected immediately. Pandit Hirday Nath Kunzru regretted that[42] Dr Ambedkar should seek to modify the original proposal in such a way as to leave it to the discretion of the Provincial and the State Governments as to the time the reform, which the people of India had been demanding for half a century, should be carried out. In his opinion, by deleting the time-limit originally proposed the impression created was that the State was not serious about the reform. Supporting the amendment of Dr Ambedkar, Pandit Nehru said that the new amendment, far from lessening the significance or the importance of the reform, placed that on a "high level" before the country. Any time-limit, in the opinion of Pandit Nehru, was "apt on the one hand to delay this very process in large parts of the country, probably the greater part of the country; on the other hand, in some parts where practically speaking

[39] Constituent Assembly Debates, 24th November, 1948, p. 582.
[40] Constituent Assembly Debates, 25th November, 1948, p. 585.
[41] *Ibid.*, p. 585.
[42] *Ibid.*, p. 587.

it may be very difficult to bring about, it may produce enormous confusion". But in so far as the Government was concerned, Pandit Nehru added, it was entirely in favour of the separation of the judiciary from the executive.[43] The amendment of Dr Ambedkar was accepted by the House[44] and article 39-A was added to the Constitution.[45]

IV

We have stated above the decisions of the Constituent Assembly of India with regard to the Directive Principles of State Policy. The idea of incorporating in the Constitution non-justiciable directives was taken presumably from the Constitution of Eire, 1937. We have mentioned before[46] the Constitutional position of the Fundamental Rights *vis-a-vis* the Directive Principles of State policy. It is true that the Directive Principles are not enforceable in a court of law, but it is not correct to say, as has been alleged by critics, that they have no value at all and that they have been inserted in the new Constitution by way of "an outlet for romantic illusions on the part of the draftsmen".[47] In the opinion of Dr Ambedkar,[48] the Directive Principles were like the Instruments of Instructions issued to the Governor-General and to the Governors under the Government of India Act, 1935.[49] They were really instructions to the executive and the Legislatures as to how they should exercise their powers. Dr Ambedkar said that men who would capture power would have to respect those Directive Principles. They might not have to answer for the breach of the Directive Principles in a court of law. But they would certainly have to answer for the breach before the electorate at the election time. "What great value these directive principles possess", he added, "will be realized better when the forces of right contrive to capture power."[50] We agree with these obser-

[43] *Ibid*, p. 589.
[44] *Ibid*, p. 593.
[45] This article became article 50 of the Constitution of India.
[46] See page 147.
[47] See D. N. Sen, *From Raj to Swaraj*, p. 79.
[48] Constituent Assembly Debates, 4th November, 1948, p. 41.
[49] Sections 13, 53
[50] Constituent Assembly Debates, 4th November, 1948, p. 41.

vations of Dr Ambedkar. In this connection we may refer to the observations of Prof. Alan Gledhill on the value of the Directive Principles. He has rightly observed that it would be "difficult for any public figure to propose any important legislative measure without making an appeal either to the Fundamental Rights or the Directive Principles. Measures will be attacked by the Opposition as 'unconstitutional' in so far as they conflict with the Directive Principles. Even though these Principles are not directly enforceable in a court, they are bound to affect decisions of courts on constitutional questions, just as the provisions of Magna Charta have affected the decisions of English judges, and the preamble to the Declaration of Independence has affected the decisions of American judges".[51] We find that our Supreme Court relied upon[52] both the preamble and the Directive Principles in arriving at the decision that certain zamindary abolition legislation had been passed for a "public purpose" within the meaning of article 31 of the Constitution. In the opinion of Prof. Kenneth C. Wheare,[53] "if these declarations of liberal principles...help the Indian Constitution on its way and assist its people in working their Government, they are more than justified". These Directive Principles have indirectly influenced social and economic legislation in India. Different laws have been passed since the adoption of the new Constitution to give effect to these Directive Principles. Laws have been passed in different States in India with a view to organising panchayats and vesting them with powers and authority to enable them to function as units of self-government. Laws have also been passed to secure the separation of the judiciary from the executive in the public services of the State. It would, therefore, be "superficial to dismiss these precepts as good resolutions fit only for paving stones on the broad and primrose-strewn way."[54]

[51] See Alan Gledhill, *The Republic of India*, p. 162.

[52] See *State of Bihar* vs. *Kameshwar Singh of Darbhanga and others*, S.C.R., 1952, p. 889, (997).

[53] *See* article on India's new Constitution, Allahabad Law Journal, Vol. XLVIII, February 10, 1950.

[54] See Alan Gledhill, *The Republic of India*, p. 161.

CHAPTER VI

THE EXECUTIVE

I

In this chapter we shall refer to the deliberations of the Constituent Assembly of India with regard to the Union Executive and the Executive of the constituent units of the Indian Union.

II

We shall first deal with the Union Executive.

It has been stated before that in pursuance of a resolution of the Constituent Assembly, adopted on 30th April 1947, the Union Constitution Committee had been appointed by the President of the Constituent Assembly to report on the main principles of the Union Constitution.[1] That Committee had submitted its report[2] on 4th July, 1947, and the Constituent Assembly had discussed that report in its July, 1947 session.[3] The Committee had recommended that the head of the Indian federation should be the President of India. The Committee, however, had not been in favour of the Presidential system of Government, as prevailed in the United States of America, nor had it intended to make the President a mere "figure-head" like the President of the French Republic. It had wanted to make the position of the President of India "one of great authority and dignity",[4] as observed by Pandit Jawaharlal Nehru, Chairman of the Union Constitution Committee. The Committee had emphasised the ministerial character of the Government.[5] It had not suggested the principle of election of the President by adult franchise be-

[1] See page 44.

[2] Constituent Assembly Debates, Reports of Committees, First Series, pages 42-63.

[3] Constituent Assembly Debates, 21st July, 1947, 23rd July, 1947, 24th July, 1947, 25th July, 1947, 28th July, 1947, 29th July, 1947, 30th July, 1947, 31st July, 1947.

[4] Constituent Assembly Debates, 21st July, 1947, p. 734.

[5] *Ibid.*

cause, in its opinion, "there would be extraordinary expense of time and energy and money without any adequate result" as the President would not have any real powers. It had recommended that the President should be elected by an electoral college consisting of: (a) the members of both Houses of Parliament of the federation, and (b) the members of the Lower Houses of the Legislatures of the Units. In the Legislatures of some of the Units there had been nominated members and the Constituent Assembly had restricted the voting powers to the elected members of the Legislatures only.[6] The Assembly had accepted the recommendations of the Union Constitution Committee with regard to (a) the term of office of the President, and (b) the removal of President by impeachment.

With regard to the extent of the executive authority of the federation, the Committee had recommended that the executive authority of the federation should be co-extensive with its legislative authority. Regarding the position of the Ministers and their relationship with the President, the Committee had recommended[7] that there should be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. But the Committee had not said anything about the manner in which the ministers should be chosen or about the responsibility of the ministers to the legislature. Hence, the Assembly had decided that the Prime Minister should be appointed by the President and other ministers should be appointed by the President on the advice of the Prime Minister and that the ministers should be collectively responsible to the Lower House.[8] It had been advocated by some members of the Constituent Assembly that the ministers should be elected by the system of proportional representation by single transferable vote.[9] Others had pleaded for the setting up of a non-parliamentary executive in the sense that it should not be removable before the term of the legislature.[10] Both the proposals had been opposed by Pandit Nehru. He had observed

[6] Constituent Assembly Debates, 24th July, 1947, p. 847.
[7] Constituent Assembly of India, Reports of Committees, First Series, p. 50.
[8] Constituent Assembly Debates, 28th July, 1947, p. 921.
[9] *Ibid.*, p. 907.
[10] *Ibid.*, p. 908.

that election by proportional representation would lead to a weak ministry and that the setting up of a non-parliamentary executive would upset the whole "scheme and structure" of the constitution.[11] The Assembly had not accepted those suggestions. The recommendations of the Union Constitution Committee, as accepted by the Constituent Assembly, had been incorporated by the Drafting Committee in articles 41 to 65, 102, 124 to 127 of the Draft Constitution of India.

On 4th November, 1948, while introducing the Draft Constitution of India, as settled by the Drafting Committee, in the Constituent Assembly of India, Dr B. R. Ambedkar, Chairman of the Drafting Committee, said[12] that in the Draft Constitution there was placed "a functionary" who was called the President of the Indian Union. But beyond the "identity of names", he observed, there was nothing in common between the form of Government prevalent in the United States of America and the form of Government proposed under the Draft Constitution. The form of Government prevalent in the United States of America was called the Presidential system of Government but what the Draft Constitution proposed was the Parliamentary system of Government. Under the Presidential system of Government as existed in the United States of America, he added, the President was the "chief Head of the Executive" and the administration vested in him. But, Dr Ambedkar pointed out,[13] under the Draft Constitution the President occupied the same position as the King under the English Constitution. The President was "the head of the State but not of the Executive. He represents the Nation but does not rule the Nation. He is the symbol of the Nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known". Again, the President of the United States of America was not bound to accept the advice of his ministers, but under the Draft Constitution the President of the Indian Union was bound by the advice of his ministers and he could do nothing contrary to the advice of his ministers. Further, he remarked,

[11] *Ibid.*, p. 915.
[12] Constituent Assembly Debates, 4th November, 1948, p. 32.
[13] *Ibid.*, pp. 32-33.

the Presidential system of Government in the United States of America was based upon the theory of separation of the executive and the legislature. The Draft Constitution did not recognise that doctrine. Dr Ambedkar then explained the reasons why the Cabinet system of Government, as prevailed in England, was preferable in India to the Presidential system of Government, as existed in the United States of America. He said that a "democratic executive" must satisfy two conditions: (1) it must be a stable executive, and (2) it must be a responsible executive. In his opinion, it had not been possible to devise a system of Government which could ensure, in equal degree, both stability and responsibility. The non-Parliamentary system of Government ensured "more stability but less responsibility" and the Parliamentary system of Government ensured "more responsibility but less stability". He remarked that under the non-Parliamentary system of Government the "assessment of responsibility" was "periodic." It took place once in four of five years and the assessment was made by the electorate. In England, on the other hand, where Parliamentary system of Government prevailed, the assessment of responsibility of the executive was "both daily and periodic". The daily assessment was done by members of Parliament through "questions, Resolutions, No-confidence motions, Adjournment motions and Debates on Addresses". He expressed the opinion that daily assessment of responsibility was "far more effective" than the periodic assessment and "far more necessary" in a country like India.[14]

On 10th December, 1948,[15] the Constituent Assembly of India began discussing articles of the Draft Constitution dealing with the future Union Executive. During a long debate on the President's executive powers under the new Constitution the members of the Constituent Assembly heard from three members of the Drafting Committee why the Parliamentary system of Government of the British type was preferable in India to the Presidential type of Government, as prevailed in the United States of America. Articles 41 and 42 of the Draft Constitution stated that there should be

[14] *Ibid.*, p. 33.
[15] Constituent Assembly Debates, 10th December, 1948, p. 968.

a President of India and that the executive power of the Union should be "vested in the President and may be exercised by him in accordance with the Constitution and the law". As a lone champion of the Presidential system of Government of the United States model, Prof. K. T. Shah gave early indication of his own preference by suggesting through an amendment to article 41 that the "Chief Executive and Head of the State in the Union of India shall be called the President of India."[16] Later, through some amendments to article 42, Prof. Shah sought to invest the President of India with specific executive powers including the power to declare war and make peace.[17] Explaining the reasons why the proposed changes were unacceptable, Dr Ambedkar said[18] that the Drafting Committee had followed the proposals set out in the report of the Union Constitution Committee which had already been accepted by the House. Shri K. M. Munshi, who was a strong supporter of the British system of parliamentary democracy, pointed out that[19] in England the executive power vested in the Cabinet supported by a majority in the House of Commons which had, under the British Constitution, financial powers. There was no separation of powers and, consequently, there could never be any conflict between the executive and the legislature. In his opinion, the strongest Government and the most elastic executive could be found in England and that the Government in England was found "strong and elastic under all circumstances" The British model, he said, had been "approved by every one including leading American constitutional experts as really better fitted for modern conditions". Further, the system of Government in India had been based for nearly hundred years[20] on the British model and, in his opinion, it would not be wise "to try a novel experiment". He pointed out that the Dominion Government of India was also functioning as a full-fledged Parliamentary Government. He, therefore, submitted that from that point of view the whole

[16] *Ibid.*, p. 969.
[17] *Ibid.*, p. 978.
[18] *Ibid.*, p. 974.
[19] *Ibid.*, p. 984.
[20] This was an exaggeration. The tradition has been built since the introduction of the Montagu-Chelmsford Reforms in 1921.

scheme put forward by the various amendments of Prof. Shah had not been accepted by the House so far, had not yielded the best possible result elsewhere and was against the tradition which had been built up in India.[21] Shri Alladi Krishnaswami Ayyar observed that[22] an "infant democracy" could not afford to take the "risk of a perpetual cleavage, feud or conflict or threatened conflict" between the executive and the the legislature. There was, he added, another reason why Presidential system of Government was not suitable in India. There were many Indian States which would form units of the Indian federation and there was no intention of "effacing the Rulers from the various States". Those Rulers should not again be vested with real executive powers free from the control of the legislatures, because that would be against the "marked tendency of the times" and would create difficulties. The amendments of Prof. K. T. Shah were not accepted by the Assembly and articles 41 and 42 were adopted[23] by the Assembly on 10th December, 1948.[24]

The Constituent Assembly decided[25] that the future President of India should be elected by an electoral college consisting of the elected members of both Houses of Parliament and the elected members of the Legislative Assemblies of the States. The Assembly rejected an amendment of Prof. K. T. Shah who pleaded that, in order to make the will of the people supreme, the President of India should be elected "by the adult citizens of India, voting by secret ballot, in each constituent part of the Union".[26] As the President of India would not have any real powers the Drafting Committee, Dr Ambedkar said, had not thought it necessary to provide for the election of the President by the adult citizens of India.[27] He also pointed out that it would be impossible to provide an electoral machinery for the election in which at least 158.5 millions of people would have to participate. Declaring his inability to accept the suggestion of Prof. Shah, he said

[21] Constituent Assembly Debates, 10th December, 1948, p. 985.
[22] *Ibid.*
[23] *Ibid.*, pp. 974-87.
[24] Articles 41 and 42 became articles 52 and 53 of the Constitution of India.
[25] Constituent Assembly Debates, 13th December, 1948, p. 999. This became article 54 of the Constitution of India.
[26] Constituent Assembly Debates, 13th December, 1948, p. 991.
[27] *Ibid.*, pp. 997-8.

that if the President of India was in the same position as the President of the United States of America, he could have understood the argument in favour of direct election of the President. But the position of the Indian President was different. He was only a "figurehead" and if any functionary was to be compared to the American President that functionary was the Prime Minister who would be elected by adult suffrage. Clause (3) of article 44 of the Draft Constitution stated that the "election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot". In the opinion of Shri Mahavir Tyagi[28] and Begum Aizaz Rasul,[29] the first condition of proportional representation was the existence of a multiple-member constituency and it was argued by them that if only one man was to be elected the question of proportional representation by means of the single transferable vote did not arise. Shri Naziruddin Ahmad[30] wanted to know how there could be proportional representation when there was only one man to be elected. Shri Tyagi also moved an amendment[31] suggesting that the "election of the President shall be held by secret ballot and in accordance with the system of majority preferential voting by the single alternative vote". According to that system, as he explained, "votes can be transferred from one candidate to another and the candidate who gets the minimum number of votes will be eliminated from the contest, and his votes will be altered and counted in favour of the next higher candidate of his choice. And this process of elimination will proceed on till there remains only one candidate in the contest. He will be declared elected". Dr Ambedkar said[32] that proportional representation involved elimination. Otherwise, in his opinion, proportional representation had no meaning. Instead of having several proportional representations, the Draft Constitution provided one single proportional representation, in which every candidate at the bottom would

[28] *Ibid.*, p. 1003.
[29] *Ibid.*, p. 1005.
[30] *Ibid.*, p. 1017.
[31] *Ibid.*, p. 1005.
[32] *Ibid.*, p. 1018.

be eliminated, until one man was left who got what was called a "quota". He added that "alternative" was "another name for proportional." The amendment of Shri Tyagi was not accepted[33] by the Assembly.[34] Two other principles were decided by the Constituent Assembly in connexion with the election of the President. First, there should be, as far as practicable, uniformity in the scale of representation of the different States, and secondly, there should be parity between the States as a whole and the Union. It was also decided by the Assembly that this uniformity and this parity should be determined with reference to the population of the States.

It may be noted here that this method of electing the President by proportional representation by means of the single transferable vote was borrowed presumably from the Constitution of Ireland.[35] We shall see later on that our Constituent Assembly also decided that the election of members of the Council of States and the Legislative Councils of the States should also be held in accordance with the system of proportional representation by means of the single transferable vote. This method, we submit, pre-supposes a plural-member constituency. The details of the procedure for the election of members of the Council of States and the Legislative Councils of the States are explained in Conduct of Election Rules, 1961. In the case of election of the President there is only one member who has to be elected and here also the details of the procedure are laid down in the Presidential and Vice-Presidential Election Rules, 1952. From the provisions of these two Rules[36] it appears that in the case of members of the Council of States or the Legislative Councils of the States, election is secured by transfer of surplus votes from the above and that in the case of election of the President the process works from the bottom and there is elimination of the candidate who has polled the lowest number of votes. Thus, though the same expression, namely, "proportional representation by means of the single trans-

[33] Constituent Assembly Debates, 13th December, 1948, p. 1018.

[34] Clause (3) of article 44 became clause (3) of article 55 of the Constitution of India.

[35] Article 12(2).

[36] See Conduct of Election Rules, 1961, and the Presidential and Vice-Presidential Election Rules, 1952.

ferable vote" was used by the Constituent Assembly in both the cases, it contemplated a procedure in connexion with the election of the President which was different from what was intended in other contexts. It is, we submit, not proper to use in one constitutional document the same phrase to convey different meanings in different contexts. The Constituent Assembly might have called the procedure whereby the President should be elected "proportional representation by the alternative vote" and not "proportional representation by means of the single transferable vote". It should, however, be pointed out that the procedure decided by the Constituent Assembly for the election of the President excludes the possibility of a person being elected to that office by a minority vote.

In the year 1961, the Constitution (Eleventh Amendment) Act, 1961,[37] was passed by our Parliament which, *inter alia*, provided that the election of a person as President or Vice-President "shall not be called in question on the ground of existence of any vacancy for whatever reason among the members of the electoral college" electing him. This provision was made, because it was felt[38] that elections of the two Houses of Parliament might not always be completed before a President or a Vice-President was elected. It was, therefore, thought desirable to make it clear that the election of a President a or Vice-President could not be challenged on the ground that there were vacancies in the appropriate electoral college for any reason. As a matter of fact, in *Narayan Bhaskar Khare* vs. *The Election Commission*[39] a point was raised that for a valid election of the President, all elections to the two Houses of Parliament should be completed before the date of the Presidential election, as otherwise some members would be denied the right to take part in the election. But the Supreme Court did not express any opinion on that point as it was not necessary to do so. In this case, when the notification for the election of the President was issued, elections in certain areas in northern India had not been completed.

[37] See Appendix 11.

[38] Statement of Objects and Reasons, *the Gazette of India*, Extraordinary, Part II, Section 2, November 30, 1961.

[39] *Narayan Bhaskar Khare* vs. *the Election Commission*, 1957. S.C.R. 1081.

With regard to the term of office of the President, it was decided[40] by the Constituent Assembly that the President should hold office for a term of five years from the date on which he entered upon his office.[41] Article 46 of the Draft Constitution laid down that a person "who holds, or who has held, office as President shall be eligible for re-election to that office once, but only once". The article, thus, restricted a person's right to re-election to that office only once. That restriction was removed.[42] The words "once, but only once" were deleted from that article. Articles 43, 44, 45 and 46 were adopted on 13th December, 1948, and the Assembly adjourned till Monday, 27th December, 1948.[43]

After a recess of a fortnight, the Constituent Assembly of India reassembled to resume consideration of the Draft Constitution. On 27th December, 1948, the Constituent Assembly decided[44] on the qualifications for election as President,[45] the conditions of President's office[46] and the oath to be taken by the President before entering upon his office.[47] On 28th December, 1948, the Assembly began discussing article 50 of the Draft Constitution which laid down the procedure for impeachment of the President. The article ran as follows:

> "50. (1) When a President is to be impeached for violation of the Constitution, the charge shall be preferred by either House of Parliament.
>
> (2) No such charge shall be preferred unless—
>
> (*a*) the proposal to prefer such charge is contained in a resolution which has been moved after a notice in writing signed by not less than thirty members of the House has been given of their intention to move the resolution, and

[40] Constituent Assembly Debates, 13th December, 1948, p. 1022.
[41] This became article 56 of the Constitution of India.
[42] Constituent Assembly Debates, 13th December, 1948, p. 1024. Article 46 became article 57 of the Constitution of India.
[43] Constituent Assembly Debates, 13th December, 1948, p. 1024.
[44] Constituent Assembly Debates, 27th December, 1948, pp. 1037, 1047, 1062.
[45] This became article 58 of the Constitution of India.
[46] This became article 59 of the Constitution of India.
[47] This became article 60 of the Constitution of India.

(*b*) such resolution has been supported by not less than two-thirds of the total membership of the House.

(3) When a charge has been so preferred by either House of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.

(4) If as a result of the investigation a resolution is passed, supported by not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed."

Various suggestions were made through different amendments. The first suggestion was that[48] the President should be impeached not only for violation of the Constitution, but also for "treason, bribery or other high crimes and misdemeanours". The second suggestion was that the charge should be preferred by the Lower House[49] and that the resolution convicting the President must be passed by both the Houses.[50] The third suggestion was that the trial should be presided over by the Chief Justice of the Supreme Court[51] who would be detached from "political passions" and prejudices. In his reply, Dr Ambedkar said that[52] the phrase "violation of the Constitution" included treason, bribery or other high crimes and misdemeanour. With regard to the second suggestion, his reply was that "the honour, dignity and the rectitude" of the office of the President was not merely the concern of the Lower House alone but was equally a matter of concern for the Upper House. There was, in his opinion, no valid reason for ousting the Upper House from investigating or entertaining the charge against the President. He

[48] Constituent Assembly Debates, 28th December, 1948, p. 1063.
[49] *Ibid.*, p. 1066.
[50] *Ibid.*, p. 1071.
[51] *Ibid.*, p. 1066.
[52] *Ibid.*, pp. 1080-1.

could not also understand why the verdict of one House should be submitted to another House. He pointed out that difficulty would arise if the other House did not adopt the conclusion which had been arrived at by one House. Obviously, he said, there would be a "tie". In his opinion, the suggestion provided no "remedy for the dissolution of that tie". Referring to the third suggestion, he said that Parliament, while framing Rules of Procedure, could make a provision that the Chief Justice should preside over the trial. The suggestions were not accepted by the House. Clause 2(a) of the article spoke of a notice but did not specify any period of notice. It was decided that fourteen days' notice should be given. It was also decided that the notice should be signed by one-fourth of the total number of members of the House.[53] The article was adopted[54] on 28th December, 1948[55]. On 29th December, the Assembly decided[56] that in certain cases the President should have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute sentences of any person convicted by a court.[57] It may be mentioned in this connexion that the Union Constitution Committee had recommended that the right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction should be vested in the President, but such power of commutation or remission might also be conferred by law on other authorities.[58] When this matter had come up for discussion on 31st July, 1947, the representatives of the pre-existing Indian States had expressed a desire that the power to grant pardon and reprieve which had vested in the Rulers of the States should be preserved. In fact, Shri B. L. Mitter, representative of Baroda, had moved an amendment to the effect that the power to grant pardon proposed to be given to the President should be restricted only to punishment imposed by any court exercising criminal jurisdiction in a Province.[59] His amendment had been opposed by Shri Gopalaswamy Ayyangar

[53] Constituent Assembly Debates, 28th December, 1948, p. 1083.
[54] *Ibid.*, p. 1085.
[55] This became article 61 of the Constitution of India.
[56] Constituent Assembly Debates, 29th December, 1948, p. 1120.
[57] This became article 72 of the Constitution of India.
[58] Constituent Assembly of India, Reports of Committees, First Series, p. 50
[59] Constituent Assembly Debates, 31st July, 1947, p. 1013.

who had pointed out that[60] practically in all federations the head of the federation had the power to grant pardon in case of convictions for offences against the laws of the federation and that the head of a Unit had the power to grant pardon in case of convictions for offences against the laws of the Unit. He had moved an amendment[61] suggesting that the President of India should be given the power to grant pardon in case of convictions for offences against the federal laws. Shri Mitter, however, had not pressed his amendment.[62] The Assembly had then also decided that in the case of death sentence the President should have powers of suspension, remission and commutation of sentence.[63]

We may now pass on to the Ordinance-making power of the President.

The Union Constitution Committee had recommended[64] that the President of India should have the power to promulgate Ordinances during the recess of the Federal Parliament in order to meet any circumstances when immediate action was necessary. The Committee had also recommended that every such Ordinance should be laid before the Federal Parliament and should cease automatically to have effect at the expiration of six weeks from the reassembly of the Federal Parliament, unless disapproved by the Federal Parliament before that period. The Ordinance might, however, be withdrawn at any time by the President. The Committee had admitted that the Ordinance-making power had been the subject of severe criticism. But it had emphasised that circumstances might exist when immediate promulgation of a law was absolutely necessary and there was no time to summon the Federal Parliament. The Committee had hoped that "a democratically elected" President, who would act on the advice of ministers responsible to Parliament, was not "at all likely to abuse any Ordinance-making power" with which he might be invested. When the report of the Union Constitution Committee was under discussion in the Constituent Assembly, Shri Ananthasayanam Ayyangar pointed

[60] *Ibid.*, pp. 1014-15.
[61] *Ibid.*, p. 1017.
[62] *Ibid.*, p. 1022.
[63] *Ibid.*, p. 1028.
[64] Constituent Assembly of India, Reports of Committees, First Series, pp. 53-54.

out that under the proposed provisions the President could promulgate an Ordinance only on the advice of his ministers and that the ministers would be responsible to Parliament.[65] Sardar Vallabhbhai Patel, Chairman of the Provincial Constitution Committee, had observed on a previous occasion that by long experience such Ordinance-making power had been found to be necessary.[66] The Constituent Assembly accepted the recommendations of the Union Constitution Committee and decided that[67] the President of the Indian Federation should have the power to promulgate Ordinances, as suggested by the Union Constitution Committee.[68]

This provision, it may be noted here, was taken from the Government of India Act, 1935.[69] In England the King has no such independent power of legislation, nor is there any such provision in the constitutions of the Dominions or of Eire. The provisions, as adopted by the Constituent Assembly, were, however, different from the provisions of the Government of India Act, 1935. Under the Government of India Act, 1935, the Governor-General of India could promulgate Ordinances both when the Central Legislature was in session and also when it was not in session. Again, the Governor-General could promulgate Ordinances while exercising his "individual judgment" and also while acting "in his discretion". But under the provisions, as adopted by the Constituent Assembly, the President could promulgate an Ordinance during the recess of Parliament and he could do it only on the advice of his ministers. It may be mentioned here that the Rules of Procedure and Conduct of Business in Lok Sabha[70] requires[71] that whenever a Bill seeking to replace an Ordinance is introduced in the House a statement explaining the circumstances which necessitated immediate legislation by Ordinance should be placed before the House along with the Bill, and that whenever an Ordinance, which embodies wholly or partly or with modifications the provisions of a Bill pending before the House, is promulgated a statement

[65] Constituent Assembly Debates, 28th July, 1947, p. 936.
[66] Constituent Assembly Debates, 21st July, 1947, p. 702.
[67] Constituent Assembly Debates, 23rd May, 1949, p. 217.
[68] This became article 123 of the Constitution of India.
[69] Sections 42, 43.
[70] i.e. the House of the People.
[71] See Rules of Procedure and Conduct of Business in Lok Sabha, rule 71.

explaining the circumstances which necessitated immediate legislation by Ordinance should be laid on the Table at the commencement of the session following the promulgation of the Ordinance. The Rules of Procedure and Conduct of Business in Lok Sabha, therefore, seek to make the ministers liable to account before the House if the Ordinance-making power of the President is abused by the ministers in order to secure the passage of a measure by resorting to the Ordinance-making power of the President.

The Assembly next decided that there should be a Vice-President of India[72] who should be elected by the members of both Houses of Parliament in accordance with the system of proportional representation by means of the single transferable vote and that he should not be a member of either House of Parliament or of a House of the Legislature of any State.[73] He should hold office for a period of five years[74] and should be the *ex-officio* Chairman of the Council of States.[75] It was also decided that the Vice-President should "act as President" in the event of the occurrence of any vacancy in the office of the President "by reason of his death, resignation or removal, or otherwise" and should "discharge" the functions of the President when the President was unable to discharge his functions owing to "absence, illness or otherwise".[76] As the normal function of the Vice-President would be to preside over the Council of States, it was not thought necessary to make a provision asking the members of the State Legislatures to take part in the election of the Vice-President.[77] It may be mentioned here that the Constituent Assembly agreed upon the way and the circumstances in which Parliament might provide for the discharge of the functions of the President in any contingency not provided in the Constitution[78]

[72] Constituent Assembly Debates, 28th December, 1948, p. 1088. Article 52 of the Draft Constitution. This became article 63 of the Constitution of India.

[73] Constituent Assembly Debates, 29th December, 1948, p. 1102, Article 55 of the Draft Constitution. This became article 66 of the Constitution of India.

[74] Constituent Assembly Debates, 29th December, 1948, p. 1116, Article 56 of the Draft Constitution. This became article 67 of the Constitution of India.

[75] Constituent Assembly Debates, 28th December, 1948, p. 1089, Article 53 of the Draft Constitution. This became article 64 of the Constitution of India.

[76] Constituent Assembly Debates, 28th December, 1948, p. 1092. Article 54 of the Draft Constitution. This became article 65 of the Constitution of India.

[77] Constituent Assembly Debates, 29th December, 1948, p. 1101.

[78] Constituent Assembly Debates, 29th December, 1948, p. 1117. This became article 70 of the Constitution of India.

and also upon mode of resolving disputes in connexion with the election of a President or Vice-President.[79]

A question arose as to what should be the extent of executive power of the Union. The Constituent Assembly decided that the executive power of the Union should extend to the matters with respect to which Parliament had power to make laws. But unless expressly provided in the Constitution or in any law made by Parliament, this executive power should not extend in any State to matters with respect to which the Legislature of the State had also power to make laws. It was also decided that the executive power of the Union should extend[80] to the exercise of such rights, authority and jurisdiction as were exercisable by the Government of India by virtue of any treaty or agreement.

Let us now see the position of the ministers and their relationship with the President as decided by the Constituent Assembly. Articles 61, 62 and 65 of the Draft Constitution dealt with the position of the ministers and their relationship with the President. Article 60 and 61 were discussed on 30th and 31st December, 1948, and article 65 was discussed on 7th January, 1949. Article 61 stated that there should be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions and that the question whether any, and if so what, advice was tendered by the ministers should not be inquired into in any court. With regard to article 61, various suggestions were made through amendments. According to one amendment, there should be fifteen ministers who should be "elected by the elected members of both the Houses of Parliament from among themselves in accordance with the system of proportional representation by means of a single transferable vote, and one of the ministers shall be elected as Prime Minister, in like manner.[81] The suggestion was made, as the mover said, with a view to securing in the Cabinet "proper representatives" and representatives "from all sections of the

[79] Constituent Assembly Debates, 29th December, 1948, p. 1118. This became article 71 of the Constitution of India.

[80] Constituent Assembly Debates, 30th December, 1948, p. 1141, 17th Nov., 1949, p. 592.
This became article 73 of the Constitution of India.

[81] Constituent Assembly Debates, 30th December, 1948, p. 1141.

people". According to the second amendment, there should be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion".[82] According to the third amendment, the designation "Prime Minister" should be kept out of the Constitution.[83] In the opinion of the mover,[84] it was not desirable to place the Prime Minister at the head of the Council of Ministers because, inevitably, certain amount of power would concentrate in the hands of the Prime Minister which would "militate against the working of a real, responsible and democratic Government". The fourth amendment was to the effect that a person who had been convicted of bribery and corruption should not be appointed a minister.[85] It was pointed out by a member[86] that articles 61, 62 and 65 embodied the "conventions of the Cabinet system of Government evolved in Great Britain as a result of a long struggle between the King and Parliament".[87] The articles should not, therefore, be interpreted literally. The articles, he said, did not mean that normally the function of the Prime Minister was to aid or advise the President in the exercise of his functions. In fact, he added, the position was altogether "opposite, or the reverse". It was the Prime Minister's business, with the support of the Council of Ministers, to rule the country and the President might be permitted, now and then, to aid and advise the Council of Ministers. Dr Ambedkar opposed all the amendments. He did not think it possible to make any statutory provision for the inclusion of the members of different communities in the Cabinet.[88] He opposed the amendment for fixing the number of ministers. Speaking about the second amendment, Dr Ambedkar said that in the new Constitution the President would only have "certain prerogatives but not functions" and, hence, no situation could arise when the President would be called upon to discharge his functions

[82] *Ibid.*, p. 1145.
[83] *Ibid.*, p. 1144.
[84] Prof. K. T. Shah.
[85] Constituent Assembly Debates, 30th December, 1948, p. 1146.
[86] Shri K. Santhanam.
[87] Constituent Assembly Debates, 30th December, 1948, p. 1155.
[88] *Ibid.*, p. 1157.

without the advice of the Prime Minister.[89] Opposing the third amendment, Dr Ambedkar said that the amendment, if accepted, would be "absolutely fatal" to the principle of collective responsibility. Collective responsibility, he observed, could be achieved only through the "instrumentality of the Prime Minister" and, therefore, statutory recognition should be given to the office of Prime Minister. The Prime Minister, he also observed, "is really the keystone of the arch of the Cabinet" and unless and until that office was endowed with statutory authority to nominate and to remove ministers there could be no collective responsibility.[90] Speaking about the fourth amendment, Dr Ambedkar said that that was a case which might be left to the good sense of the Prime Minister.[91] The amendments were not accepted by the Assembly and article 61, as drafted by the Drafting Committee, was incorporated in the Constitution on 30th December, 1948.[92]

Clauses (1), (2) and (3) of article 62 of the Draft Constitution provided that the Prime Minister should be appointed by the President and the other ministers should be appointed by the President on the advice of the Prime Minister, that the ministers should hold office during the pleasure of the President and that the Council of Ministers should be collectively responsible to the House of the People. An amendment was moved by a member suggesting that the ministers should hold office "so long as they enjoy the confidence of the House of the People".[93] Dr Ambedkar did not think that amendment to be necessary because, in his opinion, under article 62 a minister was liable to removal on the ground that he had lost confidence of the Legislature.[94] He was also of opinion that under article 62 a minister was liable to removal on the ground that his administration was not 'pure'. It would be perfectly open to the President, he remarked, under article 62 to call for the removal of a particular minister on the ground that he was guilty of corruption

[89] *Ibid.*, p. 1158.
[90] *Ibid.*, p. 1160.
[91] *Ibid.*, p. 1160.
[92] *Ibid.*, p. 1162.
[93] Constituent Assembly Debates, 31st December, 1948, p. 1168.
[94] *Ibid.*, pp. 1185-6.

or bribery or maladministration, although that particular minister probably was a person who enjoyed the confidence of the House.[95] He wanted the members to realise that the tenure of a minister should be subject not merely to one condition but to two conditions and the two conditions were, purity of administration and the confidence of the House. The article, in his opinion, made provisions for both. Clause (5) of article 62 stated that a minister who, "for a period of six consecutive months, is not a member of either House of Parliament shall at the expiration of that period cease to be a member". It was alleged that the provision of that clause was "wholly against the spirit of democracy",[96] because under that clause a person who had not been chosen by the people of the country could be appointed a minister. Justifying the insertion of that clause, Dr Ambedkar said that[97] under that clause a person who was otherwise competent to hold the post of a minister but had for some reason been defeated in the election in a particular constituency, could be appointed a minister on the assumption that he would be able to get himself elected either from the same constituency or from another constituency within a period of six months from the date of his appointment as a minister. The clause, he said, did not confer any right on any person to be appointed a minister without at all being elected to the Legislature. In his opinion, the clause did not "violate the principle of collective responsibility", nor did it cause any breach of the fundamental principles on which parliamentary government was based. The Assembly adopted article 62 of the Draft Constitution on 31st December, 1948.[98]

Article 65 was adopted[99] by the Constituent Assembly on 7th January, 1949, without practically any discussion.[100] It was decided that it should be the duty of the Prime Minister to communicate to the President, not only all decisions of the Council of Ministers but also any other information that the President might call for, relating to the administration

[95] *Ibid.*, p. 1186.
[96] *Ibid.*, p. 1172.
[97] *Ibid.*, p. 1186.
[98] *Ibid.*, p. 1192.
[99] Constituent Assembly Debates, 7th January, 1929, p. 1354.
[100] Articles 61, 62 and 65 of the Draft Constitution became articles 74, 75 and 78 of the Constitution of India.

of the affairs of the Union and proposals for legislation. It should also be the duty of the Prime Minister to submit, if the President so required, for the consideration of the Council of Ministers any matter on which a decision had been taken by a minister but which had not been considered by the Council.

The Constituent Assembly also decided that there should be an Attorney-General for India[101] and a Comptroller and Auditor-General of India,[102] and that both of them should be appointed by the President of India. With regard to the Attorney-General for India, it was decided that he should be a person qualified to be appointed a judge of the Supreme Court of India and that his duties should be to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as might from time to time be referred or assigned to him by the President.[103] Regarding the duties of the Comptroller and Auditor-General, it was decided that he should perform such duties and exercise such powers in relation to the accounts of the Government of India and of the Government of any State as might be prescribed by Parliament. In the opinion of Dr Ambedkar, Chairman of the Drafting Committee, the Comptroller and Auditor-General was "probably the most important officer in the Constitution of India"[104] and that he should be independent of any control of the Executive. In order to secure that independence it was decided by the Assembly:

(a) that though appointed by the President, the Comptroller and Auditor-General might be removed from office "in like manner and on like grounds as a judge of the Supreme Court";
(b) that his salary and conditions of service should be laid down by Parliament and should not be varied to his disadvantage;
(c) that he should not be eligible for further office either under the Government of India or under the Government of any State after retirement; and

[101] Constituent Assembly Debates, 7th January, 1949, p. 1350.
[102] Constituent Assembly Debates, 30th May, 1949, p. 409.
[103] This became article 76 of the Constitution of India.
[104] Constituent Assembly Debates, 30th May, 1949, p. 407.

(d) that the salaries, etc., of the Comptroller and Auditor-General and his staff and the administrative expenses of his office should be charged upon the Consolidated Fund of India and should thus be made non-votable expenditures.[105]

It may be mentioned here that in November, 1949, during the Third Reading of the Constitution Bill, Shri Alladi Krishnaswami Ayyar, a member of the Drafting Committee, Shri T. T. Krishnamachari who had become later on a member of the Drafting Committee, and Dr Rajendra Prasad, President of the Constituent Assembly, reiterated that the proposed Constitution provided for the setting up of the Cabinet system of Government both at the Centre and in the constituent States of the Indian Union. Shri Alladi Krishnaswami Ayyar observed[106] that after "weighing the pros and cons" of the Presidential system of Government prevailing in the United States of America and the Cabinet system of Government obtaining in England and in the Dominions, and after taking into account the working of responsible Government in the provinces of India for several years and also the difficulty of providing for a purely Presidential type of Government in the pre-existing Indian States, the Constituent Assembly adopted the principle of responsible Government at the Centre and also in the constituent States of the Indian Union. Shri T. T. Krishnamachari remarked[107] that, in so far as the relationship of the President with the Cabinet was concerned, the Constituent Assembly "completely copied" the system of responsible Government that was functioning in England and that the deviations that were made were only such as were necessary for the setting up of the federal form of Government in India. It has been stated before that the Constitution was adopted by the Constituent Assembly on 26th November, 1949. On that day just before putting the motion for the final adoption of the Constitution of India to the vote of the Constituent

[105] This became articles 148, 149, 150 and 151 of the Constitution of India.
[106] Constituent Assembly Debates, 23rd November, 1949, pp. 834-6.
[107] Constituent Assembly Debates, 25th November, 1949, pp. 956-7.

Assembly, Dr Rajendra Prasad in the course of a speech said,[108] among other things:

"We have had to reconcile the position of an elected President with an elected Legislature and, in doing so, we have adopted more or less the position of the British Monarch for the President....His position is that of a constitutional President. Then we come to the Ministers. They are of course responsible to the Legislature and tender advice to the President who is bound to act according to that advice. Although there are no specific provisions, so far as I know, in the Constitution itself making it binding on the President to accept the advice of his Ministers, it is hoped that the convention under which in England the King acts always on the advice of his Ministers will be established in this country also and the President, not so much on account of the written word of the Constitution, but as a result of this very healthy convention, will become a constitutional President in all matters".

It is thus clear from what we have shown above that whatever might be the language of our Constitution, the framers of our Constitution intended to establish Cabinet system of Government in India.[109] In this connection it may be mentioned that in April, 1955, our Supreme Court[110] also expressed the view that our Constitution "though federal in its structure, is modelled on the British Parliamentary System", that the President of India has been made "a formal or constitutional head of the executive" and that "the real executive powers are vested in the Ministers or the Cabinet". Our country has thus a constitutional President "superimposed on the Parliamentary system of the British type".[111] But in November, 1960, Dr Rajendra Prasad, President of India, expressed the opinion[112] that in "equating" the powers of the President with those of the British Monarch, our Constitution had been "wrongly interpreted", that "there is no provision in the Constitution which in so many words lays

[108] Constituent Assembly Debates, 26th November, 1949, p. 988.

[109] See D. N. Banerjee, *Some Aspects of the Indian Constitution*, pp. 65-66.

[110] *Rai Sahib Ram Jawaya Kapur and others* vs. *The State of Punjab*, 1955, 2 S.C.R. pp. 236-7.

[111] See Durga Das Bose, *Commentary on the Constitution of India*, Third Edition, Vol. I, p. 417.

[112] *The Statesman*, Calcutta, 29th November, 1960.

down that the President shall be bound to act in accordance with the advice of his Council of Ministers", and that our Constitution had often been "wrongly interpreted on the lines of the British Constitution". Thus, in November, 1960, Dr Rajendra Prasad, President of India, repudiated what he had said in November, 1949, as the President of the Constituent Assembly of India, to which we have already referred. In December, 1960, however, Prime Minister, Pandit Jawaharlal Nehru, categorically stated[113] that our Constitution was "basically modelled on the British Parliamentary System" and that the position of the President in India was similar to the position of the King in England. Speaking on this subject, in March, 1961, Shri A. K. Sen, Law Minister of India, said[114] that the President himself had given "a ruling on this issue as the President of the Constituent Assembly" and that the Government of India did not think that there could be "a more authoritative pronouncement". He also said that the Government of India did not think that the issue "called for a reference to the Supreme Court".

In conclusion, we may say that ever since the introduction of the Montagu-Chelmsford Reforms in 1921 the people of India have become familiar with the working of the parliamentary system of Government and that parliamentary system of Government has worked with a remarkable success since the 15th day of August, 1947. Our Constituent Assembly, therefore, acted wisely in deciding that parliamentary system of Government should be established in India.

III

We may now refer to the deliberations of the Constituent Assembly of India with regard to the executive of those units of the Indian Union which were formerly known as Governors' Provinces under the Government of India Act, 1935.

It has been stated before that the Constituent Assembly discussed the report of the Provincial Constitution Committee

[113] *The Statesman*, Calcutta, 16th December, 1960.
[114] *The Statesman*, Calcutta, 25th March, 1961.

in July, 1947 session.[115] The Committee had recommended[116] the setting up of Cabinet system of Government in the Provinces. With regard to the Provincial Executive, it had suggested that for each Province there should be a Governor who should be elected directly by the people of the Province for a term of four years. The principle of election of the Governor had been suggested by the Committee because it had thought that[117] an elected Governor would be able to "exert considerable influence on the popular ministry".[118] It had further been suggested by the Committee that the Governor should be eligible for re-election but he should be re-elected only once, that casual vacancy in the office of the Governor should be filled up by election by the Provincial Legislature on the system of proportional representation by means of the single transferable vote and that the Governor should be removed from office by impeachment for "stated misbehaviour". The Assembly accepted the principle of election of the Governor and the principle of removal of the Governor by impeachment, but it decided that casual vacancy in the office of the Governor should be filled up by a Deputy Governor who should be elected by the Provincial Legislature by the system of proportional representation by means of the single transferable vote after every general election.[119] With regard to the extent of the executive authority of a Province, the Committee, in caluse 8 of its report, had recommended that, subject to the provisions of the Constitution "and of any special agreement", the executive authority of a Province "shall extend to the matters with respect to which the Provincial Legislature has power to make laws".[120] The words "and of any special agreement" had been inserted by the Committee in clause 8 to enable the Rulers of the former Indian States, desiring to have a "common administration with a neighbouring Province in

[115] See page 68.

[116] Constituent Assembly of India, Reports of Committees, First Series, pp. 35-41.

[117] Constituent Assembly Debates, 15th July, 1947, p. 588.

[118] Shri B. N. Rau, Constitutional Adviser to the Constituent Asssembly, suggested that the Governor should be elected by the Provincial Legislature 'by secret vote according to the system of proportional representation by the single transferable vote'. (See B. N. Rau, *India's Constitution in the Making*, p. 141.).

[119] Constituent Assembly Debates, 16th July, 1947, p. 618.

[120] Constituent Assembly of India, Reports of Committees, First Series, p. 36.

certain specified matters of common interest" in respect of Provincial subjects, to cede necessary jurisdiction to the Province by such special agreement. Normally, the authority of a Provincial Government, whether executive, legislative or judicial, could not extend beyond the boundaries of the Province. But the clause sought to give a Province extra-territorial jurisdiction by agreement with an Indian State. The clause was referred to an *ad hoc* committee for further consideration.[121] The *ad hoc* committee recommended that it should be "competent for a Province, with the previous sanction of the Federal Government, to undertake, by an agreement made in that behalf with any Indian State, any legislative, executive or judicial functions vested in that State, provided that the agreement relates to a subject included in the Provincial or Concurrent Legislative List" and that on such agreement being concluded, the Province might, subject to the terms thereof, exercise the legislative, executive or judicial functions specified therein through the appropriate authorities of the Province.[122] The recommendations of the *ad hoc* committee were accepted by the Assembly.[123] This provision was incorporated by the Drafting Committee in article 237 of the Draft Constitution. But we shall see later on that article 237 was ultimately deleted from the Constitution.[124] It was also decided by the Assembly that, subject to the provisions of the Constitution and of any special agreement referred to above, the executive authority of a Province should extend to matters with respect to which the Provincial Legislature would have power to make laws.

Regarding the position of the ministers and their relationship with the Governor, the Provincial Constitution Committee had recommended that there should be a Council of Ministers to "aid and advise" the Governor, that normally the Governor should act on the advice of the ministers but in certain matters he should act "in his discretion", that the ministers should be chosen by the Governor and that they should hold office during the "pleasure" of the Governor. In the course of the

[121] Constituent Assembly Debates, 16th July, 1947, p. 629.
[122] Constituent Assembly Debates, 18th July, 1947, p. 697.
[123] *Ibid.*, p. 668.
[124] Constituent Assembly Debates, 13th October, 1949, p. 175.

discussion of the report of the Committee in the Assembly it was suggested by some members that the ministers should be elected by the legislature "by the system of proportional representation by single non-transferable vote".[125] It was urged that that system would be more consistent with the principle of democracy. Others, however, expressed the opinion that as a result of proportional representation the ministry would consist of representatives of different groups having different policies and that it would lead to a coalition Government which would be a weak Government. Sardar Vallabhbhai Patel, Chairman of the Provincial Constitution Committee, observed that[126] the Committee had contemplated the setting up of Cabinet system of Government on the British model and that election of ministers by proportional representation would upset the framework of the Constitution intended to be introduced. The Assembly did not accept the principle of election of ministers by proportional representation[127] and accepted the recommendations of the Provincial Constitution Committee regarding the position of the ministers and their relationship with the Governor.

Clause 15 of the report of the Provincial Constitution Committee dealt with the special responsibilities of the Governor. The Provincial Constitution Committee in that clause had recommended that the prevention of any grave menace to the peace and tranquility of the Province or any part thereof should be the special responsibility of the Governor and that in the discharge of his special responsibility, the Governor should act in his discretion. It had also suggested that if at any time in the discharge of his special responsibility the Governor thought it essential that provision should be made by legislation, but he was unable to secure such legislation, he should report the matter to the President of the Union for taking such action as the President might consider appropriate under his emergency powers. The mover of the clause, Sardar Vallabhbhai Patel, admitted the controversial nature of that clause and said that the[128] clause required careful consideration of the House because, on the one hand, some

[125] Constituent Assembly Debates, 17th July, 1947, pp. 632, 655.
[126] *Ibid.*, p. 654.
[127] *Ibid.*, pp. 655-6.
[128] Constituent Assembly Debates, 21st July, 1947, p. 727.

of the provisions of section 93[129] of the Government of India Act, 1935, were sought to be introduced in the new constitution and, on the other hand, there was a feeling that in view of the conditions prevailing in the country some provisions should be made for giving special responsibility to the Governor to deal with the situation. Shri B. M. Gupte, Pandit Hirday Kunzru and Shri K. M. Munshi moved respectively three amendments to clause 15. In the original clause and in the amendment moved by Shri Gupte[130] the ultimate authority who would deal with the emergency was the President of India. But Shri Gupte suggested that the Governor should, if necessary, take immediate action. Pandit Hirda Nath Kunzru suggested[131] that if the Governor was satisfied that peace and tranquillity of the Province or any part thereof were threatened he should report the matter to the President of India for taking such action as the President might consider appropriate. Shri K. M. Munshi suggested[132] that the Governor should assume to himself all or any of the functions of the Provincial Government by a proclamation which should forthwith be communicated by the Governor to the President. Shri B. M. Gupte argued that[133] when peace was actually threatened a mere power to report the matter to the President would be of no use at all. Pandit Kunzru pointed out that[134] the amendment of Shri Munshi was practically "a reproduction" of section 93 of the Government of India Act, 1935. He apprehended that in case of conflict between the Governor and the ministers the position would be one of great embarrassment both for the Governor and his ministers. It would not be possible for the Governor, he said, to discharge his special responsibilities unless the services were made answerable to the Governor. But that would lead to administrative complications. Shri T. Prakasam, Shri B. G. Kher, Pandit Lakshmi Kanta Maitra, Dr P. K. Sen, Prof. N. G. Ranga supported

[129] Under section 93 of the Government of India Act, 1935, the Governor of a Province could assume to himself all or any of the powers vested in or exercisable by any Provincial body or authority, if he was satisfied that a situation had arisen in which the Government of the Province could not be carried on in accordance with the provisions of that Act.

[130] Constituent Assembly Debates, 21st July, 1947, p. 728.

[131] *Ibid.*, p. 728.

[132] *Ibid.*, p. 729.

[133] Constituent Assembly Debates, 23rd July, 1947, p. 795.

[134] *Ibid.*, p. 798.

the amendment of Shri Munshi. Pandit Govind Ballabh Pant, who was then Chief Minister of the United Provinces, observed that[135] the amendment of Shri Munshi was fraught with danger. He said that if the Governor had control over the executive in the day to day administration he could deal with the situation, but to "keep the Governor aloof from the entire sphere of administration" and then to ask him to face a delicate situation at a time when the ministers were supposed not to be equal to it was "to create chaos and to make confusion worse confounded". In his opinion, the Governor should not be given such powers as suggested in the amendment of Shri Munshi. He remarked that if peace and tranquillity of the Province were threatened the ministers should be given a free hand to deal with the situation. There was, we think, considerable force in the argument of Pandit Govind Ballabh Pant. The Assembly, however, accepted the amendment of Shri Munshi.[136] This provision was incorporated by the Drafting Committee in article 188 of the Draft Constitution, but that article was subsequently deleted from the Constitution. We shall have occasion to refer to this later on. Other recommendations of the Provincial Constitution Committee, as accepted by the Constituent Assembly, were incorporated by the Drafting Committee in chapters II and V of Part VI of the Draft Constitution. In this connexion it may be mentioned that for the sake of uniformity the Drafting Committee thought it desirable[137] to describe the Units of the proposed Indian Union in the new Constitution as "States", whether they had been previously known as the Governors' Provinces, or Chief Commissioners' Provinces, or Indian States. The Committee, however, admitted that some differences would undoubtedly remain between the Units of the Indian Union even in the new Constitution and, in order to mark those differences, it divided the States into three classes enumerated in Part I, Part II and Part III of the First Schedule to the Draft Constitution. They corresponded respectively to the pre-existing Governors' Provinces, Chief Commissioners' Provinces and Indian States.

[135] *Ibid.*, pp. 810-11.
[136] *Ibid.*, p. 818.
[137] Reports of Committees of the Constituent Assembly of India, Third Series, p. 172.

On 30th May, 1949,[138] the Constituent Assembly began discussing articles of the Draft Constitution dealing with the executive of the States specified in Part I of the First Schedule to the Draft Constitution.[139] It decided that there should be a Governor for each such State[140] and that the executive power of the State should vest in the Governor and should be exercised by him in accordance with the provisions of the Constitution.[141] A question then arose whether the Governor should be elected by the people of the State or should be appointed by the President of the Indian Union. Some of the members of the Drafting Committee had felt that[142] the "co-existence" of a Governor elected by the people of the State and Chief Minister responsible to the Legislature of that State might lead to friction and consequent weakness in administration. The Drafting Committee had, therefore, suggested an alternative method of appointing Governors which had been incorporated in article 131 of the Draft Constitution. According to that alternative proposal, the State Legislature should elect a panel of four persons and the President of the Indian Union should appoint one of them as Governor. During the discussion of that article in the Constituent Assembly, on 30th May, 1949, Shri Brajeshwar Prasad moved an amendment suggesting that the Governor of a State should be appointed "by the President by warrant under his hand and seal".[143] While moving his amendment he argued that "in the interest of All-India unity, and with a view to encouraging centripetal tendencies" it was necessary that the authority of the Government of India should be maintained over the States. In his opinion, the alternative method suggested by the Drafting Committee would restrict the choice of the President and he wanted that the President should be free from any influence of the State Legislature in the matter of appointment of a Governor.

[138] Constituent Assembly Debates, 30th May, 1949, p. 416.

[139] Madras, Bombay, West Bengal, the United Provinces, Bihar, East Punjab, the Central Provinces and Berar, Assam and Orissa.

[140] Constituent Assembly Debates, 30th May, 1949, p. 422. This became article 153 of the Constitution of India.

[141] *Ibid.*, p. 424. This became article 154 of the Constitution of India.

[142] Reports of the Committees of the Constituent Assembly, Third Series, pp. 174-5.

[143] Constituent Assembly Debates, 30th May, 1949, p. 426.

We may mention here that in the year 1947, when the question whether the President and the Governor should be elected by adult franchise was discussed in the joint sitting[144] of the Union Constitution Committee and the Provincial Constitution Committee, two different views were expressed. One view was that India as a whole should adopt the American model and the other, that it should adopt the British model. The general opinion was, however, in favour of the British model both at the Centre and in the Provinces. There was an intermediate position which some members favoured. It was felt by them that if at any time it was impossible to form a majority government either at the Centre or in the Provinces and there was fragmentation of political parties, a strong President, and a Governor elected on adult franchise and supported by the authority of the electorate, would give stability to the Government. Ultimately, however, with regard to the Centre it was decided that the President at the Centre should be a constitutional head and should not be directly elected by the adult franchise of the whole country. The "co-ordinated" scheme of both the President and the Governors being elected by adult franchise, so that they would have prestige in the country and power to stabilise administration, was thus broken up. In April 1949, both the Committees met again,[145] considered this question and ultimately came to the conclusion that as the post of an elected Governor would be "completely useless from the point of view of his having any controlling voice in the government", there was no need for going through the process of election. It was also felt that in the event of a conflict between the Governor elected by adult franchise and the Chief Minister, the position of the Governor might be superior to that of the Chief Minister. With the prestige of a general election by adult franchise the Governor might seek to over-ride the powers of the Chief Minister. The Joint Committee, therefore, ultimately decided that the best way would be to eliminate the election of the Governor.[146]

Shri Munshi, a member of the Drafting Committee, there-

[144] Constituent Assembly Debates, 31st May, 1949, p. 452.
[145] *Ibid.*
[146] *Ibid.*, pp. 452-3.

fore, supported the amendment of Shri Brajeshwar Prasad.[147] In the opinion of Pandit Jawaharlal Nehru,[148] the principle of nominated Governor would be desirable from the practical point of view. After much deliberation, the Assembly decided that the Governor of a State should be "appointed by the President by warrant under his hand and seal".[149] We have stated before that in July, 1947, the Constituent Assembly decided that provisions should be made in the proposed Constitution for a Deputy Governor.[150] But the Drafting Committee did not think it necessary[151] to make any provision in the Draft Constitution for a Deputy Governor, because a Deputy Governor would not have any function so long as the Governor was there.

The Constituent Assembly agreed upon, among other things: (*a*) the term of office of a Governor;[152] (*b*) the qualifications for appointment as a Governor;[153] (*c*) the conditions of Governor's office;[154] (*d*) the oath to be taken by a Governor before entering office;[155] (*e*) the discharge of the functions of a Governor in certain contingencies not provided for in the Constitution;[156] and (*f*) the power of a Governor to grant pardons, *etc.*, and to suspend, remit or commute sentences in certain circumstances.[157] The Assembly also decided on the extent of the executive power of the States.[158]

Let us now see the position of the ministers and their relationship with the Governor as agreed upon by the Constituent Assembly. Article 143 (1) of the Draft Constitution laid down that there should be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, "except in so far as he is by or under

[147] *Ibid.*, p. 451.
[148] *Ibid.*, p. 451.
[149] *Ibid.*, p. 469.
This became article 155 of the Constitution of India.
[150] See page 151.
[151] Report of Committees of the Constituent Assembly of India, Third Series, p. 175.
[152] Constituent Assembly Debates, 31st May, 1949, p. 474. This became article 156 of the Constitution of India.
[153] *Ibid.*, p. 475. This became article 157 of the Constitution of India.
[154] *Ibid.*, p. 482. This became article 158 of the Constitution of India.
[155] *Ibid.*, p. 485. This became article 159 of the Constitution of India.
[156] Constituent Assembly Debates, 1st June, 1949, p. 488. This became article 160 of the Constitution of India.
[157] *Ibid.*, p. 488. This became article 161 of the Constitution of India.
[158] *Ibid.*, p. 489. This became article 162 of the Constitution of India.

this Constitution required to exercise his functions or any one of them in his discretion". It was argued by some of the members[159] of the Assembly that the words "except in so far as he is by or under this Constitution required to exercise his functions or any one of them in his discretion" should be deleted, because those words sought to confer discretionary powers on the Governor[160] and that a nominated Governor, who would function during the pleasure of the President, should not be given any discretionary power.[161] Dr Ambedkar, Chairman of the Drafting Committee, pointed out that the main and the crucial question[162] was whether the Governor should have any discretionary power and that no decision on that question had yet been arrived at by the Constituent Assembly. In his opinion, after a decision was reached on that question the other question, namely, whether the words should be retained, would arise. He, however, expressed the opinion that vesting the Governor with discretionary powers was in no way contrary to the principle of responsible Government. Clause (1) of article 143 of the Draft Constitution was adopted by the Assembly.[163] In September, 1949[164], the Assembly decided that the administration of certain tribal areas in Assam should be carried on by the President of India through the Governor of Assam as his agent and that in the discharge of his functions as the agent of the President the Governor should act in his discretion. This discretionary power was given to the Governor of Assam only. The Constituent Assembly did not provide for any occasion for the exercise of discretionary power by the Governor of any other State. The words "in his discretion", therefore, appear to us to be a drafting anomaly. It may be stated here that in the year 1956, by the Constitution (Seventh Amendment) Act, 1956,[165] a new article was substituted for article 371 of the Constitution and the substituted article provided

[159] Shri H. V. Kamath, Pandit Hirday Nath Kunzru, Prof. Shibban Lal Saksena.

[160] Constituent Assembly Debates, 1st June, 1949, p. 489.

[161] *Ibid.*, p. 494.

[162] *Ibid.*, p. 500.

[163] Constituent Assembly Debates, 1st June, 1949, p. 502. This became clause (1) of article 163 of the Constitution of India.

[164] Constituent Assembly Debates, 7th September, 1949, pp. 1055-6.

[165] See also the Constitution (Thirteenth Amendment) Act, 1962 for special responsibility of the Governor of Nagaland. Appendix 13.

for special responsibility of the Governors of some of the States in certain cases.

The Draft Constitution provided[166] that the ministers should be appointed by the Governor and should hold office during the pleasure of the President. It did not say anything about the responsibility of the ministers to the State Legislature. Accordingly, the Assembly decided that the Chief Minister should be appointed by the Governor, that the other ministers should be appointed by the Governor on the advice of the Chief Minister, that the ministers should hold office during the pleasure of the Governor and that the Council of Ministers should be collectively responsible to the Legislative Assembly of the State.[167] It also decided that in the States of Bihar, Central Provinces and Berar, and Orissa there should be a minister in charge of tribal welfare who might in addition be "in charge of welfare of the Schedule Castes and backward classes or any other work".[168] This decision was taken in order to give effect to the recommendations of the Excluded and Partially Excluded Areas (other than Assam) Sub-Committee.[169] The Assembly further decided that a minister who for any period of six consecutive months was not a member of the Legislature of the State should at the expiration of that period cease to be a minister.[170] We have already stated that on 7th January, 1949, the Constituent Assembly agreed upon certain specific duties of the Prime Minister of India.[171] On 2nd June, 1949, the Assembly decided that[172]

[166] Article 144.

[167] Constituent Assembly Debates, 1st June, 1949, p. 521.

[168] *Ibid.*

[169] The Advisory Committee appointed by the Constituent Assembly on 24th January, 1947, was directed by the Assembly, among other things, to appoint a sub-committee to prepare schemes for the administration of excluded and partially excluded areas (Constituent Assembly Debates, 24th January, 1947, p. 326). Accordingly, the Excluded and Partially Excluded Areas (other than Assam) Sub-Committee was set up by the Advisory Committee in its meeting held on 27th February 1947 (Reports of Committees of the Constituent Assembly of India, Third Series, p. 178). This Sub-Committee recommended that in the Provinces of Bihar, the Central Provinces and Berar, and Orissa there should be a 'separate Minister for Tribal Welfare' (Reports of Committees of the Constituent Assembly, Third Series, p. 80).

[170] Constituent Assembly Debates, 1st June, 1949, p. 523. Article 144 of the Draft Constitution. This became article 164 of the Constitution of India.

[171] Constituent Assembly Debates, 7th January, 1949, p. 1354.

[172] Constituent Assembly Debates, 2nd June, 1949, p. 547.

the Chief Minister of a State should also have similar duties.[173]

The Constituent Assembly also decided that there should be an Advocate-General for each State. The Assembly also agreed upon the duties of the Advocate-General.[174]

IV

We may now pass on to the constitution of the government of the States specified in Part III[175] of the First Schedule to the Draft Constitution. These territories were pre-existing Indian States and Unions of States.

It may be recalled that the Cabinet Mission's Plan contemplated that the former Indian States would retain all subjects and powers other than those ceded to the Union.[176] That position remained unchanged in the Mountbatten Plan of 3rd June, 1947.[177] On the formation of the Dominion of India these States acceded[178] to the Dominion of India only on three subjects, namely, Defence, Foreign Affairs and Communications, their content being as defined in List I of the Seventh Schedule to the Government of India Act, 1935. The Draft Constitution, therefore, did not contain any provision with regard to the constitution of those States because, when the Draft Constitution had been framed, it had been thought that the constitution of those States would not form part of the Constitution of India. Subsequently, however, the Rajpramukhs of all the States signed fresh Instruments of Instructions[179] in which they acceded to the Dominion of India in respect of all the subjects in the Federal and the Concurrent List except those relating to taxation.

[173] This became article 167 of the Constitution of India.

[174] Constituent Assembly Debates, 1st June, 1949, p. 528. This became article 165 of the Constitution of India.

[175] Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab States Union, Rajasthan, Saurashtra, Travancore-Cochin and Vindhya Pradesh (Constitutent Assembly Debates, 14th October, 1949, p. 287). The Drafting Committee had changed the numbering of Parts I, II, III, IV of the First Schedule to Parts A, C, B and D respectively in order to avoid confusion with the Parts of the Draft Constitution (Reports of the Committees of the Constituent Assembly, Third Series, p. 246).

[176] Paragraph 15(4).

[177] See page 64.

[178] See *White Paper on Indian States* (1950), pp. 36, 76-77.

[179] *Ibid.* See also V. P. Menon, *The Story of the Integration of the Indian States*, p. 465.

In May 1949, the Chief Ministers of the various Unions and States decided[180] that separate constitutions for the several Unions and States were not necessary and that the Constitution to be framed by the Constituent Assembly of India would apply to them as well. We have stated before[181] that all the nine pre-existing Indian States specified in the Part III of the First Schedule to the Draft Constitution had signified their acceptance to the proposed Constitution before it was finally adopted by the Assembly. In this connexion we may quote the following extract from the speech of Sardar Vallabhbhai Patel, the then Minister for States, Government of India, delivered in the Constituent Assembly on 12th October, 1949:[182]

> "When the Covenants establishing the various Unions of States were entered into, it was contemplated that the Constitutions of the various Unions would be framed by their respective Constituent Assemblies within the framework of the Covenants and the Constitution of India. These provisions were made in the Covenants at a time when we were still working under the shadow of the theory that the assumption, by the Constituent Assembly of India, of the constitution-making authority in respect of the States would constitute an infringement of the autonomy of the States. As, however, the States came closer to the Centre, it was realised that the idea of separate Constitutions being framed for the different constituent units of the Indian Union was a legacy from the Rulers' polity and that in a people's polity there was no scope for variegated constitutional patterns. We, therefore, discussed this matter with the Premiers of the various Unions and decided, with their concurrence, that the Constitution of the States should also form an integral part of the Constitution of India."

Accordingly, on 13th October, 1949, the Constituent Assembly decided that the provisions of the Draft Constitution relating

[180] See V. P. Menon, *The Story of the Integration of the Indian States*, p. 467.
[181] See page 79.
[182] Constituent Assembly Debates, 12th October, 1949, pp. 162-3.

to the constitution of the States specified in Part I of the First Schedule should apply to the States specified in Part III of that Schedule subject, of course, to certain modifications.[183] It was thus decided that in the matter of their constitutional relationship with the Centre and in their internal set-up the pre-existing Indian States should be on a par with the pre-existing Indian Provinces. The provisions[184] of the Draft Constitution which sought to place the former Indian States on a footing different from that of the other Units were deleted from the Constitution. On that day the Constituent Assembly took two other decisions with regard to the pre-existing Indian States. It decided that a pre-existing Indian State having any armed force immediately before the commencement of the new Constitution might, until Parliament by law otherwise provided, continue to maintain the said force after such commencement, subject to such general or special orders as the President might, from time to time, issue in that behalf. Such armed force should, however, form part of the forces of the Indian Union.[185] This decision was taken to give effect to the agreement entered into between the Government of India and the Rulers of the pre-existing Indian States.[186] The Assembly also decided that every pre-existing Indian State should, during a period of ten years or during "such longer or shorter period" as Parliament might by law provide, remain under "the general control of, and comply with such particular directions, if any", as might from time to time be given by, the President and that "any failure to comply with such directions shall be deemed to be a failure to carry out the Government of the State in accordance with the provisions of the Constitution."[187] This decision was taken because, as Sardar Vallabhbhai Patel said,[188] it was found necessary that "in the interest of the growth of democratic institutions in these States, no less

[183] *Ibid.*, pp. 154-5. Constituent Assembly Debates, 13th October, 1949, p. 207. This became article 238 of the Constitution of India.

[184] e.g. articles 224, 225, 237.

[185] Constituent Assembly Debates, 13th October, 1949, pp. 175, 207.

[186] See in this connection the speech delivered by Sardar Vallabhbhai Patel in the Constituent Assembly on 12th October, 1949, Constituent Assembly Debates, 12th October, 1949, pp. 161-8.
See *White Paper on Indian States*, pp. 77-78.

[187] Constituent Assembly Debates, 13th October, 1949, pp. 176, 207-8.

[188] Constituent Assembly Debates, 12th October, 1949, p. 164.

than the requirements of administrative efficiency, the Government of India should exercise general supervision over the Governments of the States till such time as it may be necessary". These decisions were incorporated in articles 211A, 235A and 306B of the Draft Constitution which became articles 238, 259 and 371, respectively of the Constitution of India.

Articles 238 and 259 were, however, deleted from the Constitution, and a new article was substituted for article 371, by the Constitution (Seventh Amendment) Act, 1956. The distinction between different categories of States was removed by this Act.

The problem of the Indian States was perhaps the most difficult of the legacies which devolved on Dominion India and a great achievement of the Constituent Assembly was the assimilation of the position of the pre-existing Indian States and Unions with that of the former Provinces of India. The integration of the Indian States with India constituted a landmark in the history of India. It meant the bloodless extinction of centuries-old feudalism in the course of two years. It affected the destiny of about ninety million people and consolidated the entire Indian sub-continent into a compact State under one Government. Credit for this was due equally to the Princely Order and Sardar Vallabhbhai Patel, the then Minister for States, Government of India.

V

Let us now see the constitution of the government of the States specified in Part II of the First Schedule to the Draft Constitution. These were some of the Chief Commissioners' Provinces under the Government of India Act, 1935, and some pre-existing Indian States.[189]

[189] In the Draft Constitution Delhi, Ajmer-Merwara including Panth Piploda, and Coorg were included in Part II of the First Schedule. These were Chief Commissioners' Provinces under the Government of India Act, 1935 (Sec. 94), and were units of the proposed Indian Federation [Sec. 311(2)] as contemplated, by the Act of 1935. But these areas were under the direct administration of the Federal Government [sec. 94(3)] and were governed by the Governor-General acting through a Chief Commissioner appointed by him in his discretion.

On 14th October, 1949, Bhopal, Bilaspur, Cooch-Behar, Himachal Pradesh, Kutch, Manipur, Rampur and Tripura were included in Part II of the First Schedule (Constituent Assembly Debates, 14th October, 1949, p. 287 and Constituent Assembly Debates, 15th October, 1949, p. 324). On 1st December, 1949.

It may be mentioned here that in pursuance of a resolution adopted by the Constituent Assembly on 30th July, 1947,[190] the President of the Assembly had appointed a Committee[191] for suggesting "suitable constitutional changes to be brought about in the administrative systems of the Chief Commissioners' Provinces so as to accord with the changed conditions in the country and to give them their due place in the democratic Constitution of Free India."[192] That Committee had made detailed recommendations regarding the constitutional changes that should be brought about in the administrative systems of the Chief Commissioners' Provinces. Its important recommendations had been the following:[193]

(1) each of the Provinces of Delhi, Ajmer-Merwara and Coorg should have a Lieutenant-Governor to be appointed by the President of India;
(2) each of those Provinces should normally be administered by a Council of Ministers responsible to the Legislature; and
(3) each of those Provinces should have an elected Legislature.

The members representing Ajmer-Merwara and Coorg on that Committee had appended a separate note to the Committee's report[194] in which they had stated that the "special problems arising out of the smallness of area, geographical position, scantiness of resources" of those areas might, in near future, necessitate the joining of each of those areas to

Rampur was merged with the United Provinces and Rampur was deleted from Part II of the First Schedule (Reports of the Committee of the Constituent Assembly. Third Series, p. 248). Other territories were pre-existing Indian States and were converted to centrally administered areas (*White Paper on Indian States*, pp. 46-49). The States in Part II of the First Schedule were thus some of the Chief Commissioners' Provinces under the Government of India Act, 1935, and some pre-existing Indian States.

Part II of the First Schedule of the Draft Constitution became Part C of the First Schedule of the Constitution of India.

[190] Constituent Assembly Debates, 30th July, 1947, pp. 998 and 1004.

[191] Constituent Assembly Debates, 31st July, 1947, p. 1014. The members were: Shri N. Gopalaswami Ayyangar, Shri Pattabhi Sitaramayya, Shri K. Santhanam, Shri Deshbandhu Gupta, Shri Mukut Bihari Lal Bhargava, Shri C. H. Poonacha and Shri Hussain Imam.

[192] Constituent Assembly Debates, 30th July, 1947, p. 998.

[193] Reports of Committees of the Constituent Assembly, Third Series, p. 116.

[194] *Ibid.*, p. 120.

a contiguous Unit. They, therefore, had urged that there should be a specific provision in the Constitution to make that possible after ascertaining the wishes of the people concerned. The Drafting Committee, however, had not thought it necessary[195] to make any detailed provisions with regard to the Constitution of the States specified in Part II of the First Schedule on the lines suggested by the Committee appointed by the Constituent Assembly. The recommendations of the Drafting Committee had been incorporated in articles 212, 213 and 214 of the Draft Constitution which were discussed by the Assembly on 1st and 2nd August, 1949. The Assembly decided that a State specified in Part II of the First Schedule to the Draft Constitution should be administered by the President of the Indian Union acting, to such extent as he would think fit, through (a) a Chief Commissioner; or (b) a Lieutenant-Governor; or (c) through the Government of a neighbouring State. But the third alternative, namely, administration through the Government of an eighbouring State, should not be adopted without consulting the Government concerned as well as the views of the people of the State concerned.[196] Secondly, Parliament might by law create or continue for any such State specified in Part II of the First Schedule and administered through a Chief Commissioner or Lieutenant-Governor (a) a body, whether nominated, elected or partly nominated and partly elected, to function as a Legislature for the State; or (b) a Council of Advisers or Ministers, or both with such constitution, powers and functions, in each case, as might be specified in the law.[197] Thirdly, Parliament might by law constitute a High Court for a State specified in Part II of the First Schedule or declare any court in such State to be a High Court in that State.[198] Fourthly, until Parliament otherwise provided, the constitution, powers and functions of the Coorg Legislative Council should be the same as they had been before the commencement of the Constitution. The arrange-

[195] Footnote at page 97 of the Draft Constitution of India.

[196] Constituent Assembly Debates, 1st August, 1949, p. 73. This became article 239 of the Constitution of India.

[197] *Ibid.*, p. 74, 2nd August, 1949, p. 101.
This became article 240 of the Constitution of India.

[198] Constituent Assembly Debates, 2nd August, 1949, pp. 102-3.
A new article was added which became article 241 of the Constitution of India.

ment with respect to revenues collected in Coorg and expenses in respect of that State should, until other provisions were made in that behalf by the President by order, continue unchanged.[199] Those decisions were incorporated in articles 239 to 242 of the Constitution of India. The States specified in Part II of the First Schedule have been specified in Part C of the Constitution of India.

In exercise of the power conferred under article 240 of the Constitution, in the year 1951 Parliament passed the Government of Part C States Act, 1951, by which provisions for the Legislature and Council of Ministers were made for Part C States. Hence, to get a complete picture of the administration of Part C States the provisions of articles 240 to 242 of the Constitution of India should be read along with the Government of Part C States Act, 1951.[200]

VI

We shall now refer to the decisions of the Constituent Assembly with regard to the administration of the territories specified in Part IV[201] of the First Schedule to the Draft Constitution and other territories not specified in the First Schedule. These territories were not states for the purpose of the Union as described in article I of the Draft Constitution. They did not constitute Units of the Indian Federation. Part VIII, article 215 of the Draft Constitution provided that such

[199] Constituent Assembly Debates, 2nd August, 1949, p. 103. This became article 242 of the Constitution of India.

[200] According to the provisions of the Government of Part C States Act, 1951, the Legislature in a Part C State shall consist of one chamber only, viz., the Legislative Assembly. The members of the Legislature shall be elected by direct election and there shall be reservation of seats in the Legislature for the Scheduled Castes and Scheduled Tribes specified in the Third Schedule to the Act. It is also provided in the Act that there shall be a Council of Ministers in each State, with the Chief Minister at the head, to aid and advise the Chief Commissioner in the exercise of his functions in relation to matters with regard to which the Legislative Assembly has power to make law, except in so far as he is required by any law to exercise any judicial or quasi-judicial functions. The ministers shall be appointed by the President but they shall be collectively responsible to the Legislative Assembly. The Chief Commissioner and the Council of Ministers shall be under the general control of, and shall comply with such particular directions as may from time to time be given by, the President.

See The Government of Part C States Act, 1951. This Act was, however, repealed by the States Reorganisation Act, 1956 (section 130).

[201] The Andaman and Nicober Islands. Part IV became Part D in the Constitution of India.

territories should be administered "by the President acting, to such extent as he thinks fit, through a Chief Commissioner or other authority to be appointed by him", that the President might make regulations for the "peace and good government" of any such territory and that such regulations should have the same force and effect as an Act of Parliament. This article was adopted by the Constituent Assembly on 16th September, 1949,[202] without any amendment.[203]

VII

In this connexion we may mention that the Constituent Assembly of India agreed that there should be some special provisions with regard to the administration and control of Scheduled Areas and Scheduled Tribes[204] and also with regard to the administration of tribal areas in Assam. Accordingly, on 19th August, 1949,[205] it decided that the provisions of the Fifth Schedule to the Draft Constitution should apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State specified in Part I of the First Schedule to the Draft Constitution other than Assam and that the provisions of the Sixth Schedule should apply to the administration of the tribal areas in Assam.[206] These two Schedules were discussed by the Assembly on 5th, 6th and 7th September, 1949. The Fifth Schedule, as adopted by the Constituent Assembly, laid down that the executive power of the Union should extend to the giving of directions to the States regarding the administration of the Scheduled Areas, and that a Tribes Advisory Council should be constituted in each State having Scheduled Areas therein to give advice on such matters relating to the welfare of the Scheduled

[202] Constituent Assembly Debates, 16th September, 1949, p. 1582.

[203] This became article 243 of the Constitution of India.

[204] Article 300B(1) stated:

"The President may, after consultation with the Governor or Ruler of a State, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for purposes of this Constitution be deemed to be scheduled tribes in relation to that State". Article 300B was adopted by the Constituent Assembly on 17th September, 1949 (pp. 1636, 1640). Article 300B became article 342 of the Constitution of India.

[205] Constituent Assembly Debates, 19th August, 1949, p. 495 and 16th October, 1959, p. 383.

[206] This became article 244 of the Constitution of India.

Tribes in the State as might be referred to it by the Governor or Ruler. The Governor or Ruler was authorised to direct that any particular Act of Parliament or of the Legislature of the State should not apply to a Scheduled Area, or should apply subject to such exceptions or modifications as the Governor or the Ruler might think fit. The Governor or Ruler was also authorised to make regulations to prohibit or restrict the transfer of land by or among members of the Scheduled Tribes, to regulate the allotment of land to members of the Scheduled Tribes and to regulate the business of money-lending to members of such Tribes. All these regulations should, however, have the assent of the President.[207] According to this Schedule, "Scheduled Areas" meant "such areas as the President might by order declare to be Scheduled Areas".

The Paragraph 19 of the Sixth Schedule, as adopted by the Assembly,[208] had a Table[209] appended to it and that Table had two parts, namely, Part I and Part II. The Assembly decided that the tribal areas in each item of Part I of the Table should be an "autonomous district" and, if there were different Scheduled Tribes in an autonomous district, the Governor might divide the area or areas inhabited by them into "autonomous regions". Each autonomous district should have a District Council and each autonomous region should have a Regional Council. The administration of an autonomous district should be vested in the District Council and the administration of an autonomous region should be vested in the Regional Council for such region. The District Council

[207] Constituent Assembly Debates, 5th, 6th and 7th September, 1949.
[208] Constituent Assembly Debates, 7th September, 1949, p. 1082.

[209] TABLE

PART I

1. The United Khasi-Jaintia Hills District.
2. The Garo Hills District.
3. The Lushai Hills District.
4. The Naga Hills District.
5. The North Cachar Hills.
6. The Mikir Hills.

PART II

1. The North-East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District, Misimi Hills District.
2. The Naga Tribal Area.

See Constituent Assembly Debates, 7th September, 1949, pp. 1056, 1078-79.

and the Regional Council should have power to make laws with respect to certain matters.[210] Those laws would not, however, have effect unless assented to by the Governor. It was also decided that no Act of the State Legislature in respect of those matters should apply to any autonomous district or autonomous region unless the District Council, by public notification, so directed. The Governor might, however, direct that any Act of Parliament or of the State Legislature would not apply to an autonomous district or an autonomous region. With regard to areas specified in Part II of the Table, the Assembly decided that the Governor might, subject to the previous approval of the President, by public notification, apply all or any of the provisions of the Sixth Schedule to any area specified in Part II of the Table. But until such a notification was issued, the administration of such area or part thereof should be carried on by the President through the Governor of Assam as his agent and the provisions of Part VIII[211] of the Draft Constitution should apply thereto as if such area or part thereof were a territory specified in Part IV of the First Schedule. It was further decided that in the discharge of his functions as the agent of the President the Governor should act in his discretion.[212] It may be mentioned that the Constituent Assembly accepted in general the provisions of the Fifth[213] and Sixth Schedules[214] of the Draft Constitution and the Drafting Committee had embodied in these Schedules the recommendations of the North West Frontier (Assam) Tribal and Excluded Areas and Excluded and Partially Excluded Areas (other than Assam) Sub-Committees.[215]

VIII

We have stated that the Constituent Assembly decided

[210] Specified in paragraph 3 of the Schedule.

[211] Part VIII contained provisions regarding the administration of territories specified in Part IV of the First Schedule. This became Part IX of the Constitution of India.

[212] Constituent Assembly Debates, 5th September, 1949, p. 1001, to 7th September, 1949, p. 1082 (1055).

[213] This became 5th Schedule of the Constitution of India.

[214] This became 6th Schedule of the Constitution of India.

[215] These two Sub-Committees were set up by the Advisory Committee. Reports of Committees, Third Series, p. 178).

that there should be three different categories of Units of the Indian Union as specified in Parts I, II and III of the First Schedule to the Draft Constitution. These States were specified in Parts A, B and C of the First Schedule to the Constitution of India as originally adopted. This classification of States was done away with by the Constitution (Seventh Amendment) Act, 1956.[216] This Act was passed in order to implement[217] the scheme of the reorganisation of States recommended by the States Reorganisation Commission which had been appointed by the Government of India to examine the question of the reorganisation of the States in the Indian Union "objectively and dispassionately", so that the welfare of the people of each constituent Unit, as well as of the nation as a whole, might be promoted. By this Act, the entire country has been divided into States and Union Territories. All the former Indian States, except Himachal Pradesh, Manipur and Tripura, have been integrated in the States. All these States of the Indian Union, except the State of Jammu and Kashmir, have been placed on a footing of equality with one another with regard to their status and functions. Two new articles were substituted for original articles 239 and 240 and by these new articles Union Territories have been placed in the charge of the President of India who is required to administer them, acting to such extent as he thinks fit, through an Administrator to be appointed by him. These Union Territories have not been given any power of legislation and it is provided in the Act that such powers should be exercised by Parliament except in the case of the Union Territories of—(a) the Andaman and Nicobar Islands, and (b) the Laccadive, Minicoy and Amindivi Islands, in respect of which the President has been given the power to make regulations for the peace, progress and good Government of such territories. The First Schedule to the Constitution was amended by the Constitution (Seventh Amendment) Act, 1956, and the States as reorganised by this Act, and the Union Territories are as follows:

[216] See Appendix 7.
[217] See the Statement of Objects and Reasons, The *Calcutta Gazette*, Part VI, the 13th September, 1956, p. 140.

I. THE STATES

(1) Andhra Pradesh,
(2) Assam,
(3) Bihar,
(4) Bombay,
(5) Kerala,
(6) Madhya Pradesh,
(7) Madras,
(8) Mysore,
(9) Orissa,
(10) Punjab,
(11) Rajasthan,
(12) Uttar Pradesh,
(13) West Bengal,
(14) Jammu and Kashmir.

II. THE UNION TERRITORIES

(1) Delhi,
(2) Himachal Pradesh,
(3) Manipur,
(4) Tripura,
(5) the Andaman and Nicobar Islands,
(6) the Laccadive, Minicoy and Amindivi Islands.

The First Schedule to the Constitution was again amended by the Constitution (Ninth Amendment) Act, 1960, the Constitution (Tenth Amendment) Act, 1961, the Constitution (Twelfth Amendment) Act, 1962 and the Constitution (Fourteenth Amendment) Act, 1963. We may now state the reasons for these amendments.

The Government of India and the Government of Pakistan entered into agreements for settling certain boundary disputes between the two Governments relating to the territories of the States of Assam, Punjab and West Bengal and in pursuance of these agreements the Government of India agreed to transfer certain territories to Pakistan after demarcation. These agreements are known as Indo-Pakistan Agreements. Item 3 of paragraph 2 of the Agreement, dated 10th September, 1958, stated that[218] Berubari Union No. 12 (in West Bengal) should be so divided as to give half of the area to Pakistan, the other half adjacent to India should be retained by India. Paragraph 10 of the said Agreement stated: "Exchange of old Cooch Behar enclaves in Pakistan and Pakistan enclaves in India without claim to compensation for extra area going to Pakistan, is agreed to". A question arose whether implementation of this Agreement necessitated any legislative

[218] See the Second Schedule to the Constitution (Ninth Amendment) Act, 1960 (Appendix 9).

action. Under clause (1) of article 143 of the Constitution of India, the President of India referred the following three questions to the Supreme Court for consideration and report thereon, namely[219] :

> "(1) Is any legislative action necessary for the implementation of the agreement relating to Berubari Union?
>
> (2) If so, is a law of Parliament relatable to Art. 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Art. 368 of the Constitution necessary, in addition or in the alternative?
>
> (3) Is a law of Parliament relatable to Art. 3 of the Constitution sufficient for implementation of the agreement relating to the exchange of Enclaves or is an amendment of the Constitution in accordance with Art. 368 of the Constitution necessary for the purpose, in addition to or in the alternative?"

With regard to the first question, the Supreme Court expressed the opinion[220] that legislative action was necessary for the implementation of the said Agreement relating to Berubari Union. Regarding the second question, the Supreme Court opined: (a) that a law relatable to article 3 of the Constitution would not be competent for the purpose, (b) that a law relatable to article 368 was "competent and necessary", and (c) that a law relatable to both article 368 and article 3 would be necessary only if Parliament decided first to pass a law amending article 3, and in that case Parliament might have to pass a law under article 368 and then follow it up with a law relatable to the amended article 3 to implement the Agreement. Regarding the third question, the answer of the Supreme Court was the same as (a), (b) and (c) above. In the light of this opinion of the Supreme Court,[221] and in order to give effect[222] to the transfer of territories to Pakistan

[219] Reference by the President of India under article 143 (1) of the Constitution, A.I.R., 1960, S.C., pp. 847-8.

[220] *Ibid.*, p. 862.

[221] See Statement of Objects and Reasons, *Gazette of India, Extraordinary*, Part II, Sec. 2, dated 16th December, 1960, p. 903.

[222] See Lok Sabha Debates, 19th December, 1960, column 6242.

in pursuance of these agreements, the Constitution (Ninth Amendment) Bill, 1960, was introduced in Parliament on 16th December, 1960,[223] to amend the First Schedule to the Constitution "under a law relatable to article 368 thereof to give effect to the transfer" of these territories. The Bill was passed by Lok Sabha on 20th December, 1960,[224] and by Rajya Sabha on 23rd December, 1960.[225] It received the assent of the President on 28th December, 1960.[226]

By the Constitution (Tenth Amendment) Act, 1961, the names of Dadra and Nagar Haveli were added to the First Schedule under the heading "II. The Union Territories". Dadra and Nagar Haveli were Portuguese enclaves surrounded by Indian territory. The people of these enclaves drove out the Portuguese from their territories and "established a free country".[227] They requested the Government of India to incorporate these territories into the Indian Union and repeatedly reaffirmed their request.[228] It was also the desire[229] of the people of Dadra and Nagar Haveli that these territories should be treated as a Union Territory and should not be integrated with neighbouring States. In "deference to the desire and request" of the people of Dadra and Nagar Haveli for integration of their territories with the Union of India, the Government of India decided that these territories should form part of the Union of India.[230] The Constitution (Tenth Amendment) Bill, 1961, was introduced in Lok Sabha, as observed by Shri A. K. Sen, Minister of Law, Government of India, with a view to giving effect to the "unanimous request of the free people of Dadra and Nagar Haveli ever since they won their freedom from Portugal".[231] The Bill

[223] See Lok Sabha Debates, 16th December, 1960, columns 6007-13.
[224] See Lok Sabha Debates, 20th December, 1960, column 6610.
[225] See Parliamentary Debates, Rajya Sabha, 23rd December, 1960, columns 3382-87.
[226] See Appendix 9.
[227] See the speech of Pandit Jawaharlal Nehru, Lok Sabha Debates, 14th August, 1961, columns 2085-9.
[228] See Statement of Objects and Reasons published with the Constitution (Tenth Amendment) Bill, 1961, *Gazette of India, Extraordinary*, Part II, Sec. 2, dated 11th August, 1961, p. 700.
[229] See Lok Sabha Debates, 14th August, 1961, column 2086.
[230] See *Gazette of India, Extraordinary*, Part II, Sec. 2, dated 11th August, 1961, p. 700.
[231] See Parliamentary Debates, Rajya Sabha, 16th August, 1961, columns 335-9.

was passed by Lok Sabha on 14th August, 1961,[232] and by Rajya Sabha on 16th August, 1961.[233] The Constitution (Tenth Amendment) Act, 1961, formally recognised Dadra and Nagar Haveli as belonging to India. It may be mentioned here that in the year 1961 the Dadra and Nagar Haveli Act, 1961,[234] was passed by our Parliament which made provisions for the representation of the Union Territory of Dadra and Nagar Haveli in Parliament and for the administration of this Union Territory.

The First Schedule to the Constitution was again amended in the year 1962, by the Constitution (Twelfth Amendment) Act, 1962,[235] and by the Constitution (Fourteenth Amendment) Act, 1962.[236] By the Constitution (Twelfth Amendment) Act, 1962, the following entry was added in the First Schedule under the heading "II. The Union Territories", namely:

> "8. *Goa, Daman, Diu.* The territories which immediately before the twentieth day of December, 1961 were comprised in Goa, Daman and Diu."

By the Constitution (Fourteenth Amendment) Act, 1962, the following entry was added to the First Schedule under the heading "II. The Union Territories", namely:

> "9. *Pondicherry.* The territories which immediately before the sixteenth day of August, 1962, were comprised in the French Establishments in India known as Pondicherry, Karikal, Mahe and Yanam."

Goa, Daman and Diu were the Portuguese Enclaves and Pondicherry, Karikal, Mahe and Yanam were the French

[232] See Lok Sabha Debates, 14th August, 1961, columns 2162-67.
[233] See Parliamentary Debates, Rajya Sabha, 16th August, 1961, columns 399-403.
[234] See Appendix 20.
[235] See Appendix 12.
[236] See Appendix 14.

Enclaves in India. These territories were "acquired" by the Government of India and by virtue of sub-clause (c) of clause (3) of article (1) of the Constitution they became parts of India.[237]

With regard to Pondicherry, Karikal, Mahe and Yanam, there was a treaty between the Government of India and the Government of France and by virtue of this treaty these French establishments became territories of the Indian Union.[238] But no such agreement could be reached with the Portuguese Government with regard to the Portuguese enclaves. There were troubles within these Portuguese enclaves and Government of India had to send military forces there. In this connexion we may quote the following extracts from the speech delivered by Pandit Jawaharlal Nehru, Prime Minister of India, in Lok Sabha on 14th March, 1962,[239] in order to show under what circumstances Government of India was compelled to send troops in these Portuguese enclaves and how they became parts of India:

"We had repeated discussions with the French, and it took a few years to settle this questions with them....Ultimately they agreed and the physical possession of the French territories in India was made over to the Union Government....

With the Portuguese we tried to do the same thing. We appointed a special Minister in Lisbon to discuss these matters and sent them a note, but they refused to take the note. Subsequently we made various attempts to raise this question before them and they did not even discuss the question. Ultimately we had to withdraw our Minister in Lisbon.

That had been the situation for the last so many years.

[237] See the statement of Objects and Reasons published with the Constitution (Twelfth Amendment) Bill, 1962, *Gazette of India, Extraordinary*, dated March 12, 1962, page 2, Part II, Section 2. It is stated,—

"On the acquisition of the territories of Goa, Daman and Diu with effect from the 20th December, 1961, these territories have, by virtue of sub-clause (c) of clause (3) of article 1 of the Constitution, been comprised within the territory of India."

See also the statement of Objects and Reasons, published with the Constitution (Fourteenth Amendment) Bill, 1962, *Gazette of India, Extraordinary*, August 30, 1962, Part II, Section 2. It says, among other things:

"With the ratification of the Treaty of Cession by the Governments of India and France, on 16th August, 1962, the French establishments of Pondicherry, Karikal, Mahe and Yanam became territories of the Indian Union with effect from that date."

[238] See *Gazette of India, Extraordinary*, Part II, Sec. 2, dated 30th August, 1962.

[239] See Lok Sabha Debates, March 14, 1962, columns 282-7.

But in India there was naturally very great frustration and disappointment at this, what shall I say, difficulty of moving onwards in regard to Goa. In Goa itself there was trouble, and though there had been numerous revolts against the Portuguese Government in the past, there was no such revolt now because conditions were different and people in India and in Goa naturally thought in terms of some kind of non-violent or peaceful approach, accustomed as they were to our own methods in achieving our independence. This was attempted unofficially by large number of people, and this was suppressed in a very cruel manner by the Portuguese, and many people were killed. Now, this went on, and all of us in India felt that our independence was not complete till Goa was free....

About 7 months back, I ventured to state in this House that we could not rule out any other measures, any sterner measures, even military measures in regard to Goa. I gave them notice; I gave them and other countries notice. And even so, as I stated then, we hoped to settle this matter peacefully....

Ultimately, and rather suddenly, if I may say so, although our minds had been prepared for all this, our hands were forced by what took place in and just outside Goa. There was, the House will remember, some firing on Indian shipping carrying on in the normal way, not entering Goa, and some actual incursions from outside, the Goanese territory into India proper. That made it difficult for us not to take any steps to prevent this kind of thing happening. And, we, thereafter, took steps and sent some military forces there. The fact is that these military forces functioned—they hardly functioned in a military manner there—and within a few hours—it may be called 24 hours or 36 hours,... the whole thing was over. We could not have done so if there had been any real resistance; it could not have been done so if the people of Goa themselves were opposed to it. In fact, the people of Goa welcomed Indian forces to come there.

Ever since we took possession of Goa, it was our advice—we consulted our legal advisers—that under article 1 of the Constitution Goa became part of Indian Union and all that was necessary for us was to declare, in Schedule 1,...that Goa

is part of the Union. It was decided to do so by making Goa one of the Union Territories."

Speaking on the same subject in Rajya Sabha, on 20th March, 1962 Pandit Nehru said:[240]

"The simple fact is that in our struggle for independence we never thought of British India and Portuguese India and French India. We thought of India and we wanted to free it and if any part of it remained unfree, the struggle continued and, therefore, I say that our struggle for independence did not end till Goa became a part of India; a part of India it was, but what I mean to say is, till the colonial domain over Goa was ended.... We thought that these colonies of Portugal and France should join the Union of India. We never thought that there would be any great difficulty about it. It seemed so obvious to us. Thereafter, we appointed a Minister in Lisbon to discuss this matter, but the Portuguese Government refused even to accept any memorandum from him about this. We had a Minister from Portugal in India with whom we wanted to discuss this matter, but even he was not in a position to discuss it.... So, the position was that there was no way open internationally or otherwise for this question of Goa to be settled. The House will remember that some years ago, about seven years ago, I think, or may be more, a fairly large number of Indians went there across the border, unarmed Indians, and they were shot down by the Portuguese.... There was no way left open to us, as far as I can see, and the situation was getting worse when I declared, I think in this House, about six months before the Goa operation that we did not rule out any stronger steps, military steps. I said that because my mind struggled with the idea of finding some way, and I could find no other way. But I added even then that we earnestly hoped that it would be settled completely peacefully. We tried it and we had been trying it. Eevn as late as November last, it was not our intention to take action quickly.... Early in December certain events took place which, though small in themselves, excited our people greatly, because they had been worked up to a pitch of excitement. The House will remember those events, the firing on certain Indian ships

[240] See Parliamentary Debates, Rajya Sabha, Official Report, March 20, 1962, columns 802-10.

carrying on their normal coastal trade. They were not even coming to Goa. They were going along. Certain events happened on the borders of Goa. I repeat that they were not of great importance. But coming as they did in that atmosphere of great irritation, they created a crisis in the minds of Indians. We immediately thought of doing something to protect our ships. It was not right that the Portuguese should sink our ships, fire on our ships, shooting down and killing our people, our fishermen, and our inability to protect them. So, we thought of protecting our ships. One thing led do another. We could not protect them by putting some soldiers on the ships who could fire back, and the more we discussed the more we came to the conclusion that there could be no proper protection unless some steps were taken. All these happened in December last, early in December, and in any event we thought that if we took any steps even on the coast side, we had to be prepared for the consequences of those steps and the possibility of some kind of attack on the land side to us in a small way. In other words, we are logically compelled to take up the position that we should prepare our action both on the sea side and on land, and we sent our troops there for the purpose.... The operation itself, as the House very well knows, was remarkably successful, remarkably well done and on the whole remarkably peaceful."

In the Statement of Objects and Reasons[241] which was published along with the Constitution (Twelfth Amendment) Bill, 1962, it was stated, *inter alia*: "On the acquisition of the territories of Goa, Daman and Diu with effect from the 20th December, 1961, these territories have, by virtue of sub-clause (c) of clause (3) of article 1 of the Constitution, been comprised within the territory of India". When this Bill was under discussion in the Lok Sabha, Shri Sadhan Gupta[242] expressed the opinion that the word "acquisition" was "very unfortunate" and said: "If a robber robs me of a jewel and I take it back from the robber, that is not acquisition; I only take back what belongs to me." "Whatever", he added, "the etymological meaning may be of the word 'acquisition', it is entirely out of place in this context. I would have preferred

[241] See *Gazette of India, Extraordinary*, dated 12th March, 1962, Part II, Sec. 2.
[242] See Lok Sabha Debates, 14th March, 1962, columns 320-1.

that it were described either as liberation or as re-union, and nothing would have been lost by so describing it." Justifying the use of the word "acquisition", Pandit Nehru rightly said[243] that the word was consistent with the language of sub-clause (c) of clause (3) of article 1 of the Constitution. That was the reason why the word "acquisition" was used. Otherwise, he remarked, complications might arise.

It may also be noted here that although original article 240, as adopted by the Constituent Assembly—which provided for the creation of a Legislature and a Council of Ministers for a Part C State—was substituted[244] by a new article by the Constitution (Seventh Amendment) Act, 1956, another new article, namely, article 239A was added to the Constitution by the Constitution (Fourteenth Amendment) Act, 1962. The provisions of original article 240 have been incorporated in this new article 239A. This article empowers Parliament to create by law for any of the Union Territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu, and Pondicherry: (a) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union Territory, or (b) a Council of Ministers, or both with such Constitution, powers and functions, in each case, as may be specified in such law. Such law, however, shall not be deemed to be an amendment of the Constitution for the purposes of article 368. This article 239A was inserted because it was thought "essential"[245] to restore original article 240 in order to provide for legislature and Council of Ministers for the Union Territories.

IX

We have stated before that as a result of the reorganisation of the States[246] by the Constitution (Seventh Amendment) Act, 1956, the number of States in the Indian Union became 14. Subsequently, however, Parliament passed two other

[243] *Ibid.*, column 322.
[244] See page 163.
[245] See the speech of Shri Lal Bahadur Shastri, Minister of Home Affairs, Government of India, Lok Sabha Debates, dated 4th September, 1962, column 5839.
[246] See page 164.

Acts, namely, the Bombay Reorganisation Act, 1960, and the State of Nagaland Act, 1962, by which new States were created. By the Bombay Reorganisation Act, 1960, the State of Bombay was reorganised into two separate States—the State of Gujarat and the State of Maharashtra.[247] This Act was passed under article 3 of the Constitution. The draft Bill had, therefore, been referred by the President of India under article 3 of the Constitution to the Legislature of Bombay for expressing its views thereon and the Bill was approved by the Legislature of Bombay. By this Act the number of States in India was raised from 14 to 15.

By the State of Nagaland Act, 1962,[248] a new State, known as the State of Nagaland, was created. We may say a few words about the history of the creation of this new State of Nagaland. In the year 1947, the Naga people demanded[249] a separate independent State for themselves and they did not accept the proposed provisions of the Sixth Schedule to the Constitution which was being drafted then. In the year 1951, there was an "unofficial plebiscite"[250] on the issue of a sovereign State of Nagaland and almost cent per cent of the Nagas who took part in this plebiscite voted in favour of a separate and independent State for the Nagas. The implication of this demand was that the Nagas did not accept the Constitution of India. The Nagas also did not take part in the first two General Elections[251] held in the year 1952 and in the year 1957. The situation in the Tuensang Division became very grave and there was widespread disorder in this tribal area. Government of India was anxious to restore peace and order in this area and it had to send military forces for that purpose. In August 1957, the representatives of the Naga people met at a Convention[252] to discuss their various problems. The Convention demanded a new administrative set-up for the Nagas within the Indian Union. This demand was accepted by the

[247] Section 3. The new States came into existence on 1st May, 1960.
[248] See Appendix.
[249] See the speech of Shri S. C. Jamir, Parliamentary Secretary to the Minister of External Affairs, Lok Sabha Debates, August 28, 1962, columns 4523-30.
[250] See *Ibid.*, column 4524.
[251] See *Ibid.*, columns 4525.
[252] See *Ibid.*, See also the speech of Pandit Jawaharlal Nehru, Lok Sabha Debates, August 28, 1962, Columns 4500 to 4507. See the Report of the Scheduled Areas and Scheduled Tribes Commission, Volume I (1960-1), pp. 466-7.

Government of India and, therefore, the Parliament passed the Naga Hills-Tuensang Area Act, 1957,[253] by which a new administrative unit in Assam was formed, under the Ministry of External Affairs, Government of India, by the name of Naga Hills-Tuensang Area, comprising the tribal areas which, at the commencement of the Constitution, had been known as the Naga Hills District and the Naga Tribal Area. Paragraph 20 of the Sixth Schedule to the Constitution was amended by the Naga Hills-Tuensang Area Act, 1957. The item "The Naga Hills District" was omitted from Part A of the Table and in Part B of the Table, for the entry "The Naga Tribal Area", the entry "The Naga Hills-Tuensang Area" was substituted. A Second Convention of the Naga People was held in May, 1958,[254] which appointed a "Liason Committee" for the purpose of contacting the "misguided" Nagas in order to get their support in favour of the Convention's policy of securing maximum autonomy for the areas where the Naga people inhabited. The Third Convention of the Naga people was held in October, 1959,[255] which prepared a 16-point memorandum for the consideration of the Government of India. The Convention demanded the creation of a separate State for the Nagas within the Indian Union, to be known as the State of Nagaland. There was an agreement between the Government of India and the leaders of the Naga Peoples Convention and in pursuance of the agreement the Government of India decided that the Naga Hills-Tuensang Area within the State of Assam should be formed into a separate State within the Union of India.-[256] Therefore, Parliament passed the State of Nagaland Act, 1962, which created the new State of Nagaland comprising the territories which immediately before 1st December, 1963, were comprised in the Naga Hills-Tuensang Area. The new State was called "Nagaland", because the Nagas insisted that the name of the new State should be "Naga-

[253] See sections 2 and 3.
[254] See Lok Sabha Debates, August 28, 1962, columns 4504 and 4526.
[255] See *Ibid.*, columns 4504 and 4527.
[256] See the Statement of Objects and Reasons published along with the State of Nagaland Bill, 1962, *Gazette of India, Extraordinary*, Part II, Section 2, August 21, 1962, p. 681.

land".[257] The new State came into existence on 1st December, 1963.[258] The State of Nagaland Act, 1962, and the Constitution (Thirteenth Amendment) Act, 1962, which made certain special provisions with regard to the administration of the State of Nagaland, incorporated in them the agreement arrived at between the Government of India and the leaders of the Naga Peoples Convention.[259] This is, in short, the history of the birth of the State of Nagaland.

[257] See Lok Sabha Debates, August 26, 1962, column 4623.
See also Parliamentary Debates, Rajya Sabha, Official Report, September 3, 1962, column 4659.

[258] See Notification No. G.S.R. 1735, dated 30th October, 1963, Ministry of External Affairs, *Gazette of India*. November 9, 1963, p. 2030, Part II Section, 3, sub-sec. (i).

[259] See Parliamentary Debates, Rajya Sabha, Official Report, September 3, 1962, column 4707.

CHAPTER VII

THE LEGISLATURE

I

In this chapter we shall refer to the deliberations of the Constituent Assembly of India with regard to the future Parliament of the Union of India and the Legislatures of the constituent States of the Indian Union.

II

We shall first deal with the future Parliament of India.

The Union Constitution Committee, to which we have already referred, had recommended[1] that the future Parliament of India should consist of the President and two Houses to be named respectively as the Council of States and the House of the People. The Council of States should consist of the representatives of the Units and not more than ten members should be nominated by the President. During the discussion of the report in the Constituent Assembly in July, 1947, the provision of nomination of only ten members had been found to be insufficient for the purpose of getting into the Upper House persons connected with important sides of national activities. The Assembly had decided that[2] not more than twenty-five members should be returned "by functional constituencies or panels constituted on the lines of the provisions in Section 18 (7) of the Irish Constitution of 1937"[3]

[1] Constituent Assembly of India, Reports of Committees, First Series, p. 50.
[2] Constituent Assembly Debates, 31st July, 1947, pp. 1029, 1038 and 1039.
[3] Section 18 (7) of the Irish Constitution of 1937 provides:-

"(7) 1. Before each general election of the members of Seanad Eireann to be elected, from panels of candidates, five panels of candidates shall be formed in the manner provided by law containing respectively the names of persons having knowledge and practical experience of the following interests and services, namely: (i) National language and culture, literature, art, education and such professional interests as may be defined by law for the purpose of this panel. (ii) Agriculture and allied interests and fisheries. (iii) Labour, whether organised or unorganised. (iv) Industry and commerce, including banking, finance, accountancy, engineering and architecture. (v) Public administration and social services, including voluntary social activities.

and that the balance of the members should be returned by constituencies representing Units on a scale to be worked out in detail. It had also decided that the total number of representation of the Indian States in the Council of States should not exceed 40 per cent of that balance and that the total number of members of the Council of States should not exceed one-half of the strength of the House of the People. It had further decided that the strength of the House of the People should not exceed 500.

These decisions of the Constituent Assembly had been considered by the Drafting Committee. In its opinion, however, the panel system had proved unsatisfactory in Ireland and the Committee had thought it best to provide for 15 members to be nominated by the President for their special knowledge or practical experience in literature, art, science, etc. The Committee had not thought it necessary to make any provision for special representation for labour or commerce and industry among those nominations as it had thought that they would be adequately represented in the elected element of Union Parliament owing to adult suffrage.[4] The Committee, therefore, had not incorporated the decisions of the Constituent Assembly regarding the panel system in the Draft Constitution, but it had incorporated therein the decisions of the Assembly with regard to the representations of the Indian States in the Council of States.

On 3rd January, 1949, the Constituent Assembly began discussing the articles of the Draft Constitution dealing with the future Parliament. It adopted article 66 of the Draft Constitution which stated that there should be a Parliament for the Union "which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People". The article was adopted without any amendment.[5] Clauses (1) to (4) of article 67 dealt with the composition of the Council of States and clauses (5) to (7) dealt with the composition of the House of the People. Clause

2. Not more than eleven and, subject to the provisions of article 19 hereof, not less than five members of Seanad Eireann shall be elected from any one panel."

[4] Reports of Committees of the Constituent Assembly, Third Series, p. 174.

[5] Constituent Assembly Debates, 3rd January, 1949, p. 1199. This became article 79 of the Constitution of India.

(1) of article 67 laid down that the Council of States should consist of two hundred and fifty members of whom:

> "(a) fifteen members shall be nominated by the President in the manner provided in clause (2) of this article; and
> (b) the remainder shall be representatives of the States:
>
> Provided that the total number of representatives of the States for the time being specified in Part III of the First Schedule shall not exceed forty per cent of this remainder."

Clause (2) of article 67 stated that the members to be nominated by the President should consist of persons having "special knowledge or practical experience" in:

> (a) literature, art, science and education;
> (b) agriculture, fisheries and allied subjects;
> (c) engineering and architecture; and
> (d) public administration and social services.

When, on 3rd January, 1949, article 67 came up for discussion in the Constituent Assembly, Dr Ambedkar moved four amendments to that article. Through the amendments he proposed that instead of fifteen members twelve members should be nominated by the President,[6] that the proviso to clause (1) of article 67 should be deleted,[7] that after clause (1) of article 67, the following new clause should be added, namely:—[8]

> "(1a) The allocation of seats to representatives of the States in the Council of States shall be in accordance with the provisions in that behalf contained in Schedule III-B",

and that for clause (2) of that article, the following clause should be substituted, namely:—[9]

> "(2) The members to be nominated by the President

[6] Constituent Assembly Debates, 3rd January, 1949, p 1202.
[7] *Ibid.*, p. 1205.
[8] *Ibid.*
[9] *Ibid*, p. 1211.

under sub-clause (a) of clause (1) of this article shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:

'Letters, art, science and social services'."

Speaking about his suggestions for the deletion of the proviso to clause (1) and the insertion of the new clause, Dr Ambedkar said that the proviso granting the Indian States 40 per cent of the representation in the Council of States had been introduced in the Draft Constitution, because the number of the former Indian States had been so many that it would not have been possible to give representation to every Indian State which had wanted to join the Indian Union unless the total number of the representation granted to the States had been 'enormously increased'. But, he said, the situation had completely changed. We have already referred to that change in the situation. Some of the former Indian States had become united and some other had merged with Indian Provinces. Because of that change, Dr Ambedkar observed, it was not necessary to give the Indian States 40 per cent of the representation in the Council of States. The Schedule proposed by him, he said, would remove the weightage given to the States.[10] This Schedule was added to the Constitution on 17th October, 1949.[11] It was provided in that Schedule that the States for the time being specified in Part I, Part II and Part III of the First Schedule would respectively have 144, 8, and 53 seats in the Council of States. The amendments of Dr Ambedkar were accepted by the Assembly.[12] We think that this provision of unequal representation of the constituent States of the Indian Union in the Council of States is a departure from the federal principle in our Constitution. The Constitutions of the United States of America and Australia provide for equal representation of the States in the Upper House. This provision for unequal representation is "neither congenial to federal sentiment nor consistent with federal equality".[13] It was also decided by the Assembly that the Council of States

[10] *Ibid.*, pp. 1226-7.
[11] Constituent Assembly Debates, 17th October, 1949, p 410.
[12] Constituent Assembly Debates, 3rd January, 1949, pp. 1228-30.
[13] See D. N. Banerjee, *Some Aspects of the Indian Constitution*, p. 77.

should consist of "not more than two hundred and fifty members".[14] It was further decided that the representatives of each State specified in Part I or Part III of the First Schedule in the Council of States should be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote[15] and that the representatives of the States specified in Part II of the First Schedule in the Council of States should be chosen in such manner as Parliament might by law prescribe.

With regard to the composition of the House of the People, the Drafting Committee had incorporated in clauses (5) and (6) of article 67 the decisions of the Assembly which had been taken at the time of discussing the report of the Union Constitution Committee.[16] The clauses were adopted by the Assembly on 4th January, 1949.[17] It was decided that subject to the provisions of articles 292 and 293 of the Draft Constitution,[18] the House of the People should consist of not more than 500 representatives of the people of the territories of the States directly chosen by the voters. A suggestion was made[19] that the election to the House of the People should be held in accordance with the system of proportional representation by means of the single transferable vote. That suggestion was not, however, accepted by the House.[20] The Assembly also decided[21] that the States in the Indian Union should be "divided, grouped or formed into territorial constituencies" and that the number of members to be allotted to each such constituency should be so determined as to ensure that there should be "not less than one member for every 750,000 of the population and not more than one member for every 500,000 of the population." The words "not less than one member for every 750,000 of the population and" were, however, omitted

[14] Constituent Assembly Debates, 3rd January, 1949, p. 1228.
[15] *Ibid.*, p. 1265.
[16] Constituent Assembly Debates, 31st July, 1947, p. 1038.
[17] Constituent Assembly Debates, 4th January, 1949, p. 1265.
[18] Articles 292 and 293 of the Draft Constitution made provisions for reservation of seats for minorities in the House of the People. These articles incorporated the decisions of the Assembly taken in August, 1947, when discussing the report of the Advisory Committee on minority rights.
[19] Constituent Assembly Debates, 4th January, 1949, p. 1244.
[20] *Ibid.*, p. 1261.
[21] *Ibid.*, p. 1265.

by the Constitution (Second Amendment) Act, 1952.[22] We have already stated[23] that in the year 1956, by the Constitution (Seventh Amendment) Act, 1956, the entire country was divided into States and Union territories. It was then thought that the provision that the States should be "divided, grouped or formed into territorial constituencies" would no longer be proper, because after re-organisation of the States each State would be large enough to be divided into a number of constituencies and, as such, would not "permit of being grouped together with other States for this purpose or being 'formed' into a single territorial constituency".[24] Hence, by the Constitution (Seventh Amendment) Act, 1956,[25] which was passed in order to implement the scheme of the reorganisation of the States, it was provided that subject to the provisions of article 331, the House of the People should consist of—(a) not more than 500 members chosen by direct election from territorial constituencies in the States, and (b) not more than 20 members to represent the Union territories, chosen in such manner as Parliament may by law provide. This number was increased to 25 by the Constitution (Fourteenth Amendment) Act, 1962, because the maximum limit had already been reached.[26]

On 18th May, 1949,[27] the Constituent Assembly of India decided that the Council of States should not be subject to dissolution, but as nearly as possible one-third of the members should retire on the expiration of every second year and that the House of the People, unless sooner dissolved, should continue for five years from the date appointed for its first meeting. It was also decided that while a Proclamation of Emergency was in operation, the said period of five years might be extended by Parliament for a period "not exceeding one year at a time and not extending in any case beyond a period of six months after the Proclamation has ceased to operate".[28]

[22] See Appendix 2.
[23] See page 163
[24] See Statement of Objects and Reasons, *Calcutta Gazette*, September 13, 1956, Part VI, p. 110.
[25] See Appendix 7
[26] See Statement of Objects and Reasons, *Gazette of India, Extraordinary*, Part II, Section 2, August 30, 1962. See also Appendix 14.
[27] Constituent Assembly Debates, 18th May, 1949, p. 89.
[28] This article became article 83 of the Constitution of India.

The Constituent Assembly agreed upon, among other things:

(a) the sessions of Parliament, its prorogation and dissolution;[29]
(b) the right of the President to address and send messages to Parliament;[30]
(c) the powers and duties of the Chairman and Deputy Chairman of the Council of States and of the Speaker and Deputy Speaker of the House of the People;[31]
(d) the procedure to be followed in either House Parliament in connection with the conduct of its business;[32] and
(e) the qualifications for membership, and the disqualifications of members, of Parliament.[33]

The Assembly also provided for joint sittings of the two Houses of Parliament in certain cases[34] but it decided that the House of the People should have more powers in respect of Money Bills.[35]

[29] See Constituent Assembly Debates, 18th May, 1949, page 108. This became article 85 of the Constitution of India. Clause (1) of this article stated that the "Houses of Parliament shall be summoned to meet twice at least in every year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session". This article was amended in the year 1951, by the Constitution (First Amendment) Act, 1951, and the amended clause (1) states that the "President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session". The amendment was made because, it was thought, that the provisions of the original article might lead to an absurd position. Parliament might be in session continuously for several months but under the old clause Parliament would not be taken to have met if it had been summoned in the previous year. It was also thought that the original clause might also lead to some practical difficulties if Parliament was in session for more than six months in one particular year. (*See* Parliamentary Debates, Lok Sabha, 16th May, 1951, column 8819 and 2nd June, 1951, columns 9956-7.)

[30] Constituent Assembly Debates, 18th May, 1949, pp. 109, 114. This became articles 86 and 87 of the Constitution of India.

[31] Constituent Assembly Debates, 19th May, 1949, pp. 120, 121, 122, 124. This became articles 89 to 98 of the Constitution of India.

[32] Constituent Assembly Debates, 19th May, 1949, pp. 126, 129. This became articles 99 and 100 of the Constitution of India.

[33] Constituent Assembly Debates, 19th May, 1949, pp. 133, 137, 143. This became articles 84, 101 to 104 of the Constitution of India.

[34] Constituent Assembly Debates, 20th May, 1949, p. 181. This became article 108 of the Constitution of India.

[35] Constituent Assembly Debates, 20th May, 1949, p. 185. This became article 109 of the Constitution of India.

With regard to the question of privileges and immunities of the members of Parliament, clauses (1) and (2) of article 85 of the Draft Constitution laid down that there should be freedom of speech in Parliament and that no member of Parliament "shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings". There was no controversy regarding the provisions of these two sub-clauses and they were adopted by the Assembly on 19th May, 1948.[36] But a controversy arose with regard to clause (3) of that article which stated as follows:

> "(3) In other respects, the privileges and immunities of members of the Houses shall be such as may from time to time be defined by Parliament by law, and, until so defined, shall be such as are enjoyed by the members of the House of Commons of the Parliament of the United Kingdom at the commencement of this Constitution."

Reference to the privileges enjoyed by the members of the House of Commons was vehemently opposed by three members[37] of the Assembly. It was even remarked by a member: "I would much rather go without any specified privileges than make provision therefor by reference to foreign legislation."[38] It was suggested by Shri Kamath[39] that the privileges and immunities of the members of Parliament should be such "as were enjoyed by the members of the Dominion Legislature of India" before the commencement of the new Constitution of India. He also pointed out that most of the members of the Constituent Assembly did not know what were the privileges of the members of the House of Commons. Opposing the suggestion of Shri Kamath, Prof. Shibban Lal Saksena said that there were practically

[36] Constituent Assembly Debates, 19th May, 1948, p. 150.
[37] Shri H. V. Kamath, Prof. Shibban Lal Saksena, Pandit Lakshmi Kanta Maitra.
[38] Pandit Lakshmi Kanta Maitra, Constituent Assembly Debates, 19th May, 1949, p. 152.
[39] *Ibid.*, p. 144.

no privileges of the members of the Dominion Legislature of India.[40] It was also suggested by some members that the privileges should be specifically defined in the Constitution of India.[41] Justifying the provisions of clause (3) of article 85, Shri Alladi Krishnaswamy Ayyar,[42] a member of the Drafting Committee, said that there was nothing to prevent Parliament from setting up a proper machinery for formulating the privileges of its members and that clause (3) left wide scope for that. He pointed out that only as a temporary measure the privileges of the members of the House of Commons were made applicable to the members of the Indian Parliament. At the same time, he expressed the opinion that "widest privileges" were enjoyed by the members of the House of Commons. He added that there were similar provisions in the Constitution of Australia[43] which secured complete freedom of speech of the members of the House. In conclusion, he observed that far from the article being framed "in a spirit of servility . . . or subjection to Britain", it was framed in a "spirit of self-assertion and an assertion that our country and our Parliament are as great as the Parliament of Great Britain".[44] Clause (3) of article 85 was adopted by the House.[45]

We do not think that it was an unwise decision of the Constituent Assembly that, until the privileges and immunities of the members of the Houses were defined by Parliament by law, the privileges and immunities should be such as were enjoyed by the members of the House of Commons of England. We should not disregard them "simply because they are British in their origin". The Constituent Assembly also authorised the future Parliament of India to define these privileges and immunities by law. Such law may be passed under article 246 read with entry 74 in List I of the Seventh Schedule to the Constitution of India. There is, however, one disadvantage of codification of our parliamentary privileges. If such codification takes place it may attract the operation of different articles of the Constitution

[40] *Ibid.*, p. 145.
[41] *Ibid.*, p. 147.
[42] *Ibid.*, pp. 148-9.
[43] Section 49.
[44] Constituent Assembly Debates, 19th May, 1949, p. 149.
[45] *Ibid.*, p. 156. Article 85 became article 105 of the Constitution of India.

dealing with fundamental rights and this may lead to prolonged litigations. In our opinion, a Commission should be appointed by the President of India to prepare a standard list of parliamentary privileges on the model of the privileges of the House of Commons in England. The advantage of this course of action will be that it will enable those interested in the question of privileges and immunities of the members of the Houses of Parliament to know what they exactly are and what are their implications. But this will avoid the danger of litigations. It may be mentioned in passing that the Rules of Procedure and Conduct of Business in Lok Sabha[46] provide that there shall be a Committee of Privileges to determine whether there has been any breach of privileges of the House in any case referred to it and to report to the House with its recommendations for necessary action. A question of privileges may be referred to the Committee of Privileges either by the Speaker of the Lok Sabha or upon a motion of a member being allowed by the House.

II

We shall now pass on to the deliberations of the Constituent Assembly with regard to the State Legislatures.

Chapter II of the report of the Provincial Constitution Committee contained recommendations[47] of the Committee with regard to the Provincial Legislatures. Those recommendations had been discussed by the Constituent Assembly in its July, 1947, session. The Assembly then had not accepted the recommendations of the Provincial Constitution Committee that the privileges of the members of the Legislature should be such as had been provided in the Government of India Act, 1935, because the privileges of the members of the Legislature under the Government of India Act, 1935, had been considered by it to be restricted.[48] It had decided that the Legislatures should themselves determine the powers, privileges and immunities of the members and that until they were so determined the powers, privileges and immunities

[46] See Rules of Procedure and Conduct of Business in Lok Sabha, rules 222 to 233, 313 to 315.

[47] Reports of Committees, First Series, pp. 38-39.

[48] Constituent Assembly Debates, 21st July, 1947, p. 689.

of the members of the Legislatures should be such as were enjoyed by the members of the House of Commons in England.[49] Other recommendations of the Committee with regard to the Provincial Legislature had, however, been accepted by the Assembly. The recommendations of the Provincial Constitution Committee, as accepted by the Constituent Assembly, had been incorporated by the Drafting Committee in Chapter III of Part VI of the Draft Constitution.

On 6th January, 1949, the Constituent Assembly began discussing the articles of the Draft Constitution dealing with the Legislatures of the States.

Article 148 of the Draft Constitution, which dealt with the constitution of the State Legislature, stated as follows:

> "148. (1) For every State there shall be a Legislature which shall consist of the Governor; and
>
> (a) in the States of....., two Houses,
>
> (b) in other States, one House.
>
> (2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly and where there is only one House, it shall be known as the Legislative Assembly."

It may be mentioned here that the Provincial Constitution Committee had not decided the question whether the pre-existing Provinces of India should have Second Chambers. But it had recommended that it should be left to each Province to decide the question whether it should have a Second Chamber.[50] That recommendation had been accepted by the Constituent Assembly on 18th July, 1947.[51] Accordingly, the members of the Constituent Assembly representing different Provinces had met separately to decide that issue.[52] It had ultimately been decided that Madras, Bombay, West Bengal, the United Provinces, Bihar and East Punjab should have Second Chambers. Hence, on 6th January, 1949, when

[49] *Ibid.*, p. 690.
[50] Reports of Committees, First Series, p. 38.
[51] Constituent Assembly Debates, 18th July, 1947, pp. 670, 688.
[52] Constituent Assembly Debates, 6th January, 1949, p. 1309.

article 148 of the Draft Constitution came up for discussion in the Constituent Assembly, Dr Ambedkar, Chairman of the Drafting Committee, moved an amendment suggesting that in sub-clause (a) of clause (1) of article 148, after the words "in the States of" the words "Madras, Bombay, West Bengal, the United Provinces, Bihar and East Punjab" should be inserted.[53] That amendment was accepted by the Assembly and the article, as amended, was adopted by the Assembly on 6th January, 1949.[54]

Though the Constituent Assembly decided that some of the States should have a Second Chamber, it also agreed upon the abolition or creation of a Second Chamber in the States in certain circumstances and on 30th July, 1949,[55] it laid down the procedure to be followed for such abolition or creation. According to the procedure laid down by it, Parliament might by law provide for the abolition of the Legislative Council or for the creation of such a Council "if the Legislative Assembly of the State passes a resolution to that effect by a majority of the total membership of the Assembly and by a majority of not less than two-thirds of the members of the Assembly present and voting". In order to facilitate the abolition of the Second Chamber or the creation of it and in order to obviate the difficult process provided in the Draft Constitution for amendment of the Constitution, the Assembly decided that such a law should not be deemed to be an amendment of the Constitution.[56] With regard to the composition of the Legislative Assembly, the Constituent Assembly decided that the Legislative Assembly of each State should be composed of members chosen by direct election on the basis of adult suffrage and that the total number of members in the Legislative Assembly of a State should not be more than 500 and less than 60.[57]

[53] *Ibid*., p. 1309.

[54] *Ibid*., p. 1318. This became article 168 of the Constitution of India.

[55] Constituent Assembly Debates, 30th July, 1949, pp. 13, 21.

[56] Constituent Assembly Debates, 30th July, 1949, p. 14. This became article 169 of the Constitution of India.

[57] Constituent Assembly Debates, 8th January, 1949, p. 1390. This became article 170 of the Constitution of India. A new article was substituted for article 170 by the Constitution (Seventh Amendment) Act, 1956 in order to bring it into line with substituted articles 81 and 82. See *Calcutta Gazette*, September 13, 1956, Part VI, p. 141 For the Constitution (Seventh Amendment) Act, 1956, see Appendix 7.

Article 150 of the Draft Constitution laid down the composition of the Legislative Council of a State. It provided that the total number of members in the Legislative Council of a State should not exceed twenty-five per cent of the total number of members in the Legislative Assembly of that State and that of the total number of members in the Council—(a) one-half should be chosen from different panels of candidates; (b) one-third should be elected by the members of the Legislative Assembly of the State and (c) the remainder should be nominated by the Governor. We have already stated that in the opinion of the Drafting Committee the panel system had not proved satisfactory[58] in the country[59] from which it had been taken and that the Constituent Assembly had already discarded the panel system while discussing the composition of the Council of States.[60] The Drafting Committee had, therefore, to find out an alternative composition of the Legislative Council of a State. Hence, on 30th July, 1949, Dr Ambedkar, Chairman of the Drafting Committee, suggested through an amendment that for article 150 of the Draft Constitution, the following article should be substituted, namely:—[61]

> "150. (1) The total number of members in the Legislative Council of a State having such a Council shall not exceed twenty-five per cent of the total number of members in the Assembly of that State:
>
> Provided that the total number of members in the Legislative Council of a State shall in no case be less than forty.
>
> (2) The allocation of seats in the Legislative Council of a State, the manner of choosing persons to fill those seats, the qualifications to be possessed for being so chosen and the qualifications entitling persons to vote in the choice of any such persons shall be such as Parliament may by law prescribe."

While moving the amendment, Dr Ambedkar confessed that

[58] See page 177.
[59] Ireland.
[60] Article 67 of the Draft Constitution, Constituent Assembly Debates, 3rd January, 1949, p. 1230.
[61] Constituent Assembly Debates, 30th July, 1949, p. 21.

the Drafting Committee could not come to any definite conclusion as to the composition of the Upper Chamber, and, therefore, had decided to leave the matter to Parliament. The Committee had adopted what might be called the "line of least resistance" in proposing sub-clause (2) of article 150.[62] It was felt by some members of the Assembly that that was not the proper way of dealing with this important matter in the Constitution. The President of the Constituent Assembly also shared that feeling. He felt that the composition of the Chambers of the Legislature should be laid down in the Constitution itself and he suggested that the question might be referred back to the Drafting Committee.[63] The Assembly decided that the consideration of that article should be held over. The article was re-drafted by the Drafting Committee and the re-drafted article came up for discussion in the Assembly on 19th August, 1949.[64] The re-drafted article set out in concrete terms the composition of the Upper Chamber in the States. It also provided that Parliament might, at any time, alter the composition laid down in the article. The re-drafted article ran as follows:[65]

> "150 (1) The total number of members in the Legislative Council of a State having such a Council shall not exceed one-fourth of the total number of members in the Assembly of that State:
>
> Provided that the total number of members in the Legislative Council of a State shall in no case be less than forty.
>
> (2) Until Parliament may by law otherwise provide, the composition of the Legislative Council of a State shall be as provided in clause (3) of this article.
>
> (3) Of the total number of members in the Legislative Council of a State—
>
> (a) as nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities as Parliament may by law specify;

[62] *Ibid.*, pp. 21-22.
[63] *Ibid.*, p. 37.
[64] Constituent Assembly Debates, 19th August, 1949, p. 473.
[65] *Ibid.*, pp. 473-4.

(b) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years graduates of any university in the State and persons possessing for at least three years qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university;

(c) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament;

(d) as nearly as may be, one-third shall be elected by the members of the Legislative Assembly of [illegible] are not members of the Assembly;

(e) the remainder shall be nominated by the Governor in the manner provided in clause (5) of this article.

(4) The members to be elected under sub-clauses (a), (b) and (c) of clause (3) of this article shall be chosen in such territorial constituencies as may be prescribed by or under any law made by Parliament, and the elections under the said sub-clauses and under sub-clause (d) of the said clause shall be in accordance with the system of proportional representation by means of the single transferable vote.

(5) The members to be nominated by the Governor under sub-clause (e) of clause (3) of this article shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely:—

literature, science, art, co-operative movement and social services."

The re-drafted article was adopted by the Assembly on

19th August, 1949.[66] In sub-clause (b) of clause (3), after the words "consisting of persons", the words "resident in the State" were added and for the words "in the State", the words "in the territory of India" were substituted. The Constituent Assembly thus decided that the total number of members in the Legislative Council of a State should not exceed one-fourth of the total number of members in the Legislative Assembly of that State. It was subsequently found that in larger States, like Uttar Pradesh and Bihar, this maximum was adequate. But it led to difficulties in the case of the smaller States. Therefore, in the year 1956, Parliament changed the maximum to one-third of the strength of the Assembly.[67]

The Constituent Assembly agreed upon, among other things: (a) the duration of the State Legislature;[68] (b) the age-limit for membership of the State Legislature;[69] (c) the sessions of the State Legislature, its prorogation and dissolution;[70] (d) the right of the Governor to address and send messages to the Houses;[71] (e) the rights of the Ministers and Advocate-General as respect the Houses;[72] (f) the election of the Speaker and Deputy Speaker of the Legislative Assembly and of the Chairman and Deputy Chairman of the Legislative Council, their resignation, removal, powers and salaries;[73] (g) the staff of the Legislature,[74] and (h) the special procedure in respect of money Bills.[75] It decided that the Lower House should have more powers than the Upper House.

[66] Constituent Assembly Debates, 19th August, 1949, p. 492. This became article 171 of the Constitution of India.

[67] Section 10 of the Constitution (Seventh Amendment) Act, 1956. See Appendix 7.

[68] Constituent Assembly Debates, 2nd June, 1949, p. 550. This became article 172 of the Constitution of India.

[69] Constituent Assembly Debates, 2nd June, 1949, p. 554. This became article 173 of the Constitution of India.

[70] Constituent Assembly Debates, 2nd June, 1949, p. 557. This became article 174 of the Constitution of India. A new article was substituted for this article by the Constitution (First Amendment) Act, 1951. See Appendix 1. See also note 29.

[71] Constituent Assembly Debates, 2nd June, 1949, p. 559. These became articles 175 and 176 of the Constitution of India.

[72] Constituent Assembly Debates, 2nd June, 1949, p. 559. This became article 177 of the Constitution of India.

[73] Constituent Assembly Debates, 2nd June, 1949, pp. 560, 562, 563, 564, 565, 566. These became articles 178, 179, 180, 181, 182, 183, 184, 185 and 186 of the Constitution of India.

[74] Constituent Assembly Debates, 30th July, 1949, p. 41. This became article 187 of the Constitution of India.

[75] Constituent Assembly Debates, 10th June, 1949, p. 782. This became article 198 of the Constitution of India.

CHAPTER VIII

RELATIONS BETWEEN THE UNION AND THE STATES

I

We shall now deal with the question of relations between the proposed Indian Union and its constituent States as settled by the Constituent Assembly.

II

We shall first refer to the deliberations of the Assembly with regard to the distribution of legislative powers between the Union and the States.

We have stated before that the Cabinet Mission had recommended that the proposed Union Government should deal with three specific subjects, *viz*, foreign affairs, defence and communications and should have the powers necessary to raise finance required for those subjects.[1] Accordingly, on 25th January, 1947, the Constituent Assembly had appointed the Union Powers Committee to draw up a list of matters "included in and inter-connected with" the subjects assigned to the Centre.[2] That Committee had presented its report on 28th April, 1947.[3] But because of the changes that had been developing in the political situation of the country, the Assembly had then thought that rigid conformity with the Cabinet Mission's plan might not be possible and had, therefore, postponed the discussion on that report.[4] The Assembly had also permitted that Committee to submit a supplementary report. That supplementary report was presented to the Constituent Assembly on 20th August, 1947. The Committee had been in favour[5] of a strong central authority. In its opinion, a weak central authority would be "incapable of ensuring

[1] Paragraph 15 of the Statement of May 16, 1946.
[2] Constituent Assembly Debates, 25th January, 1947, pp. 330, 336.
[3] Constituent Assembly of India, Reports of Committees, First Series, p. 1.
[4] Constituent Assembly Debates, 28th April, 1947, pp. 359-362.
[5] Reports of Committees, First Series, p. 66.

peace, of co-ordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere". But it had not favoured the idea of setting up a unitary State in India, because it had thought that that would be politically and administratively "a retrograde step". It had recommended the establishment of a federation with a strong centre but at the same time had suggested that a fairly wide range of subjects should be left to the Provinces in which they should have utmost freedom. The residuary powers should, however, remain with the Centre. The Committee had pointed out that the Indian States had joined the Constituent Assembly on the basis of the Statement of 16th May, 1946. Hence, the Committee had recommended that so far as the Indian States were concerned, the residuary powers should belong to them unless they consented to their vesting in the Centre. In its opinion, the federal Government should have powers to exercise authority in matters which might be referred to it by one or more Units. It had also suggested certain sources of revenue for the Union but at the same time had recommended that the proceeds of some of the taxes should be assigned to, or shared with, the Provinces. In the matter of distribution of legislative powers between the Centre and its constituent Units, the Committee had thought that the "most satisfactory" arrangement would be "to draw up three exhaustive lists on the lines followed in the Government of India Act, 1935,[6] *viz.*, the federal, the provincial and the concurrent". The Committee, accordingly, had prepared three such lists which had been shown in the appendix to the report. It may be noted that the Union Constitution Committee had also recommended that the Constitution of India should be "a Federal structure with a strong Centre" and that there should be "three exhaustive lists, *viz.*, Federal, Provincial and Concurrent, with residuary powers to the Centre".[7]

The Drafting Committee had recommended that there should be three exhaustive legislative lists, namely, Union List, State List and Concurrent List. Generally speaking, it had not made any change in the legislative lists as recom-

[6] Seventh Schedule to the Government of India Act, 1935.
[7] Reports of Committees, First Series, pp. 55-56.

mended by the Union Powers Committee.[8] The recommendations of the Drafting Committee with regard to the distribution of legislative powers between the Union and the States had been incorporated in articles 216 to 232 of the Draft Constitution of India. The Drafting Committee had recommended that Parliament might make laws for the whole or any part of the territory of India, and the Legislature of a State might make laws for the whole or any part of the State.[9] It had also recommended that Parliament should have exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, that Parliament and the Legislature of any State for the time being specified in Part I of the First Schedule should have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule and that the Legislature of any State specified in Part I of the First Schedule should have exclusive power to make laws with respect to any of the matters enumerated in List II in the Seventh Schedule.[10] Those recommendations of the Drafting Committee were accepted by the Assembly on 13th June, 1949.[11] It only added that not only the States specified in Part I but the States specified in Part III of the First Schedule also should have those powers.[12] The Drafting Committee had recommended that Parliament should have exclusive power to make any law with regard to any matter not included either in the State List or in the Concurrent List and that such power should include the power of making any law imposing a tax not mentioned in either of those Lists.[13] Thus, according to the recommendations of the Drafting Committee, Parliament alone should have residuary powers of legislation. The Committee had further recommended that Parliament should have the power to provide for the establishment of any additional courts for the better administration of laws made by Parliament or of any existing laws with regard to a matter enumerated in the

[8] Reports of Committees of the Constituent Assembly, Third Series, p. 176.
[9] Article 216 of the Draft Constitution.
[10] Article 217 of the Draft Constitution.
[11] Constituent Assembly Debates, 13th June, 1949, pp. 793, 798. These became articles 245 and 246 of the Constitution of India.
[12] Constituent Assembly Debates, 13th June, 1949, pp. 793, 798.
[13] Article 223 of the Draft Constitution.

Union List.[14] Those recommendations were accepted by the Assembly without any discussion on 13th June, 1947.[15]

We may mention here that in January, 1947, the Constituent Assembly had decided that the residuary powers should belong to the Units of the proposed Indian federation.[16] That decision had been taken with a view to giving effect to the recommendations of the Cabinet Mission contained in its Statement of May 16, 1946. But in June, 1949, the political situation in the country was different. We have already referred to it. In view of that changed situation in the country the Assembly decided that the residuary powers should belong to the Centre. It will not be out of place here to refer to the corresponding provisions of the Government of India Act, 1935, regarding the residuary powers of legislation. Section 104 of the Government of India Act, 1935, authorised the Governor-General of India to empower, by public notification, either the proposed Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in the three Lists in the Seventh Schedule to that Act. That section also laid down that the executive authority of the proposed Federation of India or of the Province concerned, as the case might be, was to extend to the administration of any law so made, unless the Governor-General otherwise directed. In the discharge of his functions in these respects, the Governor-General was to act in his discretion. In so far as the provisions regarding residuary powers of legislation were concerned, the Constituent Assembly, we think, made an improvement upon the Government of India Act, 1935, because the allocation of the residuary powers of legislation to the Centre will not only contribute to the maintenance of the unity of the political system of India but would also lead to the stability, strength and the efficiency of the Central Government of India.

The different entries in the three lists of the Seventh Schedule were intended to define and demarcate the respective areas of legislative competence of Parliament and the State Legislatures.

[14] Article 219 of the Draft Constitution.

[15] Constituent Assembly Debates, 13th June, 1949, pp. 798-9. These became articles 247 and 248 of the Constitution of India.

[16] See Objectives Resolution, Constituent Assembly Debates 13th December, 1946, p. 57.

They were merely heads of legislation and the power to legislate was conferred by article 217 of the Draft Constitution, as adopted by the Constituent Assembly (which became article 246 of the Constitution of India), and other articles. We may add that though the Constituent Assembly defined the respective areas of legislative competence of Parliament and the State Legislatures, it did not intend to give absolute supremacy to Parliament or the Legislatures of the States. This is clear from the language of article 216 of the Draft Constitution, as adopted by the Constituent Assembly. That article stated: "Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State." Thus, the legislative power was made "subject to the provisions of this Constitution". We have already stated[17] that while discussing fundamental rights the Assembly decided that a "State" should not make any law which would take away or abridge the rights conferred by Part III of Constitution and that any law made in contravention of that provision should, to the extent of the contravention, be void. The Assembly thus decided that there should be two principal limitations on the legislative powers of Parliament and the State Legislatures, namely, (i) that the law must be within the legislative competence of Parliament or the State Legislatures as prescribed by article 217 of the Draft Constitution (i.e. article 246 of the Constitution), and (ii) that such law must be subject to the provisions of the Constitution, and must not take away or curtail the rights conferred by Part III of the Constitution. It has been held by the Supreme Court that both these matters "are justiciable and it is open to the Courts to decide whether Parliament has transgressed either of the limitations upon its legislative power".[18]

The Drafting Committee had suggested that Parliament should have power to legislate with respect to any matter specified in the State List when it assumed national importance.

[17] See page 110.

[18] *A. K. Gopalan* vs. *The State of Madras*, Supreme Court Reports, 1950, pp. 288-90. See in this connection *G. Nageswara Rao* vs. *A.P.S.R.T. Corporation*, A.I.R., 1959, S.C., 308 (316).

In order, however, to prevent any "unwarranted encroachment"[19] upon the powers of the States, it had also suggested that this power should be exercised only if the Council of States passed a resolution to that effect by a two-thirds majority. These suggestions had been incorporated in article 226 of the Draft Constitution.[20] Shri Alladi Krishnaswami Ayyar, a member of the Drafting Committee, in a separate note appended to the Draft Constitution had stated that he had accepted the principle underlying article 226 of the Draft Constitution. He had, however, suggested that when a subject specified in the State List assumed national importance the States should not continue to retain any power with regard to that subject. In his opinion, the "conversion of what is a Provincial power into a concurrent power would offer a premium for interference by the Centre and may strike ultimately at the federal structure of the Constitution itself".[21] It may be mentioned that no action was taken by the Constituent Assembly on this suggestion When the article came up for discussion on 13th June, 1949, Dr Ambedkar, Chairman of the Drafting Committee, moved an amendment stating that the resolution should remain in force for a period not exceeding one year and that the law made by Parliament on the strength of the resolution should cease to have effect on the expiration of a period of six months after the resolution had ceased to be in force.[22] The article was criticized in the Assembly on the ground that it provided for interference by the Centre in matters contained in the State List "through the agency of the Council of States".[23] It was argued that if the article was only an extended version of article 229,[24] it was superfluous, but if there was something behind it and if it was intended that the Centre should go beyond what was contained in article 229, then it was "surely mischievous".[25] Supporting the article, Shri T. T. Krishnamachari said that the amendment moved by Dr Ambedkar took away the

[19] Reports of the Committees of the Constituent Assembly, Third Series, p. 176.
[20] See foot-note at page 101 of the Draft Constitution of India.
[21] Draft Constitution of India, pp. 213-1.
[22] Constituent Assembly Debates, 13th June, 1949, p. 800.
[23] *Ibid.*, p. 802.
[24] To be referred to hereafter.
[25] Constituent Assembly Debates, 13th June, 1949, p. 802.

substance of the objections against the article[26] and that the mischief, if at all there was any, was restricted to a very limited period. The article, as amended by Dr Ambedkar, was adopted by the Assembly.[27] This article became article 249 of the Constitution of India.

The Constituent Assembly thus empowered the future Parliament of India to make laws with respect to a matter enumerated in the State List if the Council of States resolved by a two-thirds majority that such legislation was "necessary or expedient in the national interest." Existence of any emergency is not necessary for the assumption of this power by Parliament. Further, the words "national interest" are wide enough to include any matter which has incidence over the entire country. The resolution of the Council of States is conclusive as to whether "it is necessary or expedient in the national interest" that Parliament should make laws with respect to any matter specified in the State List. Courts have no jurisdiction to decide this matter. It may be argued that the Council of States consists of the representatives of the constituent States of the Indian Union. But we have already stated in the preceding chapter that the Constituent Assembly made provisions for unequal representation of the constituent States of the Indian Union in the Council of States. There were no provisions in the Government of India Act, 1935, corresponding to the provisions of article 249 of the Constitution of India.

We may note in passing that on 12th August, 1950, the Provisional Parliament of India passed the following resolution[28] empowering the Parliament to make laws with respect to matters included in the State List, namely:—

> "That this House do resolve in pursuance of article 249 of the Constitution, as adapted by the President under article 392[29] thereof and as at present in force, that it is necessary in the national interest that Parliament

[26] *Ibid.*, pp. 804-5.
[27] *Ibid.*, p. 810.
[28] See Parliamentary Debates, 12th August, 1950, columns 913-14.
[29] Article 392 empowers the President of India to direct, until the first meeting of Parliament duly constituted under Chaper II of Part V of the Constitution is held, by an order for the purpose of removing any difficulties, that the Constitution should have effect subject to such adaptations whether by way of modi-

should, for a period of one year from the 15th August, 1950, make laws with respect to the following matters enumerated in the State List, namely:—

(i) trade and commerce within the State subject to the provisions of entry 33 of List III, and

(ii) production, supply and distribution of goods subject to the provisions of entry 33 of List III."

In pursuance of this Resolution Parliament passed the Supply and Prices of Goods Act, 1950 (LXX of 1950). The Evacuee Interest (Separation) Act, 1951 (LXIV of 1951) was passed in pursuance of another resolution of Parliament. The former Act was, however, repealed by the Repealing and Amending Act, 1957.

The Assembly adopted, without any amendment or discussion, articles 227 and 228 of the Draft Constitution.[30] Article 227[31] sought to give power to Parliament to legislate with respect to any matter specified in the State List while a Proclamation of Emergency was in operation. Article 228[32] provided that nothing in articles 226 and 227 should restrict the power of the Legislature of a State to make any law which under the Constitution it had power to make, but in case of inconsistency between a law made by Parliament under article 226 or article 227 and a law made by the Legislature of a State, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, should prevail. Article 229 provided that Parliament could, on a resolution passed by the Legislature or Legislatures of one or more States, enact laws on matters with regard to which Parliament had no power to make laws for the State or States. The Assembly accepted an amendment moved by Dr Ambedkar, Chairman of the Drafting Committee, to the

fication, addition or omission, as he may deem to be necessary or expedient. In exercise of this power the President made the Constitution (Removal of Difficulties) Order No. II of 1950. By this order the word "Parliament" was substituted for the words "Council of States" in Article 249. (See Government of India, Ministry of Law, Orders issued under the Constitution of India, pp. 248, 252, 290.)

See also *Gazette of India, Extraordinary*, Part II, Section 3, August 11, 1950, p. 161.

[30] Constituent Assembly Debates, 13th June, 1949, p. 810.

[31] This became article 250 of the Constitution of India.

[32] This became article 251 of the Constitution of India

effect that two or more States should pass a resolution to enable Parliament to legislate on any subject on which States had power to legislate. The article, as adopted by the Assembly, ran as follows:[33]

> "(1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 226 and 227 of this Constitution should be regulated in such States by Parliament by law, and resolutions to that effect are passed by the House or, where there are two Houses, by both the Houses of the Legislature of each of the States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.
>
> (2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State."[34]

Similar provisions may be found in section 103 of the Government of India Act, 1935. The difference between the provisions of article 229, as adopted by the Constituent Assembly and the provisions of section 103 of the Government of India Act, 1935, is that under article 229 an Act passed under it cannot be amended or repealed by an Act of the Legislature of the State concerned. It can be amended or repealed only by another Act of Parliament passed or adopted in the manner provided in clause (1). But under section 103 of the Government of India Act, 1935, such an Act could be amended or repealed by an Act of the Legislature of the Province concerned. It may be pointed out that the purposes of articles 226 to 229 of the Draft Constitution, as adopted

[33] Constituent Assembly Debates, 13th June, 1949, pp. 811-12.
[34] This article became article 252 of the Constitution of India.

by the Constituent Assembly, were to create a strong Central Government in spite of the federal framework of the proposed Constitution and to promote national solidarity and unity.

The Assembly also decided[35] that Parliament should have power to make any law for any State or part thereof for implementing any treaty, agreement or convention with any other country or countries, or any decision made at any international conference, association or other body.[36] It further decided[37] that if any provision of a law made by the Legislature of a State was repugnant to any provision of a law made by Parliament, whether passed before or after the law made by the Legislature of such State, the law made by the Legislature of the State should, to the extent of the repugnancy, be void.[38] Article 232 of the Draft Constitution, as adopted by the Assembly,[39] laid down the principle that in cases where the Constitution required that a Bill could not be introduced in the legislature without the previous sanction of the Governor, Rajpramukh or President, the subsequent assent of that authority should save the law from invalidity.[40] This article practically reproduced the provisions of section 109 (2) of the Government of India Act, 1935.

III

We may now refer to the decisions of the Constituent Assembly with regard to the administrative relations between the Union and the States. Articles 233 to 238 of the Draft Constitution dealt with this subject. Provisions of articles 236 and 237 of the Draft Constitution, which sought to empower the Union Government and the Government of a State specified in Part I[41] of the First Schedule to undertake legislative, executive and judicial functions in a State specified in Part III[42] of the First Schedule, were not accepted by the

[35] Constituent Assembly Debates, 13th June, 1949 p. 813.
Constituent Assembly Debates, 14th October, 1949, p. 277.
[36] This became article 253 of the Constitution of India.
[37] Constituent Assembly Debates, 13th June, 1949, pp. 813-15.
[38] This became article 254 of the Constitution of India
[39] Constituent Assembly Debates, 13th June, 1949, p. 815.
[40] This became article 255 of the Constitution of India.
[41] Pre-existing Indian Province.
[42] Pre-existing Indian State.

Assembly.[43] Other articles[44] of the Draft Constitution relating to the administrative relations between the Union and the States were adopted by the Assembly.[45] Two new articles, namely, article 234A[46] and article 235A[47] were added to the Constitution. The provisions of all these articles were as follows:

(a) the executive power of every State should be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which applied to that State, and the executive power of the Union should extend to the giving of such directions to a State as might appear to the Government of India to be necessary for that purpose;[48]

(b) the executive power of every State should be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union should extend to the giving of such directions to a State as might appear to the Government of India to be necessary for that purpose, and the executive power of the Union should also extend to the giving of directions to a State,—

  (i) as to the construction and maintenance of means of communications declared in the direction to be of national or military importance,

  (ii) as to the measures to be taken for the protection of the railways within the State;[49]

(c) the President might, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers, functions in relation to any matter to which the executive power of the Union extended;[50]

(d) Government of India might, by agreement with the Government of any territory not being part of the

[43] Constituent Assembly Debates, 13th October, 1949. pp. 175, 205.
[44] Articles 233, 234, 235, 238 as amended, 238 and 239.
[45] Constituent Assembly Debates, 13th June, 1949, pp. 816-17, Constituent Assembly Debates, 13th October, 1949, pp. 175, 207.
[46] Constituent Assembly Debates, 9th September, 1949, p. 1187.
[47] Constituent Assembly Debates, 13th October, 1949, pp. 175, 207.
[48] This became article 256 of the Constitution of India.
[49] This became article 257 of the Constitution of India.
[50] This became article 258 of the Constitution of India.

territory of India, undertake any executive, legislative or judicial functions vested in the Government of such territory; [51] and

(e) full faith and credit should be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State, and final judgements or orders delivered or passed by civil courts in any part of the territory of India should be capable of execution anywhere within that territory according to law.[52]

The Draft Constitution contained four articles, namely, articles 239, 240, 241, and 242, providing for settlement of disputes relating to waters of inter-State rivers. Those articles were adopted on 13th June, 1949.[53] The matter was, however, reconsidered on 9th September, 1949, and those articles were deleted from the Constitution.[54] On that day a new article[55] was added to the Constitution which laid down that Parliament might by law provide for the adjudication of any dispute or complaint with respect to "the use, distribution or control of the waters of, or in, any inter-State river or river-valley". Parliament also might by law provide that neither the Supreme Court nor any other court should exercise jurisdiction in respect of any such dispute or complaint.[56] The Assembly also empowered the President to establish an Inter-State Council for settling inter-State disputes.[57]

Before we conclude this chapter we may mention that by the Constitution (Seventh Amendment) Act, 1956, article 258A was added to the Constitution which states that the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers, functions in relation to any matter to which the executive power of the State extends.[58]

[51] Amended article 236. This became article 260 of the Constitution of India.
[52] This became article 261 of the Constitution of India.
[53] Constituent Assembly Debates, 13th June, 1949, pp. 317-9.
[54] Constituent Assembly Debates, 9th September, 1949, p. 1188.
[55] Article 242A.
[56] Constituent Assembly Debates, 9th September, 1949, pp. 1187-8. This became article 262 of the Constitution of India.
[57] Constituent Assembly Debates, 13th June, 1949, p. 319. This became article 263 of the Constitution of India.
[58] See Appendix 7.

CHAPTER IX

RELATIONS BETWEEN THE UNION AND THE STATES (CONTINUED)

EMERGENCY PROVISIONS

In the preceding chapter we have referred to the deliberations of the Constituent Assembly of India on the relations between the proposed Indian Union and its constituent States under normal conditions. But there might be abnormal situations which might demand a deviation from normal arrangement and procedure. Article 275 to 280 of the Draft Constitution made provisions for these abnormal situations. These provisions were described in the Draft Constitution as 'Emergency Provisions". These articles were discussed by the Assembly on 2nd, 3rd, 4th, 19th and 20th August, and 16th October, 1949. Article 275 of the Draft Constitution sought to invest the President with the power to issue a "Proclamation of Emergency" at any time if he was satisfied that the security of India or any part thereof was threatened by war or "domestic violence". On 2nd August, 1949, Dr Ambedkar, Chairman of the Drafting Committee, moved an amendment for the substitution of the following article for article 275, namely:—[1]

> "275. (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.
>
> (2) A Proclamation issued under clause (1) of this article (in this Constitution referred to as 'a Proclamation of Emergency')—
>
> (a) may be revoked by a subsequent Proclamation;
>
> (b) shall be laid before each House of Parliament;
>
> (c) shall cease to operate at the expiration of two months unless before the expiration of that period

[1] Constituent Assembly Debates, 2nd August, 1949, pp. 103-4.

it has been approved by resolutions of both Houses of Parliament:

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or if the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c) of this clause and the Proclamation has not been approved by a resolution passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of that period resolutions approving the Proclamation have been passed by both Houses of Parliament.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof."

Speaking on the article, Shri H. V. Kamath[2] said that it sought to invest the President with an extraordinary power which "finds no parallel to the powers exercised by the executive head—nominal, figure-head, titular or otherwise—of any other democratic State in the world, monarchic or republican". He, therefore, through an amendment suggested that the power should be exercised by the President acting on the advice of the Council of Ministers. In his opinion, clause (3) of the article contained "a very unwise provision", and he pleaded for its deletion.[3] Prof. Shibban Lal Saksena, on the other hand, thought that in no case the President would be able to issue a Proclamation without the advice of his ministers.[4] Opposing the provisions of article 275,

[2] *Ibid.*, 1949. p. 106.
[3] *Ibid.*, p. 108.
[4] *Ibid.*, p. 110.

Prof. K. T. Shah[5] said that under the article "slightest disturbance" in the internal management of a State would entitle the President to declare a "State of Emergency" and to issue a Proclamation on that account. He also observed that a mere apprehension of war or external aggression or internal disturbance was made a good ground for the issue of a Proclamation of Emergency. Dr P. S. Deshmukh[6] supported the amendment of Shri Kamath. Shri Mahavir Tyagi[7] and Shri T. T. Krishnamachari[8] supported the article proposed by Dr Ambedkar. The article, as proposed by Dr Ambedkar, was, however, adopted by the Assembly on 2nd August, 1949.[9] By using the words "if the President is satisfied" in article 275, the Constituent Assembly conferred a discretionary power on the future President of India. Now, what is the implication of the expression "if the President is satisfied"? We may mention here what Maxwell[10] has stated on the question of discretionary power, in the context of English constitutional law. "Where", he has stated, "a Minister of the Crown has to be 'satisfied' before taking certain action, there is a presumption that he is acting reasonably, and a statement by him that he is so satisfied will be conclusive. And where a statute empowers Her Majesty in Council to make a regulation if it 'appears necessary or expedient', neither the necessity of the regulation nor the reasons which motivated Her Majesty to make it can be called into question". The Assembly, therefore, did not give courts any jurisdiction in this matter. But this discretionary power must be exercised in the spirit of the Constitution. We have stated before that the Constituent Assembly had decided that the President of India should be the constitutional head of the Indian Union. It, therefore, follows that the President should act on the advice of his ministers, as observed by Prof. Saksena.

Article 276 of the Draft Constitution dealt with the effect of a Proclamation of Emergency on the executive and legislative powers of the Union. The provisions of that article were

[5] *Ibid*., p. 112.
[6] *Ibid*., p. 114.
[7] *Ibid*., p. 119.
[8] *Ibid*., p. 122.
[9] *Ibid*., p. 127. This became article 352 of the Constitution of India.
[10] See *Maxwell On The Interpretation Of Statutes*, 10th Edn., 1953, by Granville Sharp and Brian Galpin, pp. 123-4.

accepted by the Assembly on 3rd August, 1949, practically without any discussion.[11] We have stated that the Constituent Assembly had already decided that normally the executive power of the Union should extend to all matters with respect to which Parliament had power to make laws and that the executive power of a State should extend to matters with respect to which the Legislature of the State had power to make laws. By adopting article 276, the Constituent Assembly decided that while a Proclamation of Emergency was in operation the executive power of the Union should extend to the giving of directions to any State as to the manner in which the executive power thereof should be exercised. Thus, under article 276, as adopted by the Constituent Assembly, while a Proclamation of Emergency was in operation the Union Government would give directions to a State Government even in regard to a matter in the State List, that is, in regard to a matter which was otherwise within the exclusive legislative and executive jurisdiction of a State. As regards the legislative powers of Parliament, the Assembly enabled the future Parliament, while a Proclamation of Emergency was in operation, to confer powers upon the Union or its officers even in regard to matters which were not in the Union List. In normal times such powers would be limited to matters in the Union List.

Article 277 of the Draft Constitution laid down that while a Proclamation of Emergency was in operation, the President might by order direct that all or any of the provisions of articles 249 to 259 of the Draft Constitution "shall for such period, not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit." We shall see that articles 249 to 259 of the Draft Constitution, as adopted by the Constituent Assembly, provided for distribution of revenue between the Centre and the States.[12] We shall also see that under the provisions of these articles the States were to get from the Centre a certain percentage

[11] Constituent Assembly Debates, 3rd August, 1949, pp. 129-30. This became article 353 of the Constitution of India.

[12] See Chapter XIII.

of the proceeds of certain taxes which were to be levied by the Union. Under article 277 the provisions of the Constitution relating to financial arrangements between the Centre and the States might be modified by the President while a Proclamation of Emergency was in operation. This article was discussed by the Assembly on 19th and 20th August, 1949. On 19th August, 1949,[13] Dr Ambedkar moved an amendment suggesting that every order made under article 277 "shall, as soon as may be after it is made, be laid before each House of Parliament". The main criticism against the article was that it contained "drastic" provisions and that its effect on the administration of the States would be very harmful,[14] because the budget framed by a State might be suddenly upset by an order of the President. Further, the provisions of that article would make the financial position of the States unstable.[15] It was also pointed out that the Union Powers Committee and the Provincial Constitution Committee had not recommended[16] any such powers for the President as were proposed to be given under article 277. Speaking on behalf of the Drafting Committee, Shri Alladi Krishnaswami Ayyar said[17] that under that article all the financial provisions relating to distribution of revenue would not come to an end. He pointed out that article 277 only provided that the provisions of articles 249 to 259 would have effect, while a Proclamation of Emergency was in operation, subject to such exceptions and modifications as the President would think fit. The only question before the House was, Shri Ayyar said, whether when a Proclamation was in force the President, acting on the advice of the Cabinet, ought to modify the provisions of the Constitution relating to distribution of the proceeds of the taxes.[18] He also observed that the power of the President "is not exclusive of, and does not derogate from, the plenary authority of Parliament". The article, as amended by

[13] Constituent Assembly Debates, 19th August, 1949, p. 504.
[14] *Ibid.*, p. 507.
[15] *Ibid*, pp. 508, 511, and Constituent Assembly Debates, 20th August, 1949, pp. 515, 517.
[16] Constituent Assembly Debates, 20th August, 1949, p. 514. See also Constituent Assembly of India, Reports of Committees, First Series, pp. 34, 42, 66.
[17] Constituent Assembly Debates, 19th August, 1949, p. 509.
[18] *Ibid.*, p. 510. This became article 354 of the Constitution of India.

Dr Ambedkar, was adopted by the Assembly on 20th August, 1949.[19]

It may be recalled that on 23rd July, 1947,[20] the Constituent Assembly had decided that in case of a failure of the constitutional machinery in any pre-existing Indian Province, the Governor of that province should have the power to assume to himself all or any of the functions of the Provincial Government by issuing a Proclamation. It had also been decided that the Proclamation should forthwith be communicated by the Governor to the President of the Union for taking such action as the President might consider appropriate. These decisions had been incorporated by the Drafting Committee in article 188 of the Draft Constitution. Article 278 of the Draft Constitution sought to give powers to the President to deal with such a situation. Article 278 stated, *inter alia*, that if the President, on receipt of a Proclamation issued by the Governor of a State under article 188, was satisfied that a situation arose in which the government of the State could not be carried on in accordance with the provisions of the Constitution, he might by Proclamation assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in, or exercisable by, the Governor or any body or authority in the State other than the Legislature of the State, and declare that the powers of the Legislature of the State shall be exercisable only by Parliament. On 3rd August, 1949, Dr Ambedkar, on behalf of the Drafting Committee, suggested through amendments the insertion of three new articles designed to arm the President with powers to deal with exigencies likely to be created by a failure of the constitutional machinery in a State. He moved an amendment for the insertion of the following new article,[21] namely:—

> "277-A. It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of this Constitution."

[19] Constituent Assembly Debates, 20th August, 1949, p. 523.
[20] See pages 145-7.
[21] Constituent Assembly Debates, 3rd August, 1949, p. 131.

He moved another amendment for the substitution of the following articles for article 278 of the Draft Constitution,[22] namely:—

"278. (1) If the President, on receipt of a report from the Governor or Ruler of a State or otherwise, is satisfied that the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or Ruler, as the case may be, or any body or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court or to suspend in whole or in part the operation of any provisions of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament:

[22] *Ibid.*, pp. 131-2.

Provided that if any such Proclamation is issued at a time when the House of the People is dissolved or if the dissolution of the House of the People takes place during the period of two months referred to in this clause and the Proclamation has not been approved by a resolution passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of that period resolutions approving the Proclamation have been passed by both Houses of Parliament.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (3) of this article:

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years:

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has not been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of that period resolutions approving the Proclamation have been passed by both Houses of Parliament.

278-A. (1) Where by a Proclamation issued under clause (1) of article 278 of this Constitution it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent—

(a) for Parliament to delegate the power to make laws for the State to the President or any other authority specified by him in that behalf;

(b) for Parliament or for the President or other authority to whom the power to make laws is delegated under sub-clause (a) of this clause to make laws conferring powers and imposing duties or authorising the conferring of powers and the imposition of duties upon the Government of India or officers and authorities of the Government of India;

(c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament;

(d) for the President to promulgate Ordinances under article 102 of this Constitution except when both Houses of Parliament are in session.

(2) Any law made by or under the authority of Parliament which Parliament or the President or other authority referred to in sub-clause (a) of clause (1) of this article would not, but for the issue of a Proclamation under article 278 of this Constitution, have been competent to make shall to the extent of the incompetency cease to have effect on the expiration of a period of one year after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period unless the provisions which shall so cease to have effect are sooner repealed or re-enacted with or without modification by an Act of the Legislature of the State."

Through another amendment, he suggested the deletion of article 188 of the draft Constitution.[23] Moving for the insertion of the new article 277A, Dr B. R. Ambedkar, Chairman of the Drafting Committee, said that[24] it had already been agreed that the new Constitution of India should be a Federal Constitution. It meant, he observed, that the States should

[23] *Ibid.*, p. 131
[24] *Ibid.*, pp. 132-4.

be sovereign in their field which was left to them by the Constitution and that the Centre should be sovereign in the field assigned to it by the Constitution. That being so, if the Centre was to interfere in the administration of a State it must be in fulfilment of a "duty" and an "obligation" which the Constitution imposed upon the Centre. That interference must not be "wanton, arbitrary or unauthorised by law". Speaking about the reason for suggesting the deletion of article 188, Dr Ambedkar said[25] that it was felt that "no useful purpose could be served, if there is a real emergency by which the President is required to act, by allowing the Governor, in the first instance, the power to suspend the Constitution merely for a fortnight. If the President is ultimately to take the responsibility of entering into the provincial field in order to sustain the Constitution, then it is much better that the President should come into the field right at the very beginning".

Under clause (1) of article 278 of the Draft Constitution, the President could act "on receipt of a proclamation issued by the Governor of the State under article 188" of the Constitution. But clause (1) of the proposed article 278 sought to empower the President to take action, "on receipt of a report from the Governor or Ruler of a State or otherwise". The word "otherwise" was inserted because it was felt[26] that in view of the fact that article 277A, which preceded article 278, imposed "a duty and an obligation" upon the Centre, it would not be proper to restrict and confine the action of the President to the report made by the Governor of the State. It might be that the Governor might not make a report but the facts were such that the President felt that his intervention was necessary. It was, therefore, thought necessary to give liberty to the President to act even when there was no report by the Governor and the President had certain facts within his knowledge on which he thought he ought to act in the fulfilment of his duty.

In the course of the discussion of the article, Shri H. V. Kamath said[27] that the new article 278 sought to confer

[25] *Ibid.*, pp. 132-4.
[26] *Ibid.*, p. 134
[27] *Ibid.*, pp. 135-9.

more powers on the President than were envisaged in the original article 278. He objected to the insertion of the word "otherwise". He wanted that the President should be empowered to act only on receipt of a report from the Governor or Ruler of a State. Prof. Shibban Lal Saksena[28] felt that articles 277A and 278 would reduce the autonomy of the State to a farce. He also pleaded for the deletion of the word "otherwise" from clause (1) of article 278. According to him, even if those articles were omitted there were other articles, namely, articles 275 and 276, which gave the executive all the powers necessary to deal with an emergency. Dr P. S. Deshmukh[29] pleaded for the retention of article 188 of the Draft Constitution. Supporting the new article, Shri Alladi Krishnaswamy Ayyar,[30] a member of the Drafting Committee, said that if responsible government contemplated by the Constitution functioned properly, the Union could not and would not interfere. It was only when there was a failure or breakdown of the constitutional machinery in a State that Union Government would interfere. He added that such a provision was by no means a "novel" one. Even in "the typical federal Constitution of the United States", where State Sovereignty was recognised more than in any other federation, there was a provision to the effect that it was the duty of the Union or the Central Government to see that the State was protected both against domestic violence and external aggression. In the opinion of Pandit H. N. Kunzru,[31] provisions of article 275 and 276, as adopted by the Assembly, were sufficient to deal with any emergency in a State. He thought that articles 278 and 278A were not at all necessary. Shri Naziruddin Ahmad[32] was of opinion that article 188 should not be deleted. He said that if there was any trouble in a State, the initial responsibility for quelling it must rest with the Ministers. If they failed then the right to initiate emergency measures must lie initially with the Governor or the Ruler. If that was not provided the result would be that the Legislature of a State and the Ministers would have responsibility of main-

[28] *Ibid.*, p. 143.
[29] *Ibid.*, p. 147.
[30] *Ibid.*, p. 150.
[31] *Ibid.*, p. 155.
[32] *Ibid.*, p. 160.

taining law and order without any powers. That would, in his opinion, "easily and inevitably develop a kind of irresponsibility". Dr Ambedkar did not deny that there was a possibility of the articles being abused or employed for political purposes. But his answer was that that objection applied to every article of the Constitution which sought to give power to the Centre to override the States. He, however, said that the articles would be brought into operation as a last resort.[33] Thereupon, the Assembly on the 4th August, 1949, decided to delete 188 from the Constitution and to add articles 277A, 278 and 278A to the Constitution of India.[34]

The provisions of the proposed article 277A were largely based on section 4 of article IV of the Constitution of the United States of America, which states as follows:

> "The United States shall guarantee to every State in the Union a republican form of Government, and shall protect each of them against invasion, and, on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence."

Similar provisions can be found in section 119 of the Constitution of Australia which lays down as follows:

> "The Commonwealth shall protect every State against invasion, and, on the application of the Executive Government of the State, against domestic violence."

It may be mentioned in this connexion that it was decided by the Supreme Court of the United States of America that if the internal disturbance of any State interfered with the operation of the national Government itself or with the movement of inter-State commerce, the Union Government might send force on its own initiative, without waiting for the application of State authorities. The Supreme Court observed in *Re Debs:*[35] "The entire strength of the nation may be used to enforce in any part of the land the full and

[33] Constituent Assembly Debates, 4th August, 1949, p. 177.

[34] *Ibid.*, pp. 177-80. Articles 277A, 278 and 278A became articles 355, 356 and 357 of the Constitution of India.

[35] In Re Debs, 158 U.S., 564 (582) (1895)

free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

The difference between the provisions of section 4 of article IV of the Constitution of the United States of America and the provisions of the proposed article 277A was that under article 277A it was not necessary that there should be any request or application for help on the part of a State before Central Government could take action even in the case of an internal disturbance. In our opinion, if there is any such internal disturbance the Union Government should not be allowed to look on indolently. The Union Government should intervene either at the request of the Government of the State concerned or at its own initiative. Ordinarily, however, it is desirable that the Union Government should take action at the request of the State Government but, if necessary, the Union Government should have the power to take action on its own initiative.

The proposed article 278 corresponded to sections 45 and 93 of the Government of India Act, 1935, as originally enacted. Section 45 of that Act dealt with the question of failure of the constitutional machinery at the Centre and section 93 made provisions to deal with such failure in the Province. In contrast with the Government of India Act, 1935, the proposed article 278 did not contemplate any possible break-down of the constitutional machinery at the Centre but dealt only with such a possible break-down in the States. Another point of difference between the provisions of the proposed article 278 and the provisions of the Government of India Act, 1935, was that under article 278 the President could assume the executive power of the State Government and could declare that the powers of the State Legislature should be exercised by or under the authority of Parliament. But under the Government of India Act, 1935, the Governor-General could assume both executive and legislative functions.

Article 279 of the Draft Constitution provided that when

a Proclamation of Emergency was in force, the State should be free from the restrictions imposed by article 13 of the Draft Constitution. The article ran as follows:

> "While a Proclamation of Emergency is in operation, nothing in article 13 of Part III of this Constitution shall restrict the power of the State as defined in that Part to make any law or to take any executive action which the State would otherwise be competent to make or to take."

This article[36] was adopted by the Assembly on 4th August, 1949, without any amendment.[37]

Article 280 of the Draft Constitution laid down as follows:

> "280. Where a Proclamation of Emergency is in operation, the President may by order declare that the rights guaranteed by article 25 of this Constitution shall remain suspended for such period not extending beyond a period of six months after the Proclamation has ceased to be in operation as may be specified in such order."

It may be remembered that article 25 of the Draft Constitution, as adopted by the Assembly on 9th December, 1948,[38] mentioned legal remedies in case of encroachment on fundamental rights by the State. The right to move the Supreme Court for the enforcement of fundamental rights was guaranteed under that article. Article 280 came up for discussion on 4th August, 1949. On that day, Dr Ambedkar, Chairman of the Drafting Committee, through an amendment suggested the substitution of the following article for article 280 of the Draft Constitution, namely:—[39]

> "Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of the rights conferred by Part III of this Constitution and all proceedings

[36] This became article 358 of the Constitution of India.
[37] Constituent Assembly Debates, 4th August, 1949, p. 186.
[38] Constituent Assembly Debates, 9th December, 1948, p. 955. See pages 107-9.
[39] Constituent Assembly Debates, 4th August, 1949, p. 186.

pending in any court for the enforcement of any right so conferred shall remain suspended for the period during which the Proclamation is in operation or for such shorter period as may be specified in the order."

While moving the amendment, Dr Ambedkar claimed[40] that the proposed article 280 was "really an improvement on the original article 280". The original article provided that the order of the President suspending the operation of article 25 might continue for a period of six months after the Proclamation had ceased to be in operation. But the proposed article made the period shorter. Beside Dr Ambedkar, five other members of the Constituent Assembly participated in the discussion of this article and all of them spoke against it. Shri H. V. Kamath[41] said that he had studied the constitutions of various countries of the world but he had not come across "any such wide and sweeping provision in any of the other constitutions". He pointed out[42] that there were certain fundamental rights in respect of which the right to move any court for their enforcement should not be suspended. He mentioned the right guaranteed in article 11[43] of the Draft Constitution. He moved an amendment for the substitution of the words "enforcement of such of the rights conferred by Part III of this Constitution as may be specified in that Order", for the words "enforcement of the rights conferred by Part III of this Constitution."[44] Prof. Shibban Lal Saksena[45] suggested that article 280 should be deleted altogether, but if that was not possible then instead of giving power to the President it should be given to Parliament. Pandit H. N. Kunzru[46] wanted to limit the operation of article 280 to certain rights only. Shri Mahavir Tyagi[47] observed that the right of an individual to move the judiciary for the enforcement of the fundamental rights should not be

[40] *Ibid.*
[41] *Ibid.*, p. 187.
[42] *Ibid.*, pp. 187-90.
[43] Article 11 abolished 'untouchability'.
[44] Constituent Assembly Debates, 4th August, 1949, p. 186.
[45] *Ibid.*, p. 190.
[46] *Ibid.*, p. 192.
[47] *Ibid.*, pp. 193-6.

taken away in any circumstances. Prof. K. T. Shah opposed[48] the provisions of article 280. He, however, said that if such provisions were necessary then the power to suspend the right to move any court should be given to Parliament. At that stage, Dr Ambedkar suggested[49] that the consideration of the article should be held over to enable the Drafting Committee to reconsider the matter. His suggestion was accepted by the Assembly.

The discussion was resumed on 20th August, 1949. On that day, Dr Ambedkar[50] moved an amendment to the effect that for article 280 of the Draft Constitution, the following article should be substituted, namely:—

> "280. (1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.
>
> (2) An order made as aforesaid may extend to the whole or any part of the territory of India.
>
> (3) Every order made under clause (1) of this article shall, as soon as may be after it is made, be laid before each House of Parliament."

Opposing the article, Shri Naziruddin Ahmad[51] said that suspension of the right to move any court to vindicate the rights would really mean suspension of the rights themselves. In his opinion, the powers sought to be given to the President under the proposed article 280 were absolutely unnecessary. Shri Kamath[52] suggested that "the right to move the Supreme Court or a High Court by appropriate proceedings for a writ of *habeas corpus*" should not be suspended except

[48] *Ibid.*, p. 197.
[49] *Ibid.*, p. 198.
[50] Constituent Assembly Debates, 20th August, 1949, p. 523.
[51] *Ibid.*, p. 530.
[52] *Ibid.*, pp. 534-9.

by an Act of Parliament. Shri Kamath apprehended that the "Emergency Provisions" would amount to laying the "foundation of a totalitarian State". Supporting the provisions of article 280, Shri Alladi Krishnaswami Ayyar[53] pointed out that under that article every order of the President must be laid before each House of Parliament and that there was nothing to prevent Parliament from taking any action it liked. He submitted that "as the security of the State is more important, as the liberty of the individual is based upon the security of the State and as a war cannot be carried on under the principles of Magna Carta, or principles of individual freedom, particularly in a country with multitudinous types of people with possibly diverse loyalties", the provisions of article 280 were very necessary. Article 280, as amended, was then put to vote and was carried.[54]

We may note here that the Executive in England has no emergency powers except under the authority of Parliament. By passing such Acts as the Defence of the Realm Act, 1914, and the Emergency Powers (Defence) Act, 1939, Parliament authorised the Executive to make regulations for the purpose of securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty might be engaged including regulations "for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm".[55] It has been held in *Liversidge* Vs. *Anderson*[56] that such detention should be upheld in the interest of the safety of the nation. It was observed by Lord Macmillan[57] in this case that--

> "the fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject. Rather the contrary. However, in a time of emergency, when the life of the whole nation is at stake, it may well be

[53] *Ibid.*, pp. 515-7.
[54] *Ibid.*, p. 554. This became article 359 of the Constitution of India.
[55] Emergency Powers (Defence) Act. 1939, Sec. 1.
[56] The All England Law Reports, 1941, p. 338.
[57] *Ibid.*, p. 366.

> that a regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the courts would be slow to attribute to a peacetime measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote, rather than to defeat, its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace-time as well as in war time."

But in England the right of access to the court has never been taken away and the relaxation from the rule of law is held justified only during emergency. In this connexion we may refer to the following observation of Lord Macmillan:[58]

> "We have had good reason to realise the truth of Cicero's adage that amidst the clash of arms the laws are silent. The still, small voice of the law is quelled when men kill and destroy in defiance of its dictates. What we have to do is to restore the reign of law, to reseat justice on her throne, to cause right once more to prevail over wrong. The process of re-establishing the rule of law once it has been shattered is slow and difficult; it is so much easier to destroy than to rebuild. But until the world once more becomes law-abiding it cannot hope to regain peace and happiness."

We may now refer to the Constitution of the United States of America. Section IX of Article 1 says—

> "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Thus, the writ of *habeas corpus* in the United States of America cannot be suspended when there is "internal disturbance" and a threatened invasion would not justify the suspension of the writ. With regard to fundamental rights other than the right of *habeas corpus*, there is no provision in

[58] Article in 53 C.W.N., CXXXIII.

the Constitution of the United States of America corresponding to the provisions of article 279 of the Draft Constitution, as adopted by the Constituent Assembly. It has, however, been observed by the Supreme Court of the United States of America that "when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."[59]

We may now come back to articles 279 and 280 of the Draft Constitution, as adopted by the Constituent Assembly. These articles virtually provided for suspension of some or even all of the fundamental rights during emergency. We think that it was not an unwise decision of the Constituent Assembly to adopt these two articles. The justification lay in the maxims: (1) *salus populi suprema lex*, and (2) *inter arma silent leges*. It should be noted that the Constituent Assembly decided that the order of the President suspending the right to move the court for the enforcement of fundamental rights should not be made final and that such order should be laid before Parliament. Thus, it would be within the competence of Parliament to revoke the order of the President. Articles 275, 279 and 280 of the Draft Constitution, as adopted by the Constituent Assembly, became respectively articles 352, 358 and 359 of the Constitution of India.

We may mention in this connexion that on 8th September, 1962[60] the Chinese invaded the northern border of India and that this invasion constituted a threat to the security of India. Hence, on 26th October, 1962, the President of India issued a Proclamation,[61] under article 352 of the Constitution, declaring that a grave emergency existed whereby the security of India was threatened by "external aggression". Article 352 of the Constitution of India states that a Proclamation shall

[59] *Schenck* vs. *U.S.* (1919) 249 U.S. 47 (52).

[60] See Lok Sabha Debates, November 8, 1962, column 111.

[61] The following Proclamation was issued:-

"In exercise of the powers conferred by clause (1) of article 352 of the Constitution, I, Sarvapalli Radhakrishnan, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by external aggression.

S. Radhakrishnan,
President."

See the *Gazette of India, Extraordinary*, Part II, Section 3, sub-section (i), dated October 26, 1962, G.S.R. 1415.

be laid before each House of Parliament and that the Proclamation "shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament". The Proclamation was, therefore, laid before each House of Parliament.[62] On 8th November, 1962, Pandit Jawaharlal Nehru, Prime Minister of India, moved the following resolution in the Lok Sabha, namely:

> "This House approves the Proclamation of Emergency issued by the President on the 26th of October, 1962, under clause (1) of article 352 of the Constitution."

This resolution was unanimously adopted by the Lok Sabha on 14th November, 1962.[63] Similar resolution was moved in the Rajya Sabha by Shri Lal Bahadur Shastri, Minister of Home Affairs, on 8th November, 1962, and the resolution was adopted by the Rajya Sabha on 13th November, 1962.[64] On 3rd November, 1962, the President issued an order, under article 359 of the Constitution of India, declaring that "the right of any person to move any court for the enforcement of the rights conferred by article 21 and article 22 of the Constitution shall remain suspended for the period during which the Proclamation of Emergency issued under clause (1) of article 352 thereof on the 26th October, 1962, is in force, if such person has been deprived of any such rights under the Defence of India Ordinance, 1962 (4 of 1962) or any rule or order made thereunder".[65] This order was laid before each House of Parliament as required by clause (3) of article 359.[66] On 11th November, 1962, this order was amended and article 14 was included therein.[67]

[62] See Lok Sabha Debates, November 8, 1962, column 97, and Parliamentary Debates, Rajya Sabha, November 8, 1962, column 188.

[63] See Lok Sabha Debates, November 8, 1962, column 106 and November 14, 1962, column 1672.

[64] See Parliamentary Debates, Rajya Sabha, November 8, 1962, column 196, and November 13, 1962, column 993.

[65] See the *Gazette of India, Extraordinary*, Part II, Sec. 3, sub-sec. (i), dated November 3, 1962. G.S.R. 1464.

[66] See Lok Sabha Debates, November 8, 1962, column 97, and Parliamentary Debates, Rajya Sabha, November 8, 1962, column 195.

[67] See the *Gazette of India, Extraordinary*, Part II, Sec. 3, sub-sec., (i), dated November 11, 1962, G.S.R. 1510.

The Defence of India Ordinance, 1962, was promulgated by the President of India on 26th October, 1962, in order to "provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences". In exercise of the powers conferred by section 3 of this Ordinance[67A] the Central Government framed the Defence of India Rules, 1962. It was observed by our Supreme Court in *Makhan Singh* vs. the *State of Punjab*[68] that the order of the President, dated 3rd November, 1962, precluded a citizen from moving any court for the enforcement of the rights specified in the said order and that it would not be open to any citizen to urge that the Defence of India Act, 1962, and the Rules framed thereunder were void on the ground that they offended against the said fundamental rights. In this case, the appellants were detenues and were detained under clause (b) of sub-rule (1) of rule 30 of the Defence of India Rules, 1962,[69] by the State Governments of the Punjab and Maharashtra. These detenues filed petitions before the High Courts of the Punjab and Bombay under clause (b) of sub-section (1) of section 491 of the Code of Criminal Procedure,[70] alleging that they had been illegally and improperly detained. Their contention was that clause (b) of sub-rule (1) of rule 30 of the Defence of India Rules, 1962, under which they were detained, was invalid because it contravened their fundamental rights guaranteed under articles 14, 21 and 22 of the Constitution. The High Courts of the Punjab and Bombay dismissed the petitions on the ground

[67A] The Ordinance was replaced by the Defence of India Act, 1962.

[68] See A.I.R., 1964, S.C., 381.

[69] Rule 30 (1) (b) of the Defence of India Rules states:-

"(1) The Central Government or the State Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, India's relations with foreign powers, the maintenance of peaceful conditions in any part of India or the efficient conduct of military operations, it is necessary so to do, may make an Order—

(a) .....

(b) directing that he be detained;"

[70] Section 491 (1) (a) and (b) of the Code of Criminal Procedure states—

"(1) Any High Court may, whenever it thinks fit, direct—

(a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;

(b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;"

that the order of the President, dated 3rd November, 1962, precluded them from moving the High Courts under clause (b) of sub-section (1) of section 491 of the Code of Criminal Procedure. Similar petitions were also filed before the Allahabad High Court. But the Allahabad High Court took a contrary view and directed the release of the detenues. The matter went up to the Supreme Court. It was held by the Supreme Court that "the proceedings taken on behalf of the appellants before the respective High Courts challenging their detention on the ground that the impugned Act and the Rules are void because they contravene Arts. 14, 21 and 22 are incompetent for the reason that the fundamental rights which are alleged to have been contravened are specified in the Presidential Order and all citizens are precluded from moving any Court for the enforcement of the said specified rights".[71] The Supreme Court also held that the Punjab and the Bombay High Courts were "right in coming to the conclusion that the applications made by the detenues for their release under S. 491 (1) (b), Cr. P. C. are incompetent in so far as they seek to challenge the validity of their detentions on the ground that the Act and the Rule under which they are detained suffer from the vice that they contravene the fundamental rights guaranteed by Arts. 14, 21 and 22 (4), (5) and (7)".[72]

We may now come back to the Constituent Assembly.

On 16th October, 1949, Dr B. R. Ambedkar, Chairman of the Drafting Committee, moved an amendment for the insertion of the following new article, namely:—[73]

> "280A. (1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a proclamation make a declaration to thatr effect.
>
> (2) The provisions of clause (2) of article 275 of this Constitution shall apply in relation to a proclamation issued under clause (1) of this article as they apply in relation to a Proclamation of Emergency issued under clause (1) of the said article 275.

[71] *Makhan Singh* vs. the *State of Punjab*, A.I.R., 1964, S.C., 381 (398).
[72] *Ibid.*, p. 405.
[73] Constituent Assembly Debates, 16th October, 1949, p. 361.

(3) During the period any such proclamation as is mentioned in clause (1) of this article is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(4) Notwithstanding anything contained in this Constitution—

(a) any such direction may include-

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

(ii) a provision requiring all Money Bills or other Bills to which the provisions of article 182 of this Constitution apply to be reserved for the consideration of the President after they are passed by the Legislature of the State;

(b) it shall be competent for the President during the period any proclamation issued under clause (1) of this article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the judges of the Supreme Court and the High Courts.

(5) Any failure to comply with any directions given under clause (3) of this article shall be deemed to be a failure to carry on the Government of the State in accordance with the provisions of this Constitution."

In the opinion of Prof. Shibban Lal Saksena,[74] although the article was an "extraordinary one" and provided for financial emergency, in the existing state of affairs in the country it was necessary that the executive should have the power proposed under the article. Shri H. V. Kamath,[75] on the other hand, felt that the danger to economic stability or credit of India or any part thereof should not be regarded

[74] *Ibid.*, p. 362.
[75] *Ibid.*, p. 363.

as an adequate ground for the proclamation of emergency. Shri Brajeshwar Prasad[76] said that provincial autonomy should completely be suspended during the period of a financial crisis. Supporting the provisions of the article, Shri K. M. Munshi, a member of the Drafting Committee, said that[77] the article was "the realization of one supreme fact that the economic structure of the country is one and indivisible. If a province breaks financially, it will affect the finances of the Centre: if the Centre suffers, all the provisions will break. Therefore, the inter-dependence of the provinces and the Centre is so great that the whole financial integrity of the country is one and a time might arise when unitary control might be absolutely necessary". The article was then put to vote and was carried.[78]

After the conclusion of the Second Reading of the Draft Constitution, the President of the Assembly, under sub-rule (1) of rule 38R[79] of the Constituent Assembly Rules, referred[80] the Draft Constitution with amendments to the Drafting Committee with instructions "to carry out such re-numbering of the articles, clauses and sub-clauses, such revision of punctuation and such revision and completion of the marginal notes thereof as may be necessary, and to recommend such formal or consequential or necessary amendments to the Constitution as may be required". On 3rd November, 1949, the Drafting Committee submitted its report[81] in which it recommended certain changes in the Draft Constitution. It pointed out that in certain articles power had been given to the Government

[76] *Ibid*., p. 365.
[77] *Ibid*., p. 371.
[78] *Ibid*., p. 373. This became article 360 of the Constitution of India.
[79] Sub-rule (1) of rule 38R laid down as follows:—
"38R. (1) When a motion that the Constitution be taken into consideration has been carried and the amendments to the Constitution moved have been considered, the President shall refer the Constitution as amended to the Drafting Committee referred to in sub-rule (1) of rule 38-I, with instructions to carry out such re-numbering of the articles, clauses and sub-clauses, such revision of punctuation and such revision and completion of the marginal notes thereof as may be necessary, and to recommend such formal or consequential or necessary amendments to the Constitution as may be required." (Constituent Assembly Debates, 15th October, 1949, p. 311).
[80] Constituent Assembly Debates, 17th October, 1949, p. 457. Constituent Assembly of India, Reports of Committees, Third Series, p. 246.
[81] Constituent Assembly of India, Reports of Committees, Third Series, pp. 246-9.

of India to give directions to the States in various matters and that in some of those articles[83] it had been mentioned that the failure to give effect to those directions would be deemed to be a failure to carry on the Government of the State in accordance with the provisions of the Constitution. The Drafting Committee felt that that particular provision should be put in a separate article, namely, article 365, which stated that if any State "failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with provisions of this Constitution". The implication was that article 278[84] would be at once brought into operation against the 'recalcitrant State" and that the President would take action under the provisions of that article. Serious objections were taken by some of the members of the Constituent Assembly on the ground that such a provision would invest the Central Government with "absolutely arbitrary power"[85] which might be used to the detriment of the States. In the opinion of some other members, however, the provision of the proposed article was necessary for the unity, stability and vigour of the entire system of Government of our country.[86] It was, we think, rightly pointed out by a member[87] that in India the danger was "not of arbitrary power being vested in the Centre", but the danger was, as the history of India would bear "ample testimony to it, that fissiparous tendencies may gather momentum and as in the past they have led to the downfall of empires and kingdoms", they might "lead us to same fate" in future. The recommendation of the Drafting Committee was accepted by the Assembly and article 365 was adopted on 16th November, 1949.[88]

[82] Articles 233, 234, 276, 280A, 306B of the Draft Constitution.
[83] Articles 280A, 306B, of the Draft Constitution.
[84] This became article 356 of the Constitution of India.
[85] Constituent Assembly Debates, 15th November, 1949, pp. 512-13.
[86] *Ibid.*, pp. 515-18.
[87] Shri Brajeshwar Prasad, Constituent Assembly Debates, 15th November, 1949, p. 515.
[88] Constituent Assembly Debates, 16th November, 1949, p. 589.

Chapter X

RELATIONS BETWEEN THE UNION AND THE STATES (CONTINUED)

CONCLUSION

In the two preceding chapters we have referred to the deliberations of the Constituent Assembly on the relations between the proposed Indian Union and its constituent States under normal conditions and also under abnormal situations. Now the question is: What was the nature of the Constitution that was decided upon by the Constituent Assembly? In other words, whether the Constituent Assembly decided that the new Constitution of India should be unitary or federal, or something in between the two? We may begin from the Cabinet Mission's Statement of 16th May, 1946. We have seen that the Cabinet Mission recommended a federal form of Constitution for India with defined powers for the Centre.[1] In January, 1947, the Constituent Assembly, by adopting the Objectives Resolution, decided[2] that the future Constitution of India should be federal and that there should be autonomous units which should have residuary powers. We have stated before that the political situation of the country rapidly changed since then and that it was agreed by the Congress and the Muslim League that India should be partitioned.[3] The Union Powers Committee, which submitted its supplementary report in July 1947, considered the changed political conditions of the country and came to the conclusion that the "soundest framework of our Constitution" was "a federation with a strong Centre".[4] The Union Constitution Committee also recommended the establishment of a federal form of Government in India. We have also stated before that the main recommendations of those Committees were accepted by the Constituent Assembly and that the

[1] Paragraph 15 of the Statement of May 16, 1946, See Appendix 18.
[2] See pp. 33-34.
[3] See pp. 44-48.
[4] Reports of Committees, First Series, p. 66.

Drafting Committee incorporated the decisions of the Constituent Assembly in the Draft Constitution.

While introducing the Draft Constitution in the Constituent Assembly on 4th November, 1948, Dr B. R. Ambedkar, Chairman of the Drafting Committee, explained[5] the nature of the Constitution contemplated in the Draft Constitution. The Draft Constitution, he said, was a Federal Constitution inasmuch as it sought to establish what might be called a "Dual Polity". The dual polity under the proposed Constitution would consist of the Union at the Centre and the States at the "periphery", each endowed with certain powers to be exercised in the field assigned to it by the Constitution. He then referred to the American Constitution and said that this dual polity resembled the dual polity in the Constitution of the United States of America. "The American polity," he observed, "is also a dual polity, one of it is known as the Federal Government and the other States which correspond respectively to the Union Government and the States Government of the Draft Constitution." He added that under the Constitution of the United States of America the Federal Government was not "a mere league of the States" nor were the States mere administrative units or agencies of the Federal Government. In the same way, under the Draft Constitution the Indian Union was not a league of the States nor were the States mere administrative units or agencies of the Union Government. He, however, said that the similarities between the proposed Constitution of India and the Constitution of the United States of America ended there.

Justifying the provisions in the Draft Constitution for a strong Central authority, Dr Ambedkar said[6] that it was difficult to prevent the Centre from becoming strong, because the conditions of the world were such that centralisation of powers was inevitable. He referred to the Constitution of the United States of America and remarked that, notwithstanding the very limited powers given to the Federal Government by the Constitution, the Federal Government had "out-grown its former self" and had "overshadowed and

[5] Constituent Assembly Debates, 4th November, 1948, pp. 33-34.
[6] *Ibid.*, p. 42.

eclipsed" the Governments of the States. The same views were expressed by Shri Alladi Krishnaswami Ayyar, a member of the Drafting Committee, on 8th November, 1948[7]. He said that in view of the complexity of industrial, commercial and financial conditions of the modern world and the need for large scale defence programmes, there was an inevitable tendency in every federation to strengthen the Federal Government. The Drafting Committee, he observed, had taken note of that tendency and had, therefore, instead of leaving the Supreme Court to strengthen the Centre by a "process of judicial interpretation", made provisions in the Draft Constitution itself for a strong Centre.

Speaking about the special features of the proposed Indian federation, Dr Ambedkar said[8] that all federal systems including the American federal system were placed "in a tight mould of federalism". Whatever might be the circumstances they could not change their form and shape. They could never be unitary. But the Draft Constitution could be "both unitary as well as federal according to the requirements of time and circumstances". In normal times, he observed, it was framed to work as a federal system. But in times of war it was "so designed as to make it work as though it was a unitary system". Once the President of India issued a Proclamation of Emergency "the whole scene can become transformed and the State becomes a unitary State". The Union Government, when emergency was proclaimed, could claim, if it wanted: (a) the power to legislate upon any matter even though it might be in the State List, (b) the power to give directions to the States as to how they should exercise their executive authority in matters which were within their jurisdiction, (c) the power to vest authority for any purpose in any officer, and (d) the power to suspend the financial provisions of the Constitution. He concluded that no federal system possessed such a power to convert itself into a Unitary State.

From these statements and from what we have shown in the last two chapters it is clear that the proposed Constitution was not really intended to be a truly Federal Constitution. It was intended to be quasi-federal in character.

[7] Constituent Assembly Debates, 8th November, 1948, p. 335.
[8] Constituent Assembly Debates, 4th November, 1948, pp. 34-5.

It is true that the authors of our Constitution vested overriding powers in the Centre. But they did not intend to make those overriding powers to be the normal feature of the proposed Constitution. In this connection we may refer to what Dr Ambedkar, Dr Rajendra Prasad and Shri Alladi Krishnaswami Ayyar observed in the Constituent Assembly in November, 1949, during the Third Reading of the Constitution Bill. Dr Ambedkar said[9] that the charge that the Centre had been given the power to override the States should be admitted. But he pointed out that those overriding powers did not form the normal feature of the Constitution. Their use and operation were expressly confined to emergency only. In his opinion, the "residual loyalty of the citizen in an emergency must be to the Centre and not to the constituent States". For it was only the Centre which could work for a common end and for the general interests of the country as a whole. Herein, he added, lay the justification for giving to the Centre certain overriding powers to be used in an emergency. Dr Rajendra Prasad, President of the Constituent Assembly, said[10] that such powers as had been given to the Centre "to act within the sphere of the States" related "only to emergencies, whether political, financial or economic". He, however, thought that there would not be any tendency on the part of the Centre to "grab" more powers than what might be necessary for the good administration of the country as a whole. Shri Alladi Krishnaswami Ayyar,[11] a member of the Drafting Committee, remarked that special provisions for the intervention by the Centre in the field assigned to the States had been inserted in the proposed Constitution in order to "meet unforeseen national emergencies and economic situations" of the country. He reminded the members of the Assembly that the whole concept of federalism was "undergoing a transformation". As a result of the impact of social and economic forces, the rapid means of communication and the close relation between the different units in a federation the ideas about federation had changed. He pointed out that the problem was one which should be faced by each country

[9] Constituent Assembly Debates, 25th November, 1949, pp. 976-77.
[10] Constituent Assembly Debates, 26th November, 1949, p. 991.
[11] Constituent Assembly Debates, 23rd November, 1949, pp. 838-9.

according to the peculiar conditions obtaining in that country and not "according to *a priori* or theoretical considerations". He observed that "in dealing with a matter like this, we cannot proceed on the footing that federalism must necessarily be of a defined or a standard type". We agree with this observation of Shri Alladi Krishnaswami Ayyar. In fact, after the partition of the country and the integration and the merger of the pre-existing Indian States with the neighbouring Provinces, the case for an undiluted federalism in India became weak in the year 1949 and the framers of our Constitution were guided mainly by the peculiar needs and requirements of our country.[12] Again, federal system of Government is not necessarily a good Government under all circumstances. We may note in this connexion the observation of Prof. Kenneth C. Wheare on the Indian federation. He said,[13] among other things:

> "While, therefore, the Indian Constitution may not be strictly speaking "federal", in the sense in which the Constitution of the United States is called "federal', it does not follow that it is any worse for that. Federalism is not necessarily good Government; it is at the most a device which may secure good government in some cases. The framers of the Indian Constitution may have done well in not following slavishly any existing federal Constitution. They have chosen rather to make use of such elements in federal Constitutions as they thought likely to be of value to them."

In fact, what was needed for our country was a strong Centre with adequate powers for the States and the Constituent Assembly of India provided for that.

[12] See in this connection Alan Gledhill, *The Republic of India*, pp. 91-92.
[13] *Allahabad Law Journal*, Vol. XLVIII, 10th February, 1950.

CHAPTER XI

THE JUDICIARY

I

In this chapter we propose to deal with the deliberations of the Constituent Assembly with regard to the future judicial system in our country.

II

We shall first begin with the Supreme Court.

The Union Constitution Committee, to which we have already referred, had appointed an *ad hoc* Committee to consider the question of the constitution and powers of the Supreme Court. The *ad hoc* Committee had recommended that[1] the Supreme Court should be vested with: (*a*) exclusive jurisdiction in respect of disputes between the Union and a Unit or between the Units *inter se*; (*b*) jurisdiction to decide finally, though not necessarily in the first instance, upon all matters arising from treaties between the Union and a foreign State; (*c*) jurisdiction for the purpose of enforcing fundamental rights; (*d*) appellate jurisdiction, and (*e*) advisory jurisdiction. In the opinion of the *ad hoc* Committee, the Supreme Court should not have exclusive jurisdiction for the purpose of enforcing fundamental rights because, in its opinion, the citizens would be practically denied the fundamental rights if, whenever they were violated, the citizens were compelled to approach the Supreme Court from which they could obtain relief. The *ad hoc* Committee had also suggested that the appellate jurisdiction of the Supreme Court should be similar to that of the Privy Council. It had not thought it advisable to leave the power of appointing judges to the "unfettered discretion" of the President. It had suggested two alternative methods, both of which involved the setting up of a panel of eleven composed of "some of the

[1] Constituent Assembly of India. Reports of Committees, First Series, pp. 60-63.

Chief Justices of the High Courts of the constituent units, some members of both the Houses of the Central Legislature and some of the law officers of the Union"[2]. According to one method, the President, in consultation with the Chief Justice of the Supreme Court, should nominate a person for appointment as a judge and the nomination should be confirmed by at least seven members of the panel. According to the other method, the panel should recommend three names and the President, in consultation with the Chief Justice, should select one of them for appointment as a judge of the Supreme Court.

The Union Constitution Committee had accepted the recommendations of the *ad hoc* Committee with regard to the jurisdiction and powers of the Supreme Court, but it had suggested in its report a different method for the appointment of a judge of the Supreme Court. According to its suggestion, a judge of the Supreme Court should be "appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court as also such judges of the High Courts as may be necessary for the purpose." The Assembly accepted that recommendation of the Union Constitution Committee.[3]

The *ad hoc* Committee or the Union Constitution Committee had not suggested any procedure for the removal of a judge. During the discussion of the report two procedures were suggested, one by Shri Alladi Krishnaswami Ayyar and the other by Shri Ananthasayanam Ayyangar. The suggestion of Shri Ayyar was as follows:[4]

> "A judge of the Supreme Court of India shall not be removed from his office except by the President on an address from both the Houses of Parliament of the Union in the same session for such removal on the ground of proved misbehaviour, or incapacity. Further provision may be made by federal law for the procedure to be adopted in that behalf."

[2] *Ibid.*, p. 62.
[3] *Ibid.*, p. 52. See also Constituent Assembly Debates, 29th July, 1947, pp. 941, 944, 959.
[4] Constituent Assembly Debates, 29th July, 1947, p. 941.

Shri Ananthasayanam Ayyangar suggested the following procedure for the removal of a judge, namely[5]:

> "A judge of the Supreme Court may be removed from office by the President on the ground of misbehaviour or of infirmity of mind or body, if, on reference being made to it (Supreme Court) by the President, a special tribunal appointed by him for the purpose, from amongst judges or ex-judges of the High Courts or the Supreme Court, report that the judge ought on any such grounds to be removed."

The Assembly accepted the procedure suggested by Shri Ayyar.[6]

The decisions of the Constituent Assembly on the report of the Union Constitution Committee dealing with the future Union Judiciary had been incorporated by the Drafting Committee in articles 103 to 123 of the Draft Constitution. Article 103 was discussed on 24th May, 1949, articles 105 to 108, 115 to 118, 120, 122 were discussed on 27th May, 1949, articles 109, 110 were discussed on 3rd June, 1949, articles 111, 112, 113, 114, 119, 121, 123 were discussed on 6th June, 1949 and article 104 was discussed on 30th July, 1949. Article 103 laid down that every judge of the Supreme Court shall be appointed by the President after consultation with "such of the judges of the Supreme Court and of the High Courts in the States as may be necessary for the purpose and shall hold office until he attains the age of sixty-five years: provided that in the case of appointment of a judge, other than the Chief Justice, the Chief Justice of India shall always be consulted." With regard to removal of a judge, the article provided that a judge of the Supreme Court should not be removed from his office except by an order of the President passed "after an address supported by not less than two-thirds of the members present and voting has been presented to the President by both Houses of Parliament in the same session for such removal on the ground of proved

[5] *Ibid.*, p. 948.
[6] *Ibid.*, pp. 957-8.

misbehaviour or incapacity". It further laid down that Parliament might by law regulate "the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a judge". During the discussion of that article four issues were raised, namely, (i) how the judges should be appointed, (ii) what should be the age of retirement; (iii) whether the judges should accept any office after retirement; and (iv) how the judges should be removed. With regard to the first issue, three different proposals were made with a view to making the appointment of judges free from any party influence. The first proposal was that the Chief Justice should be appointed by the President and the appointment should be "subject to confirmation by two-thirds majority of the total number of members of Parliament assembled in a joint session of both the Houses of Parliament".[7] The second proposal was that appointment of a judge, other than the Chief Justice, should be made by the President "with the concurrence of the Chief Justice of India".[8] In the opinion of the member[9] who made the proposal, in the matter of appointment of judges the President would be guided by the Prime Minister or the Council of Ministers who would necessarily belong to a political party and as such the decision of the President was likely to be influenced by party considerations. It was, therefore, necessary that the concurrence of the Chief Justice should be made a pre-requisite for the appointment of a judge of the Supreme Court in order to guard against party influence. According to the third proposal, every judge of the Supreme Court should be appointed by the President "after consultation with the Council of States and such of the Judges of the Supreme Court and of the High Courts in the States as may be necessary for the purpose".[10] With regard to the second issue, it was suggested by a member[11] that a judge of the Supreme Court should hold office during "good behaviour or until he resigns".[12] It was pointed out that that

[7] Constituent Assembly Debates, 24th May, 1949, p. 230. The proposal was made by Prof. Shibban Lal Saksena.
[8] *Ibid.*, p. 238.
[9] Shri Mahboob Ali Baig Sahib.
[10] Constituent Assembly Debates, 24th May, 1949, p. 234.
[11] Prof. K. T. Shah.
[12] Constituent Assembly Debates, 24th May, 1949, p. 235.

was the practice in England and in the United States of America. With regard to the third issue, *viz.*, the question of acceptance of office by the judges after retirement, two amendments were moved suggesting that any person who had once been appointed a Judge of the Supreme Court should be "debarred from any executive office under the Government of India or under that of any unit".[13] Regarding the procedure for the removal of a Judge of the Supreme Court, only one amendment was moved and that was moved by Dr Ambedkar,[14] Chairman of the Drafting Committee. Through his amendment he suggested that a judge of the Supreme Court should not be removed from office except by an order of the President passed after an address "by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President" in the same session for such removal on the ground of proved misbehaviour or incapacity.

In his reply[15] to the debate, Dr Ambedkar referred to the methods of appointment of judges in England and in the United States of America. In England, he said, the judges were appointed by the Crown and in the United States of America the judges of the Supreme Court were appointed by the President with the consent of the Senate. In his opinion, it would be dangerous to leave the appointment of judges in India to be made by the President without any kind of reservation or limitation. He also thought that to make the appointment of judges subject to the concurrence of the Legislature was not a very suitable provision because, in his opinion, apart from being cumbrous, the method involved the possibility of the appointment being influenced by political considerations. We agree with these observations of Dr Ambedkar. Justifying the provisions of article 103 of the Draft Constitution, he said that the draft article steered "a middle course". It did not make the President the supreme and the absolute authority in the matter of making appoint-

[13] *Ibid.*, p. 239.
[14] *Ibid.*, p. 243.
[15] *Ibid.*, pp. 257-60.

ments. It did not also import the influence of the Legislature. The provision in the article was, he pointed out, that there should be consultation with persons who were, *ex-hypothesi*, well qualified to give proper advice in that matter. Opposing the suggestion that the judges should be appointed by the President with the concurrence of the Chief Justice, Dr Ambedkar observed that the Chief Justice was undoubtedly a very eminent person. But, after all, the Chief Justice was a man "with all the failings, all the sentiments and all the prejudices" which common people had and to allow the Chief Justice, practically a "veto upon the appointment of Judges" was really to transfer the authority to the Chief Justice, which the members were not prepared to vest in the President or the Government of the day. He, therefore, thought that that was also "a dangerous proposition". We may add that the provisions of the Draft Constitution regarding the appointment of judges modified the method of appointment by the executive, as obtained in England, with a view to securing complete independence of the judiciary. With regard to the question of age, Dr Ambedkar agreed[16] that sixty-five years of age could not always be regarded as "the zero hour in a man's intellectual ability". He, however, drew the attention of the members of the Assembly to the provisions of article 107 wherein it was provided that the Chief Justice might request any person, who had held the office of a judge of the Supreme Court or the Federal Court, to sit and act as a judge of the Supreme Court. There was thus, in his opinion, less possibility of losing the services of a talented retired judge of the Supreme Court. Speaking on the question of acceptance of office by the judges after retirement,[17] Dr Ambedkar said that there were many cases where "the employment of judicial talent in a specialised form" was very necessary for certain purposes. He was further of opinion that the relationship between the executive and the judiciary under the proposed Constitution of India would be "so separate and distinct" that the executive would hardly get any chance of influencing the judgment of the judiciary.[18] He opposed

[16] *Ibid.*, p. 259.
[17] *Ibid.*
[18] *Ibid.*, p. 260.

the suggestion that an ex-judge of the Supreme Court should be "debarred from any executive office under the Government of India or under that of any unit". All the amendments, except the amendment of Dr Ambedkar with regard to the removal of the Judges, were negatived by the Assembly. Clause (3) of article 103 laid down the qualifications necessary for the appointment of a judge. According to this clause, a person would not be qualified for appointment as a judge unless he was a citizen of India and had been for at least five years a judge of a High Court or had been for at least ten years an advocate of a High Court. It was decided by the Assembly that a person who had been a distinguished jurist might also be appointed a judge of the Supreme Court. The Assembly also adopted clause (7) of article 103 of the Draft Constitution which stated that a person who had held office as a judge of the Supreme Court should not plead or act in any court or before any authority within the territory of India.[19] Article 103 of the Draft Constitution, as adopted by the Constituent Assembly, became article 124 of the Constitution of India.

The reply of Dr Ambedkar on the question of acceptance of office by an ex-judge was not, we submit, very convincing. We also submit that the Constituent Assembly should have accepted the suggestion that an ex-judge should be debarred from accepting any executive office under the Government of India or the Government of any State. In order to maintain the independence of the judges it is necessary that there should be no temptation before a judge of the possibility of his being offered any executive post even after retirement. A judge when he retires, should not look up to Government for appointment.[20] The Constituent Assembly debarred a person who had held office as a judge from pleading or acting in any court or before any authority. The intention presumably was to keep the judges away from patronage from any quarter and to ensure the exercise by the judges of their functions without fear or favour. That intention seems to

[19] *Ibid.*, pp. 262, 263.

[20] See in this connection the Law Commission of India, Fourteenth Report, Vol. I, 1958, pp. 45-46.

us to have been largely defeated by not debarring an ex-judge from accepting any executive post.

The Drafting Committee had proposed, following the practice prevalent in the United States of America and the United Kingdom, that in certain circumstances, retired judges might be invited to serve in particular cases in the Supreme Court.[21] The proposal, which had been incorporated in article 107 of the Draft Constitution, was accepted by the Assembly and it decided that the Chief Justice of the Supreme Court might at any time "with the previous consent of the President"[22] request any person, who had held the office of a judge of the Supreme Court or of the Federal Court, "to sit and act" as a judge of the Supreme Court.[23] The Drafting Committee had not made any provision in the Draft Constitution "to define the status of the Supreme Court". The Assembly, therefore, decided that the Supreme Court should be a Court of records and should have all the powers of such a Court including the power to punish for contempt of itself.[24]

Articles 109 to 114 of the Draft Constitution dealt with the question of jurisdiction of the Supreme Court. Article 109 provided for original jurisdiction of the Supreme Court. The article laid down as follows:

> "109. Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute—
>
> (*a*) between the Government of India and one or more States, or
> (*b*) between the Government of India and any State or States on one side and one or more other States on the other; or
> (*c*) between two or more States,
>
> if in so far as the dispute involves any question (whether

[21] Reports of Committees of the Constituent Assembly of India, Third Series, p. 174.
[22] Constituent Assembly Debates, 27th May, 1949, p. 377.
[23] *Ibid.*, p. 378. This became article 128 of the Constitution of India.
[24] Constituent Assembly Debates, 27th May, 1949, p. 383. This became article 129 of the Constitution of India.

of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to—

(i) a dispute to which a State for the time being specified in Part III of the First Schedule is a party, if the dispute arises out of any provision of a treaty, agreement, engagement, sanad or other similar instrument which was entered into or executed before the date of commencement of this Constitution and has, or has been, continued in operation after that date;

(ii) a dispute to which any State is a party, if the dispute arises out of any provision of a treaty, agreement, engagement, sanad or other similar instrument which provides that the said jurisdiction shall not extend to such a dispute."

On 3rd June, 1948, the Assembly decided to delete[25] clause (i) of the proviso to article 109. At that time it was thought that clause (i) of the proviso, which sought to put the pre-existing Indian States on a footing different from other States, was unnecessary. On 14th October, 1949, however, the Assembly thought that clause (i) of the proviso should find a place in the proposed Constitution of India, and, accordingly, the proviso was again inserted in that article.[26] It may be mentioned here that by the Constitution (Seventh Amendment) Act, 1956, clauses (i) and (ii) of the proviso were combined and the following proviso was inserted, namely:—

"Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, *sanad*, or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute."

[25] Constituent Assembly Debates, 3rd June, 1949, pp. 588-90.

[26] Constituent Assembly Debates, 14th October, 1949, p. 273. This became article 131 of the Constitution of India.

We have stated before that the Constitution (Seventh Amendment) Act, 1956, was passed in order to implement the scheme of the reorganisation of the States. The amendment of the proviso was consequential on the disappearance of Part B States as such.[27]

Articles 110, 111 and 112 of the Draft Constitution defined the conditions under which the Supreme Court might hear appeals. Articles 110 and 111 laid down as follows:

> "110. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in a State, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution.
>
> (2) Where the High Court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution, grant special leave to appeal from such judgment, decree or final order.
>
> (3) Where such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court not only on the ground that any such question as aforesaid has been wrongly decided, but also on any other ground.
>
> *Explanation.*—For the purposes of this article, the expression "final order" includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.
>
> 111. (1) An appeal shall lie to the Supreme Court from a judgment, decree or final order in a civil proceeding of a High Court in the territory of India except the States for the time being specified in Part III of the First Schedule, if the High Court certifies—
>
> (*a*) that the amount or value of the subject-matter of the dispute in the court of first instance and

[27] See Statement of Objects and Reasons, the *Calcutta Gazette*, September 3, 1956, p 141.

still in dispute on appeal was and is not less than twenty thousand rupees; or

(*b*) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(*c*) that the case is a fit one for appeal to the Supreme Court;

and, where the judgment, decree or final order appealed from affirms the decision of the court immediately below, in any case other than one referred to in clause (*c*), if the High Court further certifies that the appeal involves some substantial question of law.

(2) Notwithstanding anything contained in article 110 of this Constitution, any party appealing to the Supreme Court under clause (1) of this article may urge as one of the grounds in such appeal that the case involves a substantial question of law as to the interpretation of this Constitution which has been wrongly decided."

A controversy began when Shri Naziruddin Ahmad suggested through an amendment the deletion of the words "as to the interpretation of this Constitution" from clauses (1) and (2) of article 110,[28] thereby seeking to extend the jurisdiction of the Supreme Court. Taking their hint from this amendment several members of the Assembly[29] regretted the alleged discrimination shown in the Draft Constitution in favour of civil appeals. Criminal appeals, they argued, had a greater claim on the Supreme Court than civil appeals, because the former often concerned questions of life and death. It was said that the articles, as drafted by the Drafting Committee, appeared to attach greater importance to property than to life. Two former High Court Judges, Dr P. K. Sen[30] and Dr Bakshi Tek Chand[31] agreed with the principle underlying this grievance, though the latter emphasised that the proper place for a provision such as was being demanded,

[28] Constituent Assembly Debates, 3rd June, 1949, pp. 591-2.

[29] Pandit Thakur Dass Bhargava, Mr Frank Anthony, Shri Rohini Kumar Chowdhury, Constituent Assembly Debates, 3rd June, 1949, pp. 598, 601, 596.

[30] Constituent Assembly Debates, 3rd June, 1949, p. 604.

[31] *Ibid.*, p. 609.

lay under article 112 of the Draft Constitution. Explaining the stand of the Drafting Committee, Shri K. M. Munshi[32] and Shri A. Krishnaswami Ayyar[33] pointed out that an unrestricted right of appeal in criminal cases would flood the Supreme Court with litigations which had to be guarded against. The amendment of Shri Naziruddin Ahmad was not accepted by the House. Clauses (1) and (2) of article 110, as drafted by the Drafting Committee, were adopted by the Assembly and in clause (3) for the words "not only on the ground that any such question as aforesaid has been wrongly decided, but also", the words "on the ground that any such question as aforesaid has been wrongly decided and with the leave of the Supreme Court" were substituted.[34] The use of the words "whether in a civil, criminal or other proceeding" in clause (1) of article 110 shows that the Constituent Assembly improved upon the provisions of section 205[35] of the Government of India Act, 1935. These words clearly indicate that the jurisdiction of the Supreme Court would extend to all proceedings whenever any question relating to the interpretation of our Constitution would arise. Our Supreme Court observed in *Election Commission, India* vs. *Saka Venkata Rao*[36] that the "whole scheme" of the appellate jurisdiction of our Supreme Court clearly shows that questions relating to the interpretation of the Constitution "are placed in a special category irrespective of the nature of the proceedings in which they may arise, and a right of appeal of the widest amplitude is allowed in cases involving such questions."

While article 110 of the Draft Constitution was confined to constitutional questions only and it comprised civil, criminal and other appeals, article 111 was confined to civil appeals only on questions other than the interpretation of the Consti-

[32] *Ibid.*, p. 607.
[33] *Ibid.*, p. 595.
[34] *Ibid.*, p. 615. This became article 132 of the Constitution of India.
[35] Sub-section (1) of section 205 lays down:
"An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly".
[36] 1953 S. C. A. 203 (208).

tution. During the discussion of article 111 two members of the Drafting Committee found themselves in opposition to each other on a vital question of justice. Prof. Saksena proposed in an amendment to article 111 that the Court's jurisdiction in regard to civil appeals should be "subject to any law made by Parliament".[37] Among those who supported the proposal was the eminent jurist and a member of the Drafting Committee, Shri Alladi Krishnaswami Ayyar[38] who pleaded for elasticity in the procedure for appeals because, in his opinion, unless Parliament was given the necessary power, changes could be made only through the difficult process of amending the Constitution. Opposing his colleague on the Drafting Committee, Dr Ambedkar argued[39] that the provisions of article 111 were only a reproduction of two sections of the Civil Procedure Code,[40] and should not, therefore, be changed. The amendment of Prof. Saksena was not accepted by the Assembly and the article was adopted by it on 6th June, 1949.[41] The words "except the States for the time being specified in Part III of the First Schedule" occurring in clause (1) were deleted and after the words "twenty thousand rupees" occurring in sub-clause (*a*) of clause (1) of article 111, the words "or such other sum as may be specified in this behalf by Parliament by law" were added. On 16th October, 1949, the article was reconsidered by the Assembly and it then decided to add a proviso to clause (1) of article 111 to the effect that no appeal should lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.[42] The proviso was added with a view to restricting appeals to the Supreme Court.

It may be mentioned here that on 14th June, 1949, the Constituent Assembly decided that the Supreme Court should have appellate jurisdiction with regard to criminal matters and the following new article was adopted by it, namely:—[43]

[37] Constituent Assembly Debates, 6th June, 1949, p. 619.
[38] *Ibid.*, p. 622.
[39] *Ibid.*, pp. 631-2.
[40] Sections 109 and 110
[41] Constituent Assembly Debates, 6th June, 1949, p. 633.
[42] Constituent Assembly Debates, 16th October, 1949, p. 376. This became article 133 of the Constitution of India.
[43] Constituent Assembly Debates, 14th June, 1949, p. 857. This became article 134 of the Constitution of India.

"111A. (1) The Supreme Court shall have the power to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India—

(*a*) if the High Court has on appeal reversed the order of acquittal of an accused person and sentenced him to death; or

(*b*) if the High Court has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or

(*c*) if the High Court certifies that the case is a fit one for appeal to the Supreme Court:

Provided that an appeal under sub-clause (*c*) of this clause shall lie subject to such rules as may from time to time be made by the Supreme Court and to such conditions as the High Court may establish or require.

(2) Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law."

The article thus did not seek to confer general appellate jurisdiction upon the Supreme Court. The jurisdiction sought to be conferred was of a very limited character. Sub-clauses (*a*) and (*b*) of clause (1) confined the appellate jurisdiction of the Supreme Court only to those cases where there had been a sentence of death. It was thought that where a man was condemned to death he should have the right of appeal.[44]

Article 112 of the Draft Constitution sought to empower the Supreme Court to grant special leave to appeal from any "judgment, decree or final order in any cause or matter, passed or made by any court or tribunal in the territory of India except the States for the time being specified in Part III

[44] Constituent Assembly Debates, 14th June, 1949, pp. 853-4.

of the First Schedule, in cases where the provisions of article 110 or article 111 of this Constitution do not apply". This article was considered on 6th June, 1949. In order to remove the distinction contained in that article between different States specified in the First Schedule, the words "except the States for the time being specified in Part III of the First Schedule, in cases where the provisions of article 110 or article 111 of this Constitution do not apply" were omitted.[45] On 16th October, 1949, article 112 was reconsidered by the Assembly and the article as then adopted by the Assembly ran as follows:[46]

> "112. (1) The Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
>
> (2) Nothing in clause (1) of this article shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

Clause (2) sought to exclude from the jurisdiction of the Supreme Court any decision of any court or tribunal constituted by or under any law relating to the armed forces. The reason for inserting this article was explained by Shri T. T. Krishnamachari. The clause, he said, followed the practice obtaining in England. The matter, which had escaped the attention of the Drafting Committee at the time the article had been framed and placed before the House, was brought to the notice of the Drafting Committee by the Defence Department which convinced the Drafting Committee that a provision of that nature should find a place in the proposed Constitution.[47] In the opinion of the Law Commission of India, "the extensive discretionary jurisdiction" conferred on the Supreme Court by this article (which became article 136 of the Constitution of India) "has, on the whole, been

[45] Constituent Assembly Debates, 6th June, 1949, p. 640

[46] Constituent Assembly Debates, 16th October, 1949, p. 380. This article became article 136 of the Constitution of India.

[47] *Ibid.*, p. 376.

a most salutary provision which has led to the correction of grave injustice in many cases."[48]

The Draft Constitution did not contain any provision for review by the Supreme Court of its own judgment. It was, therefore, decided that the Supreme Court should have the power to review any judgment pronounced or passed by it.[49] It was also found that the articles of the Draft Constitution dealing with the powers of the Supreme Court did not expressly provide for appeal in income-tax cases.[50] It was thought that proceedings relating to income-tax and to acquisition of property did not lie within the purview of what were called "civil proceedings". With a view to giving the Supreme Court full powers in all proceedings which were of a civil nature, it was decided that the Supreme Court should also have jurisdiction and powers with respect to matters "in relation to which jurisdiction and powers were exercisable by His Majesty in Council immediately before the commencement of this Constitution under any existing law".[51] It was further decided that the Supreme Court should have such additional jurisdiction as Parliament might confer while legislating in respect of any of the matters included in the Union List[52] and that Parliament might confer on the Supreme Court power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any one of them, for any purposes other than those mentioned in clause (2) of article 25 (which related to the enforcement of fundamental rights) of the Draft Constitution.[53]

Article 119 of the Draft Constitution sought to empower the President to refer important questions of law or fact to the Supreme Court for consideration. Clause (1) of that article laid down that if at any time "it appears to the President

[48] See Law Commission of India, Fourteenth Report, Vol. 1, 1958, p. 47.

[49] New article 112A, Constituent Assembly Debates, 6th June, 1949, p. 640. This became article 137 of the Constitution of India.

[50] Constituent Assembly Debates, 6th June, 1949, p. 642.

[51] New Article 112B, Constituent Assembly Debates, 15th September, 1949, p. 1493 and 16th November, 1949, p. 593. This became article 135 of the Constitution of India.

[52] Constituent Assembly Debates, 6th June, 1949, p. 642. Article 114 of the Draft Constitution. This became article 138 of the Constitution of India.

[53] Constituent Assembly Debates, 27th May, 1949, p. 385. Article 115 of the Draft Constitution. This became article 139 of the Constitution of India.

that a question of law or fact has arisen, or is likely to arise, which is of such a nature and such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon". We have stated that clause (i) of the proviso to article 109 of the Draft Constitution excluded certain disputes arising out of agreements to which a State specified in Part III of the First Schedule was a party, from the original jurisdiction of the Supreme Court. But clause (2) of article 119 sought to authorise the President to refer such disputes to the Supreme Court for its opinion. Article 119 came up for discussion in the Assembly on 6th June, 1949. The Assembly then decided to delete clause (2) of article 119 from the Constitution.[54] On 14th October, 1949, that article was reconsidered by the Assembly and clause (2) was again inserted in the Constitution.[55]

Article 119 of the Draft Constitution was adopted by the Constituent Assembly without any discussion. Hence, it is not possible to say anything about the reasons for adopting that article or about the scope of that article. One of the objects presumably was to enable Government of India to obtain an authoritative opinion regarding the validity of a measure before initiating it in Parliament. Article 119, as adopted by the Constituent Assembly, became article 143 of the Constitution of India. Clause (1) of article 143 practically reproduces sub-section (1) of section 213 of the Government of India Act, 1935. We may, therefore, usefully look to the Federal Court of India for a proper understanding of the scope of article 143. From the decisions of the Federal Court in (i) *In the matter of allocation of Lands and Buildings situate in a Chief Commissioner's Province*,[56] (ii) *In the matter of Duty on Non-Agricultural Property*,[57] and (iii) *Umayal* vs. *Lakhsmi Achi*,[58] we may infer, (i) that article 143 does not impose an "obligation" on the Supreme Court to accept a reference but that the Supreme Court will always be "unwilling to

[54] Constituent Assembly Debates, 6th June, 1949, pp. 642-3.
[55] Constituent Assembly Debates, 14th October, 1949, p. 274.
[56] A.I.R. 1943, F.C. 13.
[57] 49 C.W.N. (F.R.) 9.
[58] A.I.R., 1945, F.C. 25.

decline to accept a reference"[59] under article 143, (ii) that the advisory opinion is not "in the nature of a judicial pronouncement"[60] and hence it is not binding upon other courts nor it is binding upon the referring authority, (iii) that the procedure contemplated in article 143 merely constitutes 'consultation' between the Executive and the Judiciary,[61] and (iv) that the opinion expressed by the Supreme Court would not prevent that Court from pronouncing a different opinion if the validity of the measure is challenged before that Court in a proper case.[62]

Now, the question is whether the highest Court of India should have this power of giving advisory or extra-judicial opinion on any matter. In this connection we may refer to the provisions of the Constitution of the United States of America. Article III, section 1 of that Constitution lays down that the "judicial power of the United States" shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time establish. Article III, section 2 lays down: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases effecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects". That judicial power is "the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction".[63] There is thus no provision in the Constitution of the United States of America for seeking advisory opinion from the Supreme Court and the Supreme Court has "consistently declined to exercise any powers other than those

[59] A.I.R., 1943, F.C. 14.
[60] 49 C.W.N., (F.R.) 20.
[61] 49 C.W.N., (F.R.) 20.
[62] A.I.R., 1945, F.C. 25 (36).
[63] *David Muskrat* vs. *United States*, 219 U.S. 346 (361).

which are strictly judicial in their nature".[64] We may quote the following extract from the judgment of the Supreme Court[65] of the United States of America to show that in the year 1793, the Supreme Court refused to give any advisory or extra-judicial opinion:

> "In 1793, by direction of the President, Secretary of State Jefferson addressed to the justices of the Supreme Court a communication soliciting their views upon the question whether their advice to the Executive would be available in the solution of important questions of the construction of treaties, laws of nations and laws of the land, which the Secretary said were often presented under circumstances which 'do not give a cognizance of them to the tribunals of the country'. The answer to the question was postponed until the subsequent sitting of the Supreme Court, when Chief Justice Jay and his associates answered to President Washington that, in consideration of the lines of separation drawn by the Constitution between the three departments of government, and being judges of a court of last resort, afforded strong arguments against the propriety of extra-judicially deciding the questions alluded to, and expressing the view that the power given by the Constitution to the President, of calling on heads of departments for opinions, 'seems to have been purposely, as well as expressly, united to the executive departments' ".

We may now see the position in England. In the year 1928 some members of the House of Lords seriously opposed[66] the provisions of the proposed clause 4 (1) of the Rating and Valuation Bill of that year which sought to enable a Minister to submit a question to the High Court and to obtain an opinion. The proposed clause ran as follows:

> "If on the representation of the Central Valuation Committee, made after consultation with such associations or bodies as appear to them to be concerned, it is

[64] *Ibid.*, 356.
[65] *Ibid.*, 354
[66] The Parliamentary Debates, Official Report, Vol. 70, House of Lords, 21st March, 1928, 19th April, 1928, 24th April, 1928, 1st May, 1928.

made to appear to the Minister of Health that a substantial question of law has arisen in relation to the valuation of hereditaments or of any class of hereditaments for the purposes of rating and that, unless that question is authoritatively determined, want of uniformity or inequality in valuation may result, the Minister may submit the question to the High Court for its opinion thereon, and the High Court, after hearing such parties as it thinks proper, shall give its opinion on the question."

It was argued that that was "a piece of mischievous legislation";[67] that the proposed clause would "make the Judiciary act in an ancillary and advisory capacity to the Executive, and confound the working of the judicial system with the Executive administration";[68] that it was no part of the business of the Judges and never had been "part of their business, at any rate since the Act of Settlement, to have advisory concern in the acts of the Administration, or to take any part in advising the Administration" ; that the "natural affect of associating" the judges with the Administration and "attaching to them the responsibility for conclusions which are put forward by the Administration" would be to "weaken the authority of the Judiciary"; that there was no reason why the Judges should be "brought in by this side-wind to help the Executive to carry on their business, to replace the Law Officers and to relieve the Executive of responsibility as to decisions they ought to arrive at upon the law."[69] In view of the strong opposition in the House of Lords that clause had to be left out.

We may refer in this connexion the views of Prof. Alan Gledhill,[70] who while holding that "provided there is no excessive use of this power, there is an obvious advantage in having the opinion of the highest court in the land on certain questions which have arisen", has also observed: "Advisory judgments, whether as to proposed legislation or even as to existing legislation, since they do not consider its bearing

[67] The Parliamentary Debates, Official Report, Vol. 70, House of Lords, 19th April, 1928, column 760.
[68] *Ibid.*, column 761.
[69] *Ibid.*, column 763.
[70] See Alan Gledhill, *The Republic of India*, pp. 140-41.

upon a determined set of facts, are necessarily given upon sterilised and mutilated issues; they anticipate, without full appreciation, the application of principles to an unpredictable variety of facts. They are, as far as the Supreme Court is concerned, nothing more than opinion. Embarassing as it may be to recant, there is no likelihood of the Supreme Court entrenching itself behind an earlier advisory opinion when the same question is again raised in a concrete case".

We apprehend that the advisory jurisdiction conferred on our Supreme Court by article 143 may create a difficult situation when a concrete case involving similar issues would come before the Supreme Court for adjudication. This may also be very embarrassing for the future litigants. Again, our Supreme Court should not be made to play the role of the "super-attorney-general" to the Executive or to the Legislature. In our opinion, the attitude of the Supreme Court of the United States of America in 1793 and the attitude of the House of Lords in 1928 are "more conducive to judicial impartiality and independence". They are also "consistent with the status and dignity of the highest court of law in a country".[71] We, therefore, submit that it was not an wise act on the part of the Constituent Assembly to confer this advisory jurisdiction on the Supreme Court of India. We have already stated and we repeat that this article was adopted by the Constituent Assembly without any discussion.

The Constituent Assembly also decided that all authorities, civil and judicial, should act in aid of the Supreme Court[72] and that the Supreme Court should have the power to make rules, with the approval of the President, regulating the practice and procedure of the Court.[73]

III

We shall now deal with the deliberations of the Constituent Assembly of India with regard to the judiciary in the States speci-

[71] See Prof. D. N. Banerjee, *Some Aspects of the Indian Constitution*, p. 152. For such opinion see In re Delhi Laws Act, 1951 S.C.R. 717. Special Ref. u/s 143 by the President, A.I.R. 1960 S.C. 862.

[72] Constituent Assembly Debates, 27th May, 1949, p. 387. This became article 144 of the Constitution of India.

[73] Constituent Assembly Debates, 6th June, 1949, p. 651. This became article 145 of the Constitution of India.

fied in Part I of the First Schedule to the Draft Constitution.

On 6th June, 1949, immediately after deciding the provisions relating to the future Supreme Court of India, the Constituent Assembly proceeded to discuss the articles of the Draft Constitution dealing with High Courts in the States. It decided that there should be a High Court for every State[74] and that every High Court should be a Court of records and should have all the powers of such a Court including the power to punish for contempt of itself.[75] It also decided that every High Court should consist of a Chief Justice and such other judges as the President might from time to time appoint.[76] With regard to the method of appointment, the age of retirement, and the procedure for removal of a judge, the Assembly decided that[77] every judge of a High Court should be appointed by the President after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court, that a judge should hold office until he attained the age of sixty years and that a judge might be removed from office in the manner provided in article 103[78] of the Draft Constitution for the removal of a judge of the Supreme Court.[79] The Assembly further decided that a person should not be qualified for appointment as a judge of a High Court unless he was a citizen of India, and (a) had for at least ten years held a judicial office in the territory of India, or (b) had for at least ten years been an advocate of a High Court in any State specified in the First Schedule of the Constitution.[80]

With regard to the jurisdiction of the existing High Courts,

[74] Constituent Assembly Debates, 6th June, 1949, p. 656. This became article 214 of the Constitution of India.

[75] *Ibid.*, p. 658. This became article 215 of the Constitution of India which is similar to article 129 of the Constitution.

[76] Constituent Assembly Debates, 7th June, 1949, p. 676. This became article 216 of the Constitution of India.

[77] These principles had already been accepted by the Assembly while discussing the articles of the Draft Constitution relating to the Supreme Court (Constituent Assembly Debates, 24th May, 1949).

[78] Article 103 of the Draft Constitution became article 124 of the Constitution of India.

[79] This became clause (1) of article 217, and article 218 of the Constitution of India.

[80] Constituent Assembly Debates, 6th June, 1949, p. 676. This became clause (2) of article 217 of the Constitution of India.

the Assembly decided that the jurisdiction should be "the same as immediately before the commencement" of the new Constitution, but the restriction to which the exercise of the original jurisdiction of any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof had been subject[81], should be removed.[82] It was also agreed that the High Courts should have power to issue directions, orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of fundamental rights but that power should not be in derogation of the power conferred on the Supreme Court by article 25[83] of the Draft Constitution.[84]

The Constituent Assembly agreed upon: (a) the oath to be taken by a judge before entering his office;[85] (b) salaries and allowances of the judges;[86] (c) the temporary appointment of acting Chief Justice;[87] (d) the attendance of retired judges at sittings of the court;[88] (e) the power of superintendence over all courts by the High Court;[89] and (f) the staff and expenses of High Courts.[90] On 16th September, 1949, the Assembly made provisions for subordinate courts.[91]

IV

We have stated above the scope and the extent of the

[81] Section 226 of the Government of India Act, 1935.

[82] Constituent Assembly Debates, 7th June, 1949, p. 695. This became article 225 of the Constitution of India.

[83] Article 32 of the Constitution of India.

[84] Constituent Assembly Debates, 7th June, 1949, p. 697. This became article 226 of the Constitution of India.

[85] *Ibid.*, p. 680. This became article 219 of the Constitution of India.

[86] Constituent Assembly Debates, 1st August, 1949, p. 64. This became article 221 of the Constitution of India.

[87] Constituent Assembly Debates, 7th June, 1949, p. 686. This became article 223 of the Constitution of India.

[88] *Ibid*, p. 695. This became article 224 of the Constitution of India.

[89] Constituent Assembly Debates, 15th June, 1949, p. 877. Constituent Assembly Debates, 16th October, 1949, p. 380. This became article 227 of the Constitution of India.

[90] Constituent Assembly Debates, 8th June, 1949, p. 722. This became article 229 of the Constitution of India.

[91] Constituent Assembly Debates, 16th September, 1949, p. 1570. New articles 209A, 209B, 209C, 209D and 209E were added. These became articles 233 to 237 of the Constitution of India.

powers of the Supreme Court and the High Courts as agreed upon in the Constituent Assembly. We may say a few words about the special features of our judicial system. In England, where there is parliamentary supremacy, there is no limitation upon the legislative powers of Parliament, and the courts have only to interpret and apply the law passed by Parliament. The courts cannot declare such law as unconstitutional. In the United States of America, on the other hand, the legislative powers of the Union are vested in the Congress but in order to be valid the law made by the Congress must be in conformity with the provisions of the Constitution. Otherwise, the Supreme Court may declare the law passed by the Congress to be unconstitutional. Unlike the Constitution of England, our Constitution recognises the supremacy of the courts over the legislative authority in certain respects. That is to say, such supremacy is a limited one. It is confined to the field where the legislative power is restricted by limitations put upon it by the Constitution itself. Within this restricted field the courts may declare a law to be void if it is found to have exceeded the constitutional limitations. We have seen before [91A] that our Constituent Assembly did not adopt "due process of law" clause which, as we have already said, has enabled the Supreme Court of the United States of America to examine the validity of the laws passed by the Congress not only from the point of view of the competence of the Legislature but also from the point of view of the inherent goodness of law. We may say that in a sense instead of "judicial supremacy", we have the doctrine of "legislative supremacy", subject to the restrictions imposed by the Constitution. There is, therefore, no scope for the courts in India to play exactly the role of the Supreme Court of the United States of America. The position of the judiciary in India is, therefore, "somewhere in between the courts in England and the United States." [92] Secondly, the position of our Supreme Court differs from that of the Supreme Court of the United States of America inasmuch as our Supreme Court is the final court of appeal not only with regard to constitutional questions

[91A] See pages 83-87.

[92] See *A. K. Gopalan* vs. *The State of Madras*, 1950 Supreme Court Reports, pp. 286-7.

but also with regard to ordinary law, civil, criminal or revisional. It has original, appellate, revisional and consultative jurisdiction. In fact, the jurisdiction and powers of our Supreme Court, "in their nature and extent, are wider than those exercised by the highest Court of any country in the Commonwealth or by the Supreme Court of the United States" of America.[93]

Our judicial system, as agreed upon in the Constituent Assembly, is single, united and integrated in character unlike the case in the United States of America where there is a federal judicial system, and a State judicial system in each constituent State. In our country there is one unified system of judiciary. We may refer here to what Dr B. R. Ambedkar, Chairman of the Drafting Committee, observed[94] in the Constituent Assembly on 4th November, 1948, while introducing the Draft Constitution. He said that the Draft Constitution "sought to forge means and methods" whereby India would have federation and at the same time would have "uniformity in all matters" which were essential for maintaining the unity of the country. The means adopted by the Draft Constitution to secure this uniformity were, among others, "(1) a single judiciary, and (2) uniformity in fundamental laws, civil and criminal". He expressed the opinion that "a dual judiciary, a duality of legal codes" were the "logical consequences of a dual polity" which was inherent in any federation. Speaking about the proposed judicial system of India he said that the Indian Federation "though a Dual Polity has no Dual Judiciary at all. The High Courts and the Supreme Court form one single integrated Judiciary having jurisdiction and providing remedies in all cases arising under the constitutional law, the civil law or the criminal law. This is done to eliminate all diversity in all remedial procedure." We, therefore, think that in our Judiciary "the tendency will be towards uniformity and centralisation".[95]

In conclusion, we may say that the Constituent Assembly made our Supreme Court the interpreter and the guardian of our Constitution. It has been rightly observed in *Nar Singh*

[93] See the speech of Shri M. C. Setalvad (Attorney General for India), 1950 Supreme Court Reports, p. 3. See also Constituent Assembly Debates, 23rd November, 1949, p. 837.

[94] Constituent Assembly Debates, 4th November, 1949, pp. 36-37.

[95] See Alan Gledhill, *The Republic of India*, p. 135.

and another vs. *The State of Uttar Pradesh*[96] that our Supreme Court has a "duty" to see that the provisions of our Constitution "are faithfully observed and, where necessary, to expound them".

V

Before we pass on to the next chapter, we may mention that in the year 1963 some of the articles of the Constitution dealing with the Union Judiciary and the High Courts in the States were amended by the Constitution (Fifteenth Amendment) Act, 1963.[97] Under articles 124 (2) and 217 (1) of the Constitution, as originally passed by the Constituent Assembly,[98] a judge of a Supreme Court holds office until he attains the age of sixty-five years and a judge of a High Court holds office until he attains the age of sixty years. When any question arose as to the correct age of a judge it was decided by the President "in consultation with and on the advice of the Chief Justice of India."[99] There was, however, no provision in the Constitution itself for the determination of the age of a judge either of the Supreme Court or of a High Court.[100] Certain disputes arose over the question of determination of the age of some of the High Court judges.[101] It was, therefore, considered desirable by the Government of India to have specific provisions in the Constitution for such determination of the age of a judge.[102] Hence, the Government of India, brought the Constitution (Fifteenth Amendment) Bill, 1962,[103] which stated, *inter alia*, that if any question arose as to the age of a judge of the Supreme Court or of a judge of a High Court, the question should be decided by the President after making such inquiry as the President

[96] *The Supreme Court Journal*, Madras, August 1954, pp. 571-72.

[97] See Appendix 15.

[98] i.e. articles 103 (2) and 193 (1) of the Draft Constitution, as adopted by the Constituent Assembly.

[99] See Lok Sabha Debates, 29th April, 1963, column 12734, and the Statement of Objects and Reasons, *Gazette of India, Extraordinary*, Part II, Section 2, November 23, 1962, p. 1146.

[100] See *J. P. Mitter* vs. *the Chief Justice*, 67 C.W.N., p. 662 (669).

[101] See Lok Sabha Debates, December 11, 1962, columns 5306-5320.

[102] See Statement of Objects and Reasons, *Gazette of India, Extraordinary*, Part II, Section 2, November 23, 1962, p. 1146.

[103] *Ibid.*, pp. 1140-43, clauses 2 and 4.

might think necessary and that the decision of the President in this respect should be final. This Bill was referred to a Joint Committee of both the Houses of Parliament.[104] The Joint Committee recommended that so far as the age of a judge of the Supreme Court was concerned, it should be determined by "such authority and in such manner as Parliament may by law provide."[105] With regard to the question of determination of the age of a High Court judge, the Joint Committee recommended that such question should be decided by the President "after consultation with the Chief Justice of India and the decision of the President shall be final".[106] When the Constitution (Fifteenth Amendment) Bill, 1962, was under discussion in the Lok Sabha various suggestions were made by different members on this issue. It was suggested that the age should be decided by the President "in consultation with a Board consisting of three Judges of the Supreme Court nominated by the President", and that the age so determined should not be questioned in any court of law.[107] It was also suggested[108] that the age should be "finally determined at the time of appointment and it should be entered in the warrant of appointment of the Judges". This entry should be final and should not be challenged in any court of law. In so far as the existing cases were concerned, the question might, however, be referred to the Chief Justice. It was urged by a member[109] that the question of determination of the age of a judge of the Supreme Court was a question of fact and should, therefore, be decided by a court of law. Government of India should, for this purpose, set up an administrative tribunal, consisting of some of the judges of the Supreme Court and the High Courts, to decide the issue. Another suggestion was that[110] Parliament should make identical provisions for the determination of the age of a judge of the Supreme Court and of a High Court. In fact, the Government of India did not, at first, want to make any

[104] See Lok Sabha Debates, December 11, 1962, columns 5325-6.

[105] See Lok Sabha Debates, May 1, 1963, columns 13174, 13183-4. The suggestion was made by Shri Ka nath which was accepted by the Joint Committee.

[106] See Lok Sabha Debates, April 29, 1963, column 12733.

[107] See Lok Sabha Deba , May 1, 1963, column 13164.

[108] *Ibid.*, columns 13164-5

[109] See Lok Sabha Deba December 11, 1962, columns 5273-5.

[110] See Lok Sabha Debates, May 1, 1963, column 13215.

provision in the Constitution for the determination of the age of a judge of the Supreme Court, because no dispute arose with regard to such determination and, in the opinion of the Government of India, such question would not, in future, arise.[111] But it was of opinion that the problem was likely to arise in the case of the judges of the High Courts. Speaking on the provisions of the Bill, Shri A. K. Sen, Minister of Law, Government of India, said in Lok Sabha[112]: "The Joint Committee after hearing the Government and the diverse points of view have decided upon this particular form. It is no doubt different from the Government point of view. In fact, appearing for the Government, I did say that we would not be sorry if there was no provision for the Supreme Court Judges, and I stated that the problem would not be very important because in the case of most of the Judges appointed in the Supreme Court after 1958,—those who are now serving—the age has already been verified at the time of appointment. There would be only a few who have been appointed before 1958, and in their case the question would be completely academic". He added that in the case of the judges of the Supreme Court the problem "has not arisen up till now and it is unlikely to arise". The recommendations of the Joint Committee were accepted by the Parliament and articles 124 and 217 of the Constitution were amended accordingly.

By the Constitution (Fifteenth Amendment) Act, 1963, the retiring age of a Judge of a High Court has been raised from 60 to 62 years.[113] A new article, namely, article 224A has also been inserted[114] in the Constitution. Under the provisions of this new article the Chief Justice of a High Court of any State may, with the previous consent of the President, request any person who has held the office of a judge of any High Court to "sit and act" as a Judge of the High Court for that State. The provisions of this new article are more or less similar with those of article 128. This article 128 has also been amended and the amended article enables the Chief Justice of the Supreme Court, with the previous consent of

[111] *Ibid.*, columns 13215-6.
[112] *Ibid.*, columns 13183-4.
[113] Section 4.
[114] Section 7.

the President, to require the attendance of a person who has held the office of a judge of a High Court and is duly qualified for appointment as a judge of the Supreme Court, "to sit and act" as a judge of the Supreme Court. Before the amendment of the article, the Chief Justice of the Supreme Court could, for this purpose, require the attendance of a retired judge of the Supreme Court only. But the "number of retired Supreme Court Judges being small, and in view of the age of retirement provided for Supreme Court Judge, this field" could not be expected "to be wide at any time".[115] The amendment of article 128 was, therefore, thought to be necessary. By this Act a new clause, namely, clause (1 A) has been inserted in article 226 of the Constitution. Clause (1) of article 226, as originally adopted by the Constituent Assembly, was as follows:

> "Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose".

It was held by the Supreme Court in *Lt. Col. Khajoor Singh* vs. *Union of India and another*[116] that as the seat of the Government of India was in New Delhi, the only High Court which had jurisdiction under article 226 of the Constitution in respect of the Government of India was the Punjab High Court. The Supreme Court observed[117]: "It is true that the Constitution has not provided that the seat of the Government of India will be at New Delhi. That, however, does not mean that the Government of India as such has no seat where it is located. It is common knowledge that the seat of the Government of India is in New Delhi and the Government as such

[115] See the Statement of Objects and Reasons, *Gazette of India, Extraordinary*, Part II, Section 2, November 23, 1962, p. 1146.
[116] A.I.R., 1961, S.C., 532.
[117] *Ibid.*, p. 538.

is located in New Delhi. The absence of a provision in the Constitution can make no difference to this fact". The Court held[118] that what article 226 required was "residence or location as a fact" and if, therefore, there was a seat from which the Government functioned "as a fact", even though that seat was not mentioned in the Constitution, the High Court within whose territories that seat was located would be the High Court having jurisdiction under article 226, so far as the orders of the Government as such were concerned. The Court also expressed the opinion that the view taken by it on two earlier occasions[119] that "there is two-fold limitation on the power of the High Court to issue writs, etc. under Art. 226, namely (i) the power is to be exercised 'throughout the territories in relation to which it exercises jurisdiction', that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction, and (ii) the person or authority to whom the High Court is empowered to issue such writs must be 'within those territories' which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories", was the correct one.[120] The Supreme Court also observed[121] that "the concept of cause of action cannot in our opinion be introduced in Art. 226, for by doing so we shall be doing away with the express provision contained therein which requires that the person or authority to whom the writ is to be issued should be resident in or located within the territories over which the High Court has jurisdiction. It is true that this may result in some inconvenience to persons residing far away from New Delhi who are aggrieved by some order of the Government of India as such, and that may be a reason for making a suitable constitutional amendment in Art. 226. But the argument of inconvenience, in our opinion, cannot affect the plain language of Art. 226, nor can the concept of the place of cause of action be introduced into it for that would do away with the two limitations on the powers of the High Court contained in it.... If any inconvenience is felt on account of this interpretation of Art. 226 the remedy seems

[118] *Ibid.*, p. 539.
[119] 1953 S.C.R. 1144, 1954 S.C.R. 738.
[120] A.I.R., 1961, S.C., p. 539.
[121] *Ibid.*, p. 540.

to be a constitutional amendment. There is no scope for avoiding the inconvenience by an interpretation which we cannot reasonably, on the language of the Article, adopt and which the language of the Article does not bear". Government of India, therefore, thought it necessary[122] to amend article 226 of the Constitution so that the High Court within whose jurisdiction "the cause of action arises may also have jurisdiction to issue directions, orders, or writs to any Government, authority or persons, notwithstanding that the seat of such Government or authority or the residence of such person is outside the territorial jurisdiction of the High Court". The new clause (1A) of article 226 lays down that "the power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories".

[122] See the Statement of Objects and Reasons, *Gazette of India, Extraordinary*, Part II, Section 2, dated November 23, 1962, p. 1147.

Chapter XII

CITIZENSHIP

We shall now deal with the question of citizenship in India.

The Advisory Committee in its interim report on fundamental rights recommended that[1] every person "born in the Union or naturalised in the Union according to its laws and subject to the jurisdiction thereof shall be a citizen of the Union". When the matter came up before the Constituent Assembly for discussion on 29th April, 1947,[2] a question arose as to whether the clause would include the children of visiting foreigners born in India. Two different views were expressed. According to one view, the clause would include them and according to the other view, the clause would not include them. The House could not come to any decision on the point and referred the clause to an *ad hoc* committee for further consideration.[3] The clause, as redrafted by the *ad hoc* committee, ran as follows:

"Every person born in the Union and subject to its jurisdiction; every person either of whose parents was, at the time of such person's birth, a citizen of the Union; and every person naturalised in the Union shall be a citizen of the Union.

Further provision regarding the acquisition and termination of Union citizenship may be made by the law of the Union".[4]

The committee stated that there was some authority for the view that the qualifying phrase "subject to its jurisdiction" would exclude the children of visiting foreigners, who were on the same footing as the children of foreign ambassadors, from citizenship even if born within the Union. The committee, however, thought it unnecessary to make a special exception to exclude them from citizenship as in its opinion such cases were likely to be very rare. It suggested that the possibility

[1] Constituent Assembly of India, Reports of Committee, First Series, p. 21.
[2] Constituent Assembly Debates, 29th April, 1947, p. 399.
[3] *Ibid.*, p. 409.
[4] Reports of Committees of the Constituent Assembly of India, Third Series, p. 1.

of double nationality could be provided against by making suitable provisions in the Union naturalisation law. The redrafted clause came up for discussion on the 2nd May, 1947.[5] During discussion[6] it was found that the redrafted clause covered the cases of persons who were born in the Union on the day the Union would come into existence. But it was apprehended that the Union might not consist of the whole of India. It was felt that at the beginning of the Union persons who were born in India and were subject to the jurisdiction of the Union should not be excluded from citizenship merely because they were born outside the territories of the proposed Union. It was realised that the redrafted clause would exclude a large number of persons "not intentionally but unintentionally".[7] The Assembly, however, could not come to any decision on the question and the clause was referred back to the *ad hoc* committee for further consideration.[8] It may be mentioned that Part II of the report of the Union Constitution Committee contained clauses on citizenship. The clauses were drafted "with due regard to the probability" that at the Federation would not exercise jurisdiction over the whole of India.[9] On 21st July, 1947, the Constituent Assembly proceeded to discuss the report of the Union Constitution Committee. But as the *ad hoc* committee had not yet been able to decide finally on the clauses on citizenship, Part II of the report, which dealt with the questions of citizenship, was not discussed.[10] The discussion on citizenship took place on 10th and 12th August, 1949, when the Assembly discussed articles 5 and 6 of the Draft Constitution.

The Drafting Committee gave[11] "anxious and prolonged consideration" to the question of citizenship of the Indian Union. In its opinion, in order to be a citizen of the Indian Union at the date of commencement of the new Constitution a person must have "some kind of territorial connection" with the Indian Union whether by birth, descent or domicile. The Committee did not think it prudent to admit as citizens

[5] Constituent Assembly Debates, 2nd May, 1947, p. 522.
[6] *Ibid.*, pp. 523-6.
[7] *Ibid.*, p. 526.
[8] *Ibid.*, p. 528.
[9] Constituent Assembly of India, Reports of Committees, First Series, p. 46.
[10] Constituent Assembly Debates, 21st July, 1947, p. 730.
[11] Reports of Committees, Third Series, p. 173.

those persons who, without such territorial connection, might be prepared to swear allegiance to the Indian Union because, in its opinion, if other States were to follow the same principle there might be within the Indian Union a large number of persons who, though born and permanently resident within the Indian Union, would owe allegiance to foreign States. After the creation of the two Dominions a large number of persons had migrated from Pakistan to India and from India to Pakistan. The Committee "kept in view the requirements" of the displaced persons who had migrated to the Indian Union from Pakistan and it provided for them what it called "a specially easy mode of acquiring domicile and, thereby, citizenship".

Article 5 of the Draft Constitution stated that at the date of commencement of the Constitution—(a) every person who or either of whose parents or any of whose grand-parents was born in the territory of India as defined in the Draft Constitution and who did not make his permanent abode in any foreign State after the first day of April, 1947; and (b) every person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), or in Burma, Ceylon or Malaya, and who had his domicile in the territory of India as defined in the Draft Constitution, should be a citizen of India, provided that he did not acquire the citizenship of any foreign State before the date of commencement of the Constitution. Article 6 sought to empower Parliament to make further provisions regarding the acquisition and termination of citizenship and all other matters relating thereto.

These articles came up for discussion on 18th November, 1948.[12] A large number of amendments had been tabled by different members of the Assembly. In order to give an opportunity to the members to discuss the amendments with the members of the Drafting Committee and to arrive at some kind of understanding, the Assembly decided to postpone the discussion of the article.[13] The discussion was resumed on

[12] Constituent Assembly Debates, 18th November, 1948, p. 471.
[13] *Ibid.*, p. 471.

10th August, 1949.[14] The Drafting Committee redrafted the articles on citizenship. On 10th August, 1949, Dr Ambedkar moved an amendment to the effect that for articles 5 and 6 of the Draft Constitution, following articles should be substituted,[15] namely:—

"5. At the date of commencement of this Constitution, every person who has his domicile in the territory of India and—

(*a*) who was born in the territory of India; or
(*b*) either of whose parents was born in the territory of India; or
(*c*) who has been ordinarily resident in the territory of India for not less than five years immediately preceding the date of such commencement,

shall be a citizen of India, provided that he has not voluntarily acquired the citizenship of any foreign State.

5-A. Notwithstanding anything contained in article 5 of this Constitution, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the date of commencement of this Constitution if—

(*a*) he or either of his parents or any of his grandparents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and
(*b*) (*i*) in the case where such person has so migrated before the nineteenth day of July, 1948, he has ordinarily resided within the territory of India since the date of his migration, and
(*ii*) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in this behalf by the

[14] Constituent Assembly Debates, 10th August, 1949, p. 343.
[15] *Ibid.*, pp. 343-4.

Government of the Dominion of India on an application made by him therefor to such officer before the date of commencement of this Constitution in the form prescribed for the purpose by that Government:

Provided that no such registration shall be made unless the person making the application has resided in the territory of India for at least six months before the date of his application.

5-AA. Notwithstanding anything contained in articles 5 and 5-A of this Constitution, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (*b*) of article 5A of this Constitution be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.

5-B. Notwithstanding anything contained in articles 5 and 5-A of this Constitution, any person who or either of whose parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted) and who is ordinarily residing in any territory outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form prescribed for the purpose by the Government of the Dominion of India or the Government of India.

5-C. Every person who is a citizen of India under any

of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.

6. Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship".

The redrafted articles related only to qualifications at the date of commencement of the new Constitution. Dr Ambedkar said in his introductory speech that[16] it was not the object of the articles to lay down "a permanent law of citizenship" for the Indian Union. He pointed out that the power of laying down a permanent law of citizenship was left to Parliament. Under the proposed articles, the following five categories of persons were entitled to become citizens at the date of commencement of the new Constitution,[17] namely:

(*i*) persons domiciled in India and born in India;
(*ii*) persons who were domiciled in India but who were not born in India and who resided in India;
(*iii*) persons who were residents in India but who migrated to Pakistan;
(*iv*) persons who were residents in Pakistan but who migrated to India; and
(*v*) persons who or whose parents were born in India but were residing outside India.

Persons who had come to India from Pakistan were divided by the Drafting Committee into two categories:

(*a*) those who had come before 19th July, 1948, and
(*b*) those who had come after 19th July, 1948.

It was provided that those who had come before 19th July, 1948, would automatically become citizens of India and those who had come after 19th July, 1948, would be entitled to citizenship at the date of commencement of the new

[16] *Ibid.*, p. 347.
[17] *Ibid*

Constitution, if certain procedure was followed. Persons who had left India for Pakistan and subsequently returned to India were allowed by the Government of India to settle under a "permit system" which was introduced on 18th July, 1948.[18] That was the reason for choosing that particular date. Dr Ambedkar admitted the controversial nature of the articles and confessed that few other articles had caused the Drafting Committee so much trouble. He, however, said that[19] it was not possible for the Drafting Committee to cover every kind of case for a limited purpose, namely, the purpose of conferring citizenship at the date of commencement of the Constitution. Hence, Parliament was given the power to make provisions for persons who had been left out.[20] He added that the articles he had proposed were "sufficient for the purpose and for the moment". Shri Alladi Krishnaswami Ayyar said that[21] the articles were subject to any future nationality or citizenship law that might be passed by Parliament. Pandit Jawaharlal Nehru observed that[22] no provision could be made which could provide for every possibility and for every case "with justice and without any error being committed". He claimed that the Drafting Committee had succeeded "in a remarkable measure" in producing something which dealt with "99.9 per cent. of cases with justice and practical common sense". The amendment of Dr Ambedkar was accepted by the House and articles 5, 5A, 5AA, 5B, 5C and 6 were adopted by the Assembly on 12th August, 1949.[23]

The drafting of a clear and comprehensive law on citizenship was not an easy task. For a State like India the problem was still much more complicated. According to Dr B. R. Ambedkar, Chairman of the Drafting Committee, few other articles of the proposed Constitution gave the Drafting Committee "such a headache"[24] as the articles on the proposed Indian citizenship. The original provisions of the articles on Indian citizenship were marked by simplicity and brevity. The

[18] *Ibid.*, p. 349.
[19] *Ibid.*
[20] Citizenship Act was passed by Indian Parliament in the year 1955.
[21] Constituent Assembly Debates, 12th August, 1948, p. 402.
[22] *Ibid.*, p. 398.
[23] *Ibid.*, pp. 429-30. These articles became articles 5 to 11 of the Constitution of India.
[24] Constituent Assembly Debates, 10th August, 1949, p. 347.

redrafted articles, finally adopted by the Constituent Assembly, were rather more complicated but not more so than seemed unavoidable from the nature of the subject. The Constituent Assembly decided as to who should be regarded as citizens of India at the commencement of the Constitution. The Assembly did not permanently lay down the Indian law of citizenship. It left that matter to be decided by the future Parliament of India and in that respect gave the future Parliament of India absolute powers to legislate on the question of citizenship. Our Constitution, as settled by the Constituent Assembly, is "concerned with defining who are the founding members of the Indian Republic, and does not fetter the discretion of Parliament to legislate on questions of citizenship".[25] It may be mentioned that in the year 1955 Parliament of India passed the Citizenship Act, 1955, which has provided for the conditions of acquisition and termination of citizenship.

The position, therefore, is that the status of citizenship conferred on a person by the Constitution may be injuriously affected by an ordinary law made by our Parliament. This also shows that the Constituent Assembly did not recognise the status of citizenship as a fundamental right. We find support of this view from the following observations of our Supreme Court[26]—

> "It may prima facie sound somewhat surprising, but it is nevertheless true, that though the citizens of India are guaranteed the fundamental rights specified in Art. 19 of the Constitution, the status of citizenship on which the existence or continuance of the said rights rests is itself not one of the fundamental rights guaranteed to anyone. If a law is properly passed by the Parliament affecting the status of citizenship of any citizens in the country, it can be no challenge to the validity of the said law that it affects the fundamental rights of those whose citizenship is hereby terminated. Article 19 proceeds on the assumption that the person who claims the rights guaranteed by it is a citizen of India. If the basic status of citizenship is

[25] See Alan Gledhill, *The Republic of India*, p. 166

[26] *Izhar Ahmad Khan and others* vs. *Union of India and others*, A.I.R. 1962, S.C. 1052 (1066-7).

validly terminated by a Parliamentary statute, the person whose citizenship is terminated has no right to claim the fundamental rights under Art. 19".

Our Constituent Assembly made provisions for a dual polity but at the same time provided for a single citizenship. It made provisions for only one type of citizenship, namely, the citizenship of India. Herein lies a difference with the Constitution of the United States of America. In the United States of America a person is a citizen not only of the State in which he resides but he is also a citizen of the United States. This dual citizenship, as pointed out by Dr Ambedkar on 4th November, 1948, in the Constituent Assembly, may lead to discrimination between citizens of the State and citizens of the Union. The Constituent Assembly did not leave any scope for discrimination in this respect. This dual citizenship may also lead to double allegiance. Our Constituent Assembly avoided all complications that are likely to arise from double allegiance. It may be mentioned that the provision for single citizenship is an unitary feature in the federal Constitution of India. During discussion in the Constituent Assembly it was argued that Indian citizenship was made ridiculously "cheap"[27] and that the provisions on citizenship were over-generous. We have stated the reasons for making such provisions. It should also be remembered that the Constituent Assembly gave powers to our Parliament to tighten up things later on if necessity arises. Considering this provision we think that liberality in this respect was not a sign of imprudence of our Constituent Assembly but it was sign of wisdom.

[27] Speech of Dr P. S. Deshmukh, Constituent Assembly Debates, 11th August, 1949, pp. 353-5.

CHAPTER XIII

FINANCE, PROPERTY, CONTRACTS AND SUITS

I

In this chapter we propose to take up the consideration by the Constituent Assembly of the recommendations of the Drafting Committee in regard to finance, property, contracts and suits.

II

We may first refer to some decisions of a general nature taken by the Constituent Assembly on this subject. The discussion began on 4th August, 1949. The Assembly decided that[1] no tax should be levied or collected except by authority of law. There was no such provision in the Government of India Act, 1935, or in the Draft Constitution. This provision embodies the English principle of "no taxation without representation", that is to say, no taxation should be levied upon the people except under a law duly made by its representatives in the legislature. This decision shows that the Constituent Assembly chose to treat taxation as distinct from compulsory acquisition of property and, therefore, made independent provisions giving protection against taxation except by authority of law. But as the Constituent Assembly did not adopt the "due process" clause, the reasonableness of a taxing law cannot be challenged on the ground that it offends the principles of equity. The Assembly also adopted a new article, namely, article 248A, which stated that all moneys received by the Government of India should form one Consolidated Fund to be entitled "the Consolidated Fund of India" and all moneys received by the Government of a State[2] should form one Consolidated Fund to be entitled

[1] Constituent Assembly Debates, 4th August, 1949, p. 201. This became article 265 of the Constitution of India.

[2] "State" in this chapter does not include a State specified in Part II of the First Schedule to the Draft Constitution (Constituent Assembly Debates, 4th August, 1949, p. 199). See also article 247 of the Draft Constitution.

"the Consolidated Fund of the State" and that no moneys out of such Consolidated Funds should be appropriated "except in accordance with law".[3] It was, however, felt[4] that very often the expenditure voted by Parliament for a department might not be enough and that under article 248A if expenditure was incurred without the sanction of Parliament it would be illegal. Besides, the expenditure might be urgently required and the inability of the Government to make provision for it might be detrimental to the interest of the people. It was, therefore, thought necessary that some means should be found to enable the Government to meet unforeseen expenditures. Hence, the Assembly decided to add another new article to the proposed Constitution, namely, article 248B, which provided that Parliament might by law establish a Contingency Fund to be entitled "the Contingency Fund of India" into which "shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the President to be advanced by him for the purpose of meeting unforeseen expenditure which has not been authorised by Parliament pending authorisation of such expenditure by Parliament by law".[5] It was also agreed that the Legislature of a State should also establish such a Contingency Fund to be entitled "the Contingency Fund of the State".[6] The object of these two articles was, as Dr Ambedkar said, that "not a pie should be spent without the sanction of Parliament".[7]

III

We shall now refer to the decisions of the Constituent Assembly with regard to the distribution of revenues between the Union and the States. The Drafting Committee had not incorporated in the Draft Constitution the suggestions of the Expert Committee on the Financial Provisions of the Constitu-

[3] Constituent Assembly Debates, 4th August, 1949, p. 201. This became article 266 of the Constitution of India.
[4] *Ibid.*, 1949, p. 201.
[5] *Ibid.*, 1949, pp. 201-2. Article 248B became article 267 of the Constitution of India.
[6] *Ibid.*, pp. 201-3.
[7] *Ibid.*, p. 202.

tion[8] with regard to the distribution of revenues between the Union and the States, because it had thought[9] that, in view of the unstable conditions then prevailing in the country, the existing distribution of such revenues under the Government of India Act, 1935,[10] should continue for at least five years, after which the position should be reviewed by a Finance Commission.[11] Articles 249 to 251 of the Draft Constitution provided:

(a) that certain duties[12] should be levied by the Government of India but should be collected by the States and the net proceeds should be appropriated by the States;

(b) that certain duties and taxes[13] should be levied and collected by the Government of India but the net proceeds should be assigned to the States within which they were leviable in accordance with such principles of distribution as might be laid down by Parliament; and

(c) that certain other taxes[14] should be levied and collected by the Government of India but the net proceeds should be distributed between the Union and the States.

Article 252 of the Draft Constitution sought to empower the Union to levy a surcharge on any of these taxes and to appropriate the whole of the proceeds of such surcharge. These articles of the Draft Constitution were accepted by the Constituent Assembly.[15] This was also the scheme of distribution of revenues under the Government of India Act, 1935.

[8] This Committee was appointed by the President of the Constituent Assembly to examine and report on the financial provisions of the Constitution (Reports of Committees of the Constituent Assembly, Third Series, p. 122).

[9] See Draft Constitution of India, pp. X, XI.

[10] Part VII of the Government of India Act, 1935.

[11] Footnote at page 115 of the Draft Constitution.

[12] These included stamp duties and duties of excise on medicinal and toilet preparations which were mentioned in the Union List.

[13] These comprised succession and estate duties in respect of property other than agricultural land, terminal taxes on goods and passengers carried by railway, sea or air, taxes on railway fares and freights.

[14] These included taxes on income other than agricultural income.

[15] Constituent Assembly Debates, 5th August, 1949, pp. 209, 223, 224, and 19th August, 1949, pp. 496, 504. Articles 249 to 252 became articles 268 to 271 of the Constitution of India.

Clause (1) of article 253 of the Draft Constitution, which stated that "no duties on salt shall be levied by the Union", became the subject of a controversy in the Assembly. The majority of the members of the Drafting Committee had held the view that there should be no "constitutional prohibition" with regard to the duty on salt and that its levy should be left to the discretion of Parliament. But Shri Alladi Krishnaswami Ayyar, a member of the Drafting Committee, had been of opinion that clause (1) of article 253 should be retained.[16] The Expert Committee, to which we have referred, had suggested that no duties on salt should be levied by the Federation.[17] When the article came up for discussion in the Assembly on 5th August, 1949, Shri Mahavir Tyagi moved an amendment for the deletion of clause (1) of article 253.[18] He was not in favour of salt duties but he did not want to "tie down the hands of future generations for ever".[19] He also pointed out that it might be necessary to levy an import duty on foreign salt in order to protect indigenous industries of salt against foreign competition. Prof. Shibban Lal Saksena opposed the amendment of Shri Mahavir Tyagi. He reminded[20] the House that salt had a history in the freedom movement in our country. He pleaded for the retention of the clause as "a memento to the great part which salt played in our freedom movement" in the country. He observed that it was not only on sentimental reasons that he objected to its removal. In fact, the reasons were mainly economic. He added: "It is even the poorest of the poor who have to pay duty on salt and, therefore, Mahatma Gandhi wanted that the poor man's salt must not be taxed. That was the principle on which that great movement of salt satyagraha was launched". Explaining the reason why that clause had been inserted in the Draft Constitution, Dr B. R. Ambedkar, Chairman of the Drafting Committee, said[21] on 5th August, 1949, that the Union Powers Committee had suggested that a 'section' should be incorporated in the Constitution itself prohibiting

[16] Foot-note at page 118 of the Draft Constitution of India.
[17] Reports of Committees of the Constituent Assembly of India, Third Series, p. 168.
[18] Constituent Assembly Debates, 5th August, 1949, p. 224.
[19] *Ibid.*, p. 225.
[20] *Ibid.*, p. 237.
[21] *Ibid.*, p. 238.

the imposition of any duty or tax on salt[22] and that the Drafting Committee had no alternative but to incorporate that clause in the Draft Constitution. He, however, supported the amendment of Shri Tyagi and said that it would be better "to remove the embargo and to leave the matter to the future Parliament, to act in accordance with circumstances that might arise at any particular moment".[23] At this stage, the Constituent Assembly had a most unusual experience following the spirited opposition by Dr Rajendra Prasad, President[24] of the Constituent Assembly, to the amendment of Shri Tyagi. In a short but impressive speech, the President referred to the Congress salt campaign which, he said, constituted a glorious chapter in the history of India's national struggle. The President warned the members of the Assembly that impositon of salt tax would invite similar country-wide campaign. He requested the members of the Assembly to carefully consider the matter. He, however, expressed the opinion that the amendment of Shri Tyagi should be rejected. In reply to a question put by Shri Mahavir Tyagi as to whether deletion of the clause would mean that salt tax would be levied, the President said: "It opens the door for it, and in our present financial difficulties I am not sure that it would not be taken advantage of".[25] The consideration of the article was held over and the Assembly then adjourned till 8th August, 1949.[26] On 8th August. 1949, Pandit Jawaharlal Nehru was the only member who spoke on that clause. He expressed the opinion that it would not be desirable to retain the clause in article 253 of the Draft Constitution, because that might create difficulties in future. He supported the amendment of Shri Tyagi.[27] He, however, said that no Government would think in terms of taxing salt. The Assembly then decided to delete[28] clause (1) from article 253 of the Draft Constitution. Clause (2) of article 253 stated that Union duties of excise would be shared by the States

[22] Constituent Assembly of India, Reports of Committees, First Series, p. 71.
[23] Constituent Assembly Debates, 5th August, 1949, p. 239.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*, p. 240.
[27] Constituent Assembly Debates, 8th August, 1949, p. 242.
[28] *Ibid.*

only if Parliament by law so provided. This clause was adopted by the Assembly.[29]

Under the Draft Constitution the States in which jute was grown were entitled to a share in the proceeds of export duty on jute.[30] The Assembly, however, did not accept that provision of the Draft Constitution, because it thought[31] that the proceeds of all export and import duties belonged to the Central Government and that no State had a right to a share in the proceeds of export duty levied on any commodity. But since a sudden withdrawal of this source might create a difficulty in balancing the budget of the State concerned,[32] the Assembly decided that for a period of ten years the jute-growing States of Bengal, Bihar, Assam and Orissa should receive "grants-in-aid" from the Centre to the extent of such sums as the President might prescribe.[33] Since any alteration of the aforesaid scheme of distribution of revenue would affect the States, the Assembly decided that prior recommendation of the President should be necessary for introducing a Bill in Parliament affecting taxation in which States were interested.[34] The Assembly then empowered Parliament to make such grants as it might think necessary to give financial assistance to any State which was in need of such assistance.[35] It may be noted here that it has been observed by the Taxation Enquiry Commission[36] that in recent years grants-in-aid "have come to be used increasingly, particularly as a means of correcting inter-regional disparities in resources". That Committee has rightly observed that grants-in-aid "facilitate the exercise of certain measure of federal control and co-ordination over essential welfare services on a national scale".

The Assembly agreed that notwithstanding anything in article 217 of the Draft Constitution, "no law of the Legislature of a State relating to taxes for the benefit of the State or of

[29] *Ibid.* Clause (2) of article 253 became article 272 of the Constitution of India.

[30] Article 254 of the Draft Constitution, and section 140 of the Government of India Act, 1935.

[31] Constituent Assembly Debates, 8th August, 1949, p. 242.

[32] *Ibid.*, p. 243.

[33] *Ibid.*, p. 261. This became article 273 of the Constitution of India.

[34] New article 254A, Constituent Assembly Debates, 8th August, 1949, pp. 262-4. This became article 274 of the Constitution of India.

[35] Constituent Assembly Debates, 9th August, 1949, p. 294. This became article 275 of the Constitution of India.

[36] Report of the Taxation Enquiry Commission, 1953-54, Volume I, p. 11.

a municipality, district board, local board or other local authority therein, in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income".[37] Article 257 of the Draft Constitution sought to save existing taxes levied by the States or local authorities on subjects which might have been transferred from the pre-existing Provincial List to the Union List under the new Constitution. This article was adopted by the Assembly without any discussion[38] on 9th August, 1949. On 13th October, 1949, the Assembly decided[39] that the Government of India might enter into an agreement with the Government of a State specified in Part III of the First Schedule (i.e., pre-existing Indian State) with regard to certain financial matters and that when such an agreement was entered into the provisions of the Constitution relating to the distribution of revenue between the Union and the States should have effect in relation to such State subject to the terms of such agreement. The agreement should, however, continue for a period not exceeding ten years from the commencement of the new Constitution. This decision was taken with a view to giving effect to one of the recommendations of the Indian States Finance Enquiry Committee which had been appointed by the Government of India on 22nd October, 1948, to examine and report, among other things, upon[40] "the desirability and feasibility of integrating Federal Finance in Indian States and Unions of States with that of the rest of India, to the end that a uniform system of Federal Finance may be established" throughout the country and also upon "the results of such a policy of integrating Federal Finance upon the finances of Indian States and Unions and the consequential financial adjustments and relations which should subsist between the Governments of the Indian States and Unions on the one hand and the Government of India on the other".

[37] Constituent Assembly Debates, 9th August, 1949, p. 301. This became article 276 of the Constitution of India. Article 217 of the Draft Constitution became article 246 of the Constitution of India. This article deals with the distribution of legislative powers as between Parliament and State Legislatures.

[38] Constituent Assembly Debates, 9th August, 1949, p. 302. This became article 277 of the Constitution of India.

[39] Constituent Assembly Debates, 13th October, 1949, p. 208. This became article 278 of the Constitution of India. This article was, however, deleted by the Constitution (Seventh Amendment) Act, 1956. See Appendix 7.

[40] See *White Paper of Indian States*, 1950, p. 84, published by Government of India.

The Committee had recommended[41] that the transfer of the net "burden" of financial integration of the pre-existing Indian States or the Centre should be gradual and that it should take the form of appropriate financial adjustments between the Centre and the pre-existing Indian States, extending over a transitional period of ten or fifteen years. It had also recommended that those adjustments should be so devised as to cause no sudden dislocation of the finances of the former Indian States or of the Centre at the commencement of financial integration, or during such transitional period. The main object was thus the avoidance of a sudden dislocation of the finances of the pre-existing Indian States or of the Centre as a result of federal financial integration.[42]

Before the integration and the merger of the former Indian States the Rulers of such States had made no distinction between their private properties and the properties of the State.[43] They had also made no distinction between the expenditure on the administration of the State and the privy purse. They could freely use for their personal purpose any property owned by their respective States. Even where the privy purse of the Rulers had been fixed, no effective step had been taken to ensure that the expenditure expected to be covered by the privy purse had not been charged upon the revenues of the State.[44] The various Covenants for the establishment of Unions of States and Agreements of Merger with the Indian Union contained provisions for the fixation of the privy purses of the Rulers of the former princely States[45] which were intended to cover all expenses of the Rulers and their families, including the expenses of their residences, marriages and other ceremonies, etc. The Government of India guaranteed to the Rulers of integrated and merged States the payment of privy purses fixed in terms of the various Covenants and Agreements of Merger.[46] It became thus necessary to give

[41] *Ibid.*, p. 92.
[42] See in this connection the speech of Sardar Vallabhbhai Patel, Constituent Assembly Debates, 12th October, 1949, pp. 161-68.
[43] See *White Paper on Indian States*, (1950), p. 63.
[44] Constituent Assembly Debates, 12th October, 1949, p. 165.
[45] See *White Paper on Indian States*, (1950), Appendices XII to XLII, LVII and LVIII.
[46] See speech of Sardar Vallabhbhai Patel, Constituent Assembly Debates, 12th October, 1949, p. 165.

constitutional sanction for the due fulfilment of those guarantees and assurances in respect of privy purses. Hence, on 13th October, 1949, the Constituent Assembly adopted a new article, namely, article 267A[47] which sought to give constitutional recognition to such guarantees. The settlements regarding privy purses were "in the nature of consideration for the surrender by the Rulers of all their ruling powers and also for the dissolution of the States as separate units".[48] The Rulers of the former Indian States wanted that the liability for payment of privy purses should be taken over by the Central Government on the ground, (i) that privy purses had been fixed by the Central Government; (ii) that privy purses were political in nature; and (iii) that similar payments were not made by the pre-existing Indian Provinces.[49] But ultimately it was decided that the liability should be both of the Central Government and the Governments of the States.

The Expert Committee on Financial Provisions of the Union Constitution, to which we have already referred, had recommended[50] the setting up of a Finance Commission to have "a periodical review of the whole position" regarding the distribution of revenue between the Union and the States. We have also stated that the Drafting Committee had been in favour of such a Commission.[51] The Constituent Assembly agreed that there should be such a Finance Commission. The Assembly also agreed upon the duties of such a Commission.[52] It further decided[53] that the President should cause every recommendation made by the Finance Commission, together with an explanatory memorandum as to the action taken thereon, to be laid before each House of Parliament.[54] The provision for the setting up of a Finance Commission was a main departure from the scheme embodied in the Govern-

[47] Constituent Assembly Debates, 13th October, 1949, p. 208. This became article 291 of the Constitution of India. This article was amended by the Constitution (Seventh Amendment) Act, 1956. See Appendix 7.

[48] Constituent Assembly Debates, 12th October, 1949, p. 167.

[49] See in this connection the speech of Sardar Vallabhbhai Patel, Constituent Assembly Debates, 12th October, 1949, pp. 165-68.

[50] Reports of Committees of the Constituent Assembly of India, Third Series, p. 136.

[51] Foot-note at page 115 of the Draft Constitution. See p. 276.

[52] Constituent Assembly Debates, 9th August, 1949, p. 303. and 10th August, p. 315. This became article 280 of the Constitution of India.

[53] Constituent Assembly Debates, 10th August, 1949, p. 329.

[54] This became article 281 of the Constitution of India.

ment of India Act, 1935. In fact, in a federal constitution there should be provisions for a Finance Commission, because in such a constitution it is not possible to finally lay down the division of financial resources between the Federal Government and the Governments of the constituent States and, therefore, there should be a machinery for adjustment and reallocation of resources from time to time in the light of changed conditions.[55]

The Constituent Assembly also agreed upon certain other financial provisions of the Constitution. On 10th August, 1949, it decided that "the Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may, may make laws".[56] On that day it also agreed upon adjustments in respect of certain expenses of courts, commissions and pensions.[57] On 9th September, 1949, it decided on:

(a) the custody of Consolidated Funds, Contingency Funds and moneys credited to the public accounts;[58]
(b) the custody of suitors' deposits and other moneys received by public servants and courts;[59]
(c) the exemption of property of the Union from State taxation;[60]
(d) the exemption from taxation by States on consumption of electricity by the Government of India;[61]
(e) the exemption from taxation by States in respect of water or electricity in certain cases;[62] and

[55] See Wheare, *Federal Government*, 1951, p. 123.
[56] Article 262 of the Draft Constitution. Constituent Assembly Debates, 10th August, 1949, p. 330. Article 262 became article 282 of the Constitution of India.
[57] Article 267 as adopted, Constituent Assembly Debates, 10th August, 1949, p. 335. This became article 290 of the Constitution of India.
[58] Article 263, Constituent Assembly Debates, 9th September, 1949, p. 1190. This article became article 283 of the Constitution of India.
[59] New Article 263A, Constituent Assembly Debates, 9th September, 1949, p. 1190. This became article 284 of the Constitution of India.
[60] Article 264 as amended, Constituent Assembly Debates, 9th September, 1949, pp. 1147, 1160. This article became article 285 of the Constitution of India.
[61] Article 265 as amended, Constituent Assembly Debates, 9th September, 1949, p. 1160. This article became article 287 of the Constitution of India.
[62] New Article 265A, Constituent Assembly Debates, 9th September, 1949, p. 1161. This became article 288 of the Constitution of India.

(f) the exemption of property and income of a State from Union taxation.[63]

On 16th October, 1949, the Assembly agreed upon certain restrictions on the imposition of a tax by a State on the sale and purchase of goods where such sale or purchase took place outside the State or in the course of the import of the goods into, or export of the goods out of, the territory of India.[64]

IV

We shall now pass on to the decisions of the Constituent Assembly with regard to borrowing, property, contracts, liabilities and suits. On 10th August, 1949 the Assembly decided[65] that the executive power of the Union should extend to borrowing upon the security of the Consolidated Fund of India within such limits as Parliament might by law impose and that the executive power of the States should also extend to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits as might be imposed by the State Legislature. It was also decided that normally the executive authority of a State might raise loans without Central intervention but it should not do so without the consent of the Government of India if there was still outstanding any part of a loan which had been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarantee had been given by the Government of India or its predecessor Government. It may be mentioned here that under section 163 of the Government of India Act, 1935, a Province had the power to borrow from outside India with the consent of the Federation. But the Constituent Assembly denied the States that power. Having regard to the resources of a State under

[63] Article 266 as amended. Constituent Assembly Debates, 9th September, pp. 1161, 1171. This became article 289 of the Constitution of India.

[64] New Article 264A, Constituent Assembly Debates, 16th October, 1949, p. 341. This article became article 286 of the Constitution of India.

[65] Constituent Assembly Debates, 10th August, 1949, pp. 340, 343. This became articles 292 and 293 of the Constitution of India.

the general scheme of financial distribution as compared with the ever-increasing responsibilities of the State, the power of the State to raise loans appears to be very much restricted, although, we agree, it may be argued that such a provision is justifiable in the interest of financial credit and good name of India as a whole in the international money market and that it is politically expedient not to permit the constituent Units of the Indian Union to have any direct dealings with countries outside India.

Decisions on property, contracts, liabilities and suits were taken on different days. On 15th June, 1949, the Assembly decided: [66]

(a) that property accruing by lapse, escheat or *bona vacantia* should vest in a State if the property was situated in that State, and in the Union if it was situated outside the States;[67]

(b) that all lands, minerals and "other things of value underlying the ocean within the territorial waters of India" should vest in the Union;[68]

(c) that the executive power of the Union and of each State specified in Part I or Part III of the First Schedule should extend, subject to any law made by the appropriate Legislature, "to the grant, sale, disposition or mortgage of any property held for the purposes of the Union or of such State, as the case may be," and to the purchase or acquisition of property for those purposes respectively;[69]

(d) that all contracts made in exercise of the executive power of the Union or of a State should be expressed to be made by the President, or by the Governor or the Ruler of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power should be executed on behalf of the President or the Governor or the

[66] Constituent Assembly Debates, 15th June, 1949, pp. 886, 893, 893-95, 899, 900-903.

[67] This became article 296 of the Constitution of India.

[68] New article 271A. This became article 297 of the Constitution of India.

[69] This became article 298 of the Constitution of India.

Ruler by such persons and in such manner as he might authorise;[70] and

(c) that the Union of India and the Governments of the States should be juristic personalities for purposes of suits and proceedings.[71]

On 13th October, 1949, the Assembly agreed upon the right to succession to property, assets, rights and liabilities of the Government of the Dominion India, Governments of the Governors' Provinces and of the pre-existing Indian States.[72]

[70] This became article 299 of the Constitution of India.
[71] This became article 300 of the Constitution of India.
[72] Constituent Assembly Debates, 13th October, 1949, pp. 220, 209 and 295. These became articles 294 and 295 of the Constitution of India.

Chapter XIV

TRADE, COMMERCE AND INTERCOURSE

In the preceding chapter we have referred to the deliberations of the Constituent Assembly with regard to finance, property, contracts and suits. In this chapter we shall refer to the deliberations of the Constituent Assembly with regard to trade, commerce and intercourse within the territory of India.

On 8th September, 1949,[1] Dr Ambedkar suggested the insertion of a new Part, viz., Part XA, consisting of articles 274A, 274B, 274C, 274D and 274E, in the Constitution. These articles dealt with trade, commerce and intercourse within the territory of India. It may be mentioned that article 16 of the Draft Constitution laid down that trade, commerce and intercourse throughout the country should be free. Articles 243 to 245 contained certain other provisions relating to inter-State trade and commerce. Speaking about the necessity of inserting a new Part in the Constitution, Dr Ambedkar said that the Drafting Committee had felt that it would be much better "to assemble all these different articles, scattered in the different parts of the Draft Constitution, into one single part and to set them out *seriatim*, so that at one glance it would be possible to know what are the provisions with regard to the freedom of trade and commerce throughout India".[2] Article 274A stated that "subject to other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free". It has not, however, been the intention[3] of the Drafting Committee to make trade and commerce absolutely free and it suggested certain restrictions on trade and commerce within the territory of India. It had recommended the following restrictions, namely:

(1) Parliament should have the power to impose such

[1] Constituent Assembly Debates, 8th September, 1949, pp. 1123-24.
[2] *Ibid.*, p. 1124.
[3] *Ibid.*

restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as might be required in the "public interest" [Article 274B].

(2) Parliament or the Legislature of a State should have no power to make any law giving any preference to one State over another, or making any discrimination between one State and another, by virtue of any entry relating to trade or commerce in any of the Lists in the Seventh Schedule. But discriminatory or preferential provisions might be made by Parliament for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India [Article 274C].

(3) "Reasonable restrictions" might be imposed on the freedom of trade and commerce by the Legislature of a State "in the public interest". But a Bill for this purpose should not be introduced in the Legislature of a State without the previous sanction of the President [Article 274D].

(4) Parliament might appoint such authority as it would think fit for carrying out the purposes of Part XA of the Draft Constitution [Article 274E].

Pandit Thakur Dass Bhargava pleaded for absolute freedom of trade and commerce throughout the territory of India. He, however, suggested that in times of scarcity or in times of "national emergencies" Parliament might impose "resonable" restrictions on the freedom of trade and commerce.[4] Dr P. S. Deshmukh was of opinion that it would be better to leave the whole thing to be decided by Parliament.[5] Neither of these suggestions was, however, accepted by the Assembly. Shri T. T. Krishnamachari expressed the opinion that the provisions of articles 274A, 274B, 274C, 274D and 274E in respect of trade, commerce and intercourse within the territory of India were "as nearly perfect as human ingenuity could possibly make them"[6]. Shri Alladi Krishnaswami Ayyar said that these articles contained "a very well-thought-out scheme in regard

[4] *Ibid.*, p. 1128.
[5] *Ibid.*, p. 1132.
[6] *Ibid.*, p. 1138.

to inter-State trade and commerce". He also said that the Drafting Committee had taken into account "the larger interests of India as well as the interest of particular States and the wide geography of this country in which the interests of one region differ from the interests of another region".[7] There was not much discussion on the proposed articles and they were adopted by the Assembly on 8th September, 1949.[8]

The matter, was however, reopened on 13th October, 1949. On that day a new article, viz., article 274DDD was adopted by the Constituent Assembly.[9] The new article laid down that provisions of articles 274A and 274C should not affect the provisions of any existing law except in so far as the President might by order otherwise provide[10]. Another new article[11] was added to the Constitution on 16th October, 1949.[12] The former Indian States used to levy certain taxes and duties on the import of goods from other States and on the export of goods from the State to other States. The new article provided for the continuance of such taxes and duties for a period not exceeding ten years, by agreement between the Government of India and of that State, subject to modification by the President at the end of five years according to the report of the Finance Commission.[13] This new article was added to the Constitution because Government of India had given an assurance to the Rulers of the former Indian States that these States would retain the *status quo* except in respect of three subjects, viz., defence, foreign affairs and communications.[14] There was no "intention either to encroach on the internal autonomy or the sovereignty of the States or to fetter their discretion in respect of their acceptance of the new Constitution of India".

We have seen that article 274A stated that subject to the provisions of articles 274B to 274E, trade, commerce and

[7] *Ibid.*, p. 1141.

[8] *Ibid.*, pp. 1143-45. Articles 274A, 274B, 274C, 274D and 274E became articles 301, 302, 303, 304, and 307 of the Constitution of India.

[9] Constituent Assembly Debates, 13th October, 1949, pp. 176, 207.

[10] This became article 305 of the Constitution of India.

[11] Article 274DD.

[12] Constituent Assembly Debates, 16th October, 1949, p. 345.

[13] This became article 306 of the Constitution of India. This article was repealed by the Constitution (Seventh Amendment) Act, 1956.

[14] Speech of Sardar Vallabhbhai Patel, Constituent Assembly Debates, 12th October, 1949, p. 167.

intercourse throughout the territory of India should be free. Article 274A became article 301 of the Constitution of India. We have also seen[14A] that article 13 (1) (g) of the Draft Constitution, as adopted by the Constituent Assembly, stated that subject to other provisions of that article all citizens should have the right to practise any profession or to carry on any occupation, trade or business. Article 13 (1) (g) became article 19 (1) (g) of the Constitution of India. There appears to be some amount of overlapping between article 19 (1) (g) and article 301. In this connection we may refer to the observations of the Allahabad High Court in *Moti Lal* vs. *the Government of the State of Uttar Pradesh.*[15] The Allahabad High Court observed that article 19 lays down the right of the citizens, while article 301 "deals with how the trade commerce and intercourse is to be carried on between one place and another, whether the two places are situated in two side the same State".[16] It was also observed that while article 301 "contemplates the right of trade, business or intercourse, in motion, Article 19 (1) (g) secures the right of occupation, trade or business at rest."[17] It was observed by Chaturvedi J. of the Allahabad High Court in *Sagir Ahmad* vs. *the State of Uttar Pradesh and others*[18] that what article 301 "safeguards is the carrying on of the trade as distinguished from the right of any individual to carry it on. Article 19 (1) (g) and Article 301 have been framed in order to secure two different objects. Article 19 (1) (g) refers to the individual rights and Article 301 refers to trade as a whole and not the right of any individual". But when the matter went to the Supreme Court[19], Mukherjea J. observed that the question was not "quite free from difficulty". One of the points for decision before the Supreme Court was whether U.P. Road Transport Act, 1951, which provided for a State monopoly in respect of motor vehicle transport, conflicted with the "guarantee of freedom of inter-State and intra-State trade, commerce and intercourse" provided for by article 301 of

[14A] See page 73.
[15] A.I.R. 1951, Allahabad, 257.
[16] A.I.R. 1951, Allahabad, 270.
[17] A.I.R. 1951, Allahabad, 323.
[18] A.I.R. 1954, Allahabad, 257 (288).
[19] *Sagir Ahmad* vs. *the State of Uttar Pradesh and others* (1955) 1S.C.R. 707 (732-35.)

the Constitution. The Supreme Court did not express any final opinion on this point, because it declared that Act to be unconstitutional on other grounds. But the Supreme Court indicated "the contentions that have been or could be raised upon this point and the different views that are possible to be taken in respect to them so that the Legislature might take these matters into consideration if and when they think of legislating on this subject". The Supreme Court observed: "It may be pointed out that the Constitution itself has provided in articles 302 and 304 (b) how reasonable restrictions could be imposed upon freedom of trade and commerce and it would not be proper to hold that restrictions can be imposed *aliunde* these provisions of the Constitution. The question would also arise as to what interpretation should be put upon the expression 'reasonable restrictions' and whether or not we would have to apply the same tests as we have applied in regard to article 19 (6) of the Constitution. One material thing to consider in this connection would be that although the Constitution was amended in 1951 by the insertion of an additional clause in article 19 (6) by which State monopoly in regard to trade or business was taken out of the purview of article 19 (1) (g) of the Constitution,[20] yet no such addition was made in article 301 or article 304 of the Constitution and article 301, as it stands, guarantees freedom of trade, commerce and intercourse subject only to Part XIII of the Constitution and not the other parts of the Constitution including that dealing with fundamental rights..... It is certainly an arguable point as to whether the rights of individuals alone are dealt with in article 19 (1) (g) of the Constitution leaving the freedom of trade and commerce, meaning by that expression 'only the free passage of persons and goods' within or without a State to be dealt with under article 301 and the following articles". The Supreme Court thus indicated that a law providing for a State monopoly in any trade or business might be valid for purposes of article 19 (1) (g) but it could be challenged as violating the provisions of article 301, unless it was shown to be reasonable and required in

[20] Article 19 (6) was amended by the Constitution (First Amendment) Act, 1951. See Appendix 1.

the public interest. The Government of India, therefore, thought it necessary to amend[21] article 305 of the Constitution. Article 305, as adapted by the Constituent Assembly, stated:[22] "Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order provide". Article 305, as amended by the Constitution (Fourth Amendment) Act, 1955, states: "Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct; and nothing in article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub-clause (ii) of clause (6) of article 19' . But, we submit, that the question whether articles 19 and 301 cover the same ground and have the same object still remains to be decided.

[21] "A recent judgment of the Supreme Court in *Saghir Ahmed* vs. *The State of U.P.* has raised the question whether an Act providing for a State monopoly in a particular trade or business conflicts with the freedom of trade and commerce guaranteed by article 301, but left the question undecided. Clause (6) of article 19 was amended by the Constitution (First Amendment) Act in order to take such State monopolies out of the purview of sub-clause (g) of clause (1) of that article, but no corresponding provision was made in Part XIII of the Constitution with reference to the opening words of article 301. It appears from the judgment of the Supreme Court that notwithstanding the clear authority of Parliament or of a State Legislature to introduce State monopoly in a particular sphere of trade or commerce, the law might have to be justified before the courts as being "in the public interest" under article 301 or as amounting to a "reasonable restriction" under article 304 (b). It is considered that any such question ought to be left to the final decision of the Legislature. Clause 4 of the Bill accordingly proposes an amendment of article 305 to make this clear".

See Statement of Objects and Reasons, *Calcutta Gazette, Extraordinary*, December 27, 1954, p. 1827.

[22] This was article 274 DDD of the Draft Constitution. See Note 10.

CHAPTER XV

SERVICES UNDER THE UNION AND THE STATES

I

In this chapter we propose to refer to the decisions of the Constituent Assembly with regard to Services and Public Services Commissions.

II

The Drafting Committee had refrained from inserting any detailed provisions with regard to Services in the Draft Constitution, because in its opinion[1] these should be "regulated by Acts of the appropriate Legislature rather than by constitutional provisions". The Committee had felt that the future Legislatures in this country, as in any other countries, might be "trusted to deal fairly with the Services". The recommendations of the Drafting Committee with regard to Services had been incorporated in articles 282 and 283 of the Draft Constitution. On 7th and 8th September, 1949, the Assembly adopted these articles and three other new articles, namely, articles 282A, 282B and 282C. It agreed upon: (a) the method of recruitment and conditions of service of persons serving the Union or a State;[2] (b) the tenure of office of persons serving the Union or a State;[3] (c) the procedure for dismissal, removal and reduction in rank of persons employed in civil capacities under the Union or a State;[4] and (d) the creation of All-India Services.[5]

Section 10 of the Indian Independence Act, 1947, provided that every person who "having been appointed by the Secretary

[1] Reports of Committees of the Constituent Assembly of India, Third Series, p. 177.

[2] Constituent Assembly Debates, 7th September, 1949, pp. 1082, 1092. This became article 309 of the Constitution of India.

[3] *Ibid.*, pp. 1082, 1093. This became article 310 of the Constitution of India.

[4] *Ibid.*, p. 1083 and 8th September, 1949, p. 1116 This became article 311 of the Constitution of India.

[5] *Ibid.*, p. 1083, and 8th September, 1949, p. 1119. This became article 312 of the Constitution of India.

of State, or Secretary of State in Council, to a civil service of the Crown in India continues on and after the appointed day[6] to serve under the Government of either of the new Dominions or of any Province.... shall be entitled to receive from the Governments of the Dominions and Provinces... the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or, as the case may be, as respects the tenure of his office, or rights as similar thereto as changed circumstances may permit, as that person was entitled to immediately before the appointed day". On 10th October, 1949, the Assembly decided[7] that the protection given by the Indian Independence Act should continue.[8]

Clause (2) of article 282B[9] stated that, except in certain cases specified in the proviso, no person who was a member of a civil service of the Union or an all-India Service or a civil service of a State or held a civil post under the Union or a State "shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him". This article, as adopted by the Constituent Assembly, became article 311 of the Constitution of India. We may note here that sub-section (3) of section 240 of the Government of India Act, 1935, laid down that no person who was a member of a civil service of the Crown in India, or held any civil post under the Crown of India "shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him". Thus, the provision of sub-section (3) of section 240 of the Government of India Act, 1935, was reproduced in clause (2) of article 311 of the Constitution with the addition of the words "or removed". Now, what is the meaning of the words "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him"? The Federal Court of India expressed the opinion[10]

[6] 15th August, 1947.
[7] Constituent Assembly Debates, 10th October, pp. 33, 53.
[8] This became article 314 of the Constitution of India.
[9] Constituent Assembly Debates, 7th September, 1949, p. 1083 and 8th September, 1949, p. 1116.
[10] See *Secretary of State* vs. *I. M. Lall*, A.I.R., 1945, F.C., 47 (58).

that sub-section (3) of section 240 of the Government of India Act, 1935, "requires that as and when an authority is definitely proposing to dismiss or to reduce in rank a member of the civil service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, ... the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken.... The real point of the sub-section is... that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or ommissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed". The Privy Council, while interpreting the provisions of sub-section (3) of section 240 of the Government of India Act, 1935, observed:[11] "In the opinion of their Lordships, no action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry... it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry". Thus, it was judicially settled that sub-section (3) of section 240 of the Government of India Act, 1935, required that reasonable opportunity

[11] See the *High Commissioner for India and another* vs. *I. M. Lall*, A.I.R., 1948, P.C., 121 (126).

should be given at the stage of inquiry into the charges and that a further opportunity should be given to the civil servant after the charges have been proved against him and a particular punishment is proposed to be awarded. Therefore, clause (2) of article 311, as adopted by the Constituent Assembly and which, as we have said, was a reproduction of sub-section (3) of section 240 of the Government of India Act, 1935, also required that opportunity should be given at both the stages. The Supreme Court of India also held that[12] "in order that the opportunity to show cause against the proposed action may be regarded as a reasonable one, it is quite obviously necessary that the government servant should have the opportunity, to say, if that be his case, that he has not been guilty of any misconduct to merit any punishment at all and also that the particular punishment proposed to be given is much more drastic and severe than he deserves". In the opinion of the Supreme Court, the reasonable opportunity contemplated in clause (2) of article 311 included: "(a) an opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based; (b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally (c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant".

Article 311 of the Constitution was amended by the Constitution (Fifteenth) Amendment Act, 1963.[13] The proposed provision of clause (2) of article 311 in the Constitution (Fifteenth) Amendment Bill was that "no such person as aforesaid shall be dismissed or removed except after an inquiry in which he has been informed of the charges against him and

[12] See *Khem Chand* vs. *Union of India and others*, A.I.R., 1958, S.C., 300 (306-7).
[13] See Appendix 15.

given a reasonable opportunity of being heard in respect of those charges".[14] Clause (2) was proposed to be amended in order "(a) to make it clear that only one opportunity should be given to a Government servant in respect of any departmental enquiry against him; and (b) to ensure that reduction in rank does not stand on a par with the more severe punishments of dismissal or removal from service and thus get a constitutional safeguard".[15] But when the Constitution (Fifteenth) Amendment Bill, 1962, was under discussion in the Lok Sabha, Shri A. K. Sen, Minister of Law, Government of India, moved an amendment for addition of the following words in clause (2) after the words "in respect of those charges", namely[16]:

> "and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry".

During discussion it was argued that the right of a Government servant granted under original clause (2) of article 311 was "sought to be taken away"[17] and that the proposed amendment would curtail the fundamental rights given under the Constitution of India.[18] Shri A. K. Sen denied it and observed:[19] "to say that a great constitutional safeguard is being taken away is... completely unfounded". He said that the amended clause sought only to clarify the position under the existing law. Shri Frank Anthony suggested the retention of clause (2) of article 311 in its original form as practically no change was contemplated. He observed:[20] "I agree entirely that this amendment merely spells out the decision of the Supreme Court. The Supreme Court said clearly that the second opportunity is only an opportunity

[14] See the *Gazette of India, Extraordinary*, Part II, Section 2, November 23, pp. 1140-43.
[15] *Ibid.*, p. 1148.
[16] See Lok Sabha Debates, May 1, 1963, column 13244.
[17] *Ibid.*, columns 13249-50.
[18] *Ibid.*, column 13251.
[19] *Ibid.*, column 13263.
[20] *Ibid.*

to represent against the penalty proposed. Then why not leave article 311 as it was? Unfortunately, for no rhyme or reason laymen MPs are suspecting that because you are changing it, you are taking it away. Actually this merely spells out the Supreme Court judgment". Shri A. K. Sen said:[21] "Shri Anthony and others will remember that the decision of the Supreme Court makes it quite clear that the second opportunity was merely an opportunity to make a representation on the penalty proposed. If that is so,... there was no harm in having it clarified.... The Government having regard to the decision of the Supreme Court is entitled to make the matter clear beyond doubt so that there will be no controversy on the question". The amendment of Shri A. K. Sen was accepted by the House and the words "or reduced in rank" were also retained. Thus, under amended clause (2) there will be an enquiry stage at which a reasonable opportunity of being heard must be given to a Government servant in respect of the charges and the amended clause also requires that at the stage of awarding penalty a reasonable opportunity must be given to the Government servant of making representation on the penalty proposed.

III

We may now pass on to the decisions of the Constituent Assembly with regard to Public Service Commissions. The Union Constitution Committee, to which we have already referred, had recommended[22] that there should be a Public Service Commission for the Federation whose composition and functions should follow the lines of the corresponding provisions in the Government of India Act, 1935,[23] except that the Chairman and the members of the Commission should be appointed by the President "on the advice of his ministers". The recommendation of Union Constitution Committee had been accepted by the Constituent Assembly

[21] *Ibid.*, columns 13263-64.

[22] Constituent Assembly of India, Reports of Committees, First Series, p. 55.

[23] Section 265 of the Government of India Act, 1935, stated that the Chairman and other members of a Public Service Commission should be appointed, in the case of the Federal Commission by the Governor-General, and in the case of a Provincial Commission by the Governor in his discretion.

in July, 1947, but the words "on the advice of his ministers" were deleted.[24] Articles 284 to 288 of the Draft Constitution made provisions for Public Service Commissions, their compositions and functions. Decisions on this subject were taken by the Assembly on 22nd and 23rd August, 1949. During discussion new articles were substituted for articles 284 to 288 of the Draft Constitution and four other articles, namely, 285A, 285B, 285C and 288A, were adopted by the Assembly. Article 284, as adopted by the Assembly on 22nd August, 1949,[25] stated that there should be a Public Service Commission for the Union and a Public Service Commission for each State. It also provided that two or more States might, however, agree that there should be one Public Service Commission for that group of States, and if a resolution to that effect was passed by the Legislature of each of those States, Parliament might by law provide for the appointment of a Joint Public Service Commission to serve the needs of those States. This article practically reproduced section 264 of the Government of India Act, 1935. With regard to the appointment and term of office of members of the Commission, the Assembly decided[26] that the Chairman and other members of a Public Service Commission should be appointed, in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor or Ruler of the State. As nearly as might be one-half of the members of every Public Service Commission should, however, be persons who, at the dates of their respective appointments, had held office for at least ten years either under the Government of India or under the Government of a State. This decision was taken not because there was any desire to "oblige" persons who were already in the service of the Government,

[24] Constituent Assembly Debates, 29th July, 1947, pp. 963-64.

[25] Constituent Assembly Debates, 22nd August, 1949, p. 571. This article became article 315 of the Constitution of India.

[26] Article 285 of the Draft Constitution. Constituent Assembly Debates, 22nd August, 1949, pp. 573, 594. This became article 316 of the Constitution of India. This article was amended by the Constitution (Fifteenth Amendment) Act, 1963. "There is no provision in article 316 for the appointment of an acting Chairman of a Public Service Commission when that office is vacant or when the permanent Chairman is on leave or is otherwise unable to perform the duties of his office. It is accordingly proposed to amend article 316 to provide for such appointment."

See the Statement of Objects and Reasons, the *Gazette of India, Extraordinary*, Part II, Section 2, November 23, 1962, p. 1148.

but because the intention was to secure persons with necessary experience who would be able to perform their duties in the best possible manner.[27] It was rightly thought that the judgment required to come to a conclusion on the question of fitness presupposed a certain amount of experience on the part of the person who would be asked to judge. It was also decided that a member of a Public Service Commission should hold office for a term of six years from the date on which he entered upon his office or until he attained, in the case of the Union Commission, the age of sixty-five years, and in the case of a State Commission or a Joint Commission, the age of sixty years, whichever was earlier.[28]

Regarding the removal and suspension of a member of Public Service Commission, the Assembly decided that the Chairman or any other member of a Public Service Commission should be removed from office by order of the President on the ground of misbehaviour after the Supreme Court, on a reference being made to it by the President, had, on inquiry, reported that the Chairman or such other member, as the case may be, ought on any such ground be removed. Pending such inquiry and report the President in the case of the Union Commission or a Joint Commission, and the Governor or Ruler in the case of a State Commission, was given the power to suspend from office the Chairman or any other member of the Commission in respect of whom a reference had been made to the Supreme Court. The President was, however, given the power to remove from office the Chairman or any other member of a Public Service Commission if the Chairman or such other member, (a) was adjudged an insolvent; or (b) engaged during his term of office in any paid employment outside the duties of his office; or (c) was, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body. It was also decided that the Chairman or any other member of a Public Service Commission should be deemed to be guilty of misbehaviour if he was in any way concerned or interested in any contract or agreement made by or on behalf of the Government of

[27] Constituent Assembly Debates, 22nd August, 1949, p. 592.
[28] Article 285 of the Draft Constitution. Constituent Assembly Debates, 22nd August, 1949, pp. 573-94.

India or the Government of a State.[29] It may be noted that there was no such provision in the Government of India Act, 1935, for the removal or suspension of the Chairman or a member of a Public Service Commission.

The Assembly empowered the President in the case of the Union Commission or a Joint Commission, and the Governor or Ruler of a State in the case of a State Commission, to make regulation—(a) for determining the number of members of the Commission and their conditions of service; and (b) for making provision with respect to the number of members of the staff of the Commission and their conditions of service.[30]

The Assembly further decided[31] that on ceasing to hold office—(a) the Chairman of the Union Public Service Commission should not be eligible for further employment either under the Government of India or under the Government of a State; (b) a member other than the Chairman of the Union Public Service Commission might be appointed as the Chairman of the Union Public Service Commission or as the Chairman of a State Public Service Commission, but should not be eligible for any other employment either under the Government of India or under the Government of a State; (c) the Chairman of a State Public Service Commission, should be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but should not be eligible for any other employment either under the Government of India or under the Government of a State; (d) a member other than the Chairman of a State Public Service Commission should be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but should not be eligible for any other employment either under the Government of India or under the Government of a State. It was also decided

[29] Article 285A. Constituent Assembly Debates, 22nd August, 1949, pp. 573, 594. This became article 317 of the Constitution of India.

[30] Article 285B. Constituent Assembly Debates, 22nd August, 1949, pp. 547, 595. This became article 318 of the Constitution of India.

[31] Article 285C. Constituent Assembly Debates, 22nd August, 1949. pp. 574, 595. This became article 319 of the Constitution of India.

by the Assembly that a person who had held office as a member of a Public Service Commission should on the expiration of his term of office not be eligible for re-appointment to that office.

These were, we think, very wise decisions, because any hope that might be held out for re-appointment, or continuation of the similar employment might act as a sort of temptation which might induce a member of a Public Service Commission not to act with that amount of impartiality and integrity which are expected of him in the discharge of his duties.

On 23rd August, 1949, the Assembly agreed upon[32] the functions of the Public Service Commissions and the manner of meeting their expenses. It decided, among other things, that the Commission should be consulted—(a) on all matters relating to methods of recruitment to civil services and for civil posts; (b) on the principles to be followed in making appointments; and (c) on all disciplinary matters affecting a person serving under Government. The Constituent Assembly gave the Commissions the status of an advisory body[33] as had been given under the Government of India Act, 1935, because absence of consultation would not invalidate any action[34] taken by Government with regard to the matters mentioned above and that the advice of the Commissions was not intended to be binding upon the Government. The Assembly, however, provided for a safeguard. It decided that the report of the Union Public Service Commission should be laid before Parliament and that the report of a State Public Service Commission should be laid before the State Legislature.[35] We agree that on matters over which the Commissions should be merely consulted there is much to be said for making their verdict final. But such a provision, we think, would lead practically to two Governments at the Centre and two Governments at the States. Further, that would unduly fetter the initiative of the Government. The Legislatures must carefully perform their duty of scrutinizing cases in

[32] Constituent Assembly Debates, 23rd August, 1949, pp. 597-98, 632.
[33] See D. Basu, *Commentary on the Constitution of India*, Third Edn., Vol. 2, p. 509.
[34] See *State of U.P.* vs. *Man Bhodhan Lal*, A.I.R. 1947 (S.C.) 912 (918).
[35] Constituent Assembly Debates, 23rd August, 1949, pp. 598, 632. This became article 323 of the Constitution of India.

which recommendations of the Commission have not been accepted.

The Constituent Assembly intended that the Commissions should perform certain quasi-judicial functions. Hence, like the judiciary they should be able to do their work without interference by the executive, political or other extraneous influences. The articles adopted by the Constituent Assembly seem to aim at establishing such independence. The Assembly tried to make the Commissions independent bodies and not authorities subordinate to the Government. One thing should be noted here. The powers to appoint the members of the Commissions and to fix the conditions of their employment were vested in the President, Governor or Ruler, as the case might be, in other words, in the executive. It would perhaps have been better if some independent authority were associated with it, e.g. the Union Public Service Commission in the case of a State Public Service Commission and the Supreme Court in the case of the Union Public Service Commission. The provisions of the Constitution alone will not ensure the effectiveness of the Commissions if right type of members are not chosen. Integrity, impartiality and experience of the members are necessary. The quality of administration in India will largely depend upon the work of the Public Service Commissions.

CHAPTER XVI

ELECTIONS

We may now proceed to describe the deliberations of the Constituent Assembly on matters relating to elections.

The Union Constitution Committee had recommended[1] that the superintendence, direction and control of all elections, whether federal or provincial, including the appointment of election tribunals for decision of doubts and disputes arising out of, or in connection with, such elections should be vested in a Commission to be appointed by the President. The matter had come up for decision in the Assembly on 29th July, 1947. The Assembly had then accepted the suggestion of Shri H. V. Pataskar[2] and decided that the superintendence, direction and control of all "federal elections", including the appointment of election tribunals for decision of doubts and disputes arising out of, or in connection with, such elections should be vested in a Commission to be appointed by the President.[3] The underlying idea had been that,[4] so far as federal elections had been concerned, the suprintendence, direction and control should vest in a Commission to be appointed by the President, but so far as provincial elections had been concerned, the superintendence, direction and control should be left to be regulated by the Governor of the province or by some other "appropriate authority" in the province itself. The decisions of the Constituent Assembly in this respect had been incorporated by the Drafting Committee in article 289 of the Draft Constitution which had provided for appointment by the President of an Election Commission for the superintendence, direction and control of all federal elections, and also for appointment by the Governors of separate Election Commissions for the States. When article 289 of the Draft Constitution came up for discussion on 15th June, 1949, Dr Ambedkar, Chairman of the Drafting Committee, suggested what he called "radical changes" in the provisions of the article. He

[1] Constituent Assembly of India, Reports of Committees, First Series, p. 55.
[2] Constituent Assembly Debates, 29th July, 1947, p. 971.
[3] *Ibid.*, p. 977.
[4] *Ibid.*, p. 971.

moved an amendment for the substitution of the following article for article 289, namely[5]:—

"289. (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in this Constitution as the Election Commission) to be appointed by the President.

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may, from time to time appoint, and when any other Election Commissioner is so appointed, the Chief Election Commissioner shall act as the Chairman of the Commission.

(3) Before each general election to the House of the People and to the Legislative Assembly of each State and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President shall also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on it by clause (1) of this article.

(4) The conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine:

Provided that the Chief Election Commissioner shall not be removed from office except in like manner and on the like grounds as a judge of the Supreme Court and the conditions of the service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that any other Election Commissioner

[5] Constituent Assembly Debates, 15th June, 1949, p. 904.

or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(5) The President or the Governor or Ruler of a State shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1) of this article."

The new article proposed to centralize[6] the election machinery in the hands of a single Election Commission to be assisted by Regional Commissioners. The Regional Commissioners would not work under the control of the State Governments, but would work under the superintendence and control of the Election Commission. The changes in the provisions of the article became necessary because, as Dr Ambedkar said,[7] it had been brought to the notice of the Drafting Committee as well as of the Central Government that in some of the pre-existing provinces the executive Governments were instructing or managing things in such a manner that people who did not belong to those provinces either "racially, culturally or linguistically", were being excluded from being brought on electoral rolls. In order, therefore, to prevent injustice being done by a State Government to people other than those who belonged to the State racially, linguistically and culturally, it was thought desirable to depart from the original proposal of having a separate Election Commission for each State under the guidance of the Governor and the State Government. Under the provisions of the new article the entire election machinery would be placed in the hands of a central Election Commission which alone would be entitled to "issue directives to returning officers, polling officers and others engaged in the preparation and revision of electoral rolls", so that no injustice might be done to any citizen of India who under new Constitution would be entitled to be brought on electoral rolls. Justifying the pro-

[6] See Durgadas Basu, *Commentary on the Constitution of India*, Vol. 2, p. 516 (Third Edition).

[7] Constituent Assembly Debates, 15th June, 1949, pp. 905-6.

visions of clause (4) of article 289, Dr Ambedkar observed that if the object of the House was that all matters relating to elections should be outside the control of the executive Government of the day, then it was absolutely necessary that the Election Commission should be made irremovable by the executive by a mere fiat. Therefore, the Chief Election Commissioner was proposed to be given the same status, so far as removability was concerned, as had been given to the Judges of the Supreme Court.

In the course of the discussion several suggestions were made by different members of the Assembly with a view to securing independence of the Election Commission and making it free from party influences. Prof. Shibban Lal Saxena suggested:[8] (a) that the appointment of the Chief Election Commissioner and other Election Commissioners should be "subject to confirmation by ⅔ majority in a joint session of both Houses of Parliament"; (b) that the Regional Commissioners should be appointed by the President in concurrence with the Chief Election Commissioner; (c) that the conditions of service of the Election Commissioners should not be determined by President by rule but should be determined by Parliament by law; and (d) that all the Election Commissioners should not be removed except in like manner and on like grounds as a judge of the Supreme Court. Shri Patasker[9] was of opinion that the article should remain in the form it had been drafted by the Drafting Committee. According to him, the proposed article 289 would take away the "last vestige of provincial autonomy". Pandit H. N. Kunzru expressed the opinion that by leaving a great deal of power in the hands of the President, the proposed article made room for the exercise of political influence in the matter of appointment of the Election Commissioners because the President would act on the advice of the Prime Minister who would necessarily belong to a political party. He rightly suggested that Parliament should be authorised to make provisions for that matter by law.[10] Shri K. M. Munshi,[11] a member of the

[8] *Ibid.*, p. 907.
[9] Constituent Assembly Debates, 15th June, 1949, p. 910. and 16th June, 1949, p. 915.
[10] Constituent Assembly Debates, 16th June, 1949, pp. 921-2.
[11] *Ibid.*, pp. 924-8.

Drafting Committee, agreed that the proposed article 289 should be amended in order to give parliamentary control over the appointment and determination of conditions of service of Election Commissioners. Dr Ambedkar also admitted[12] that the proposed article 289 required some amendments. He pointed out that under the Constitution of the United States of America certain appointments could not be made by the President without the concurrence of the Senate.[13] Hence, so far as those appointments were concerned, although the power of appointment was vested in the President it was subject to a check by the Senate and the Senate might at any time when any particular appointment was proposed make enquiries and satisfy itself that the person was an 'appropriate person". But he wanted the members of the Assembly to realise that that was "a very dilatory process, a very difficult process", because Parliament might not be meeting at the time when the appointment was required to be made. He expressed the opinion that the provision contained in the Constitution of the United States of America in this respect was undoubtedly a "very salutory check" upon the extravagance of the President in making appointments, but it was likely to create administrative difficulties. He, therefore, moved amendments[14] suggesting—(1) that the appointment of the Chief Election Commissioner and other Election Commissioners should, "subject to the provisions of any law made in this behalf by Parliament" be made by the President, and (2) that subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners should be such as the President may by rule determine. The amendments were accepted by the Assembly and article 289 was adopted on 16th June, 1949.[15]

The Assembly decided that no person "shall be ineligible for inclusion in, or claim to be excluded from", electoral roll on grounds only of religion, race, caste, sex or any of them[16]

[12] *Ibid.*, p, 928.
[13] Article II, section 2.
[14] Constituent Assembly Debates, 16th June, p. 929.
[15] *Ibid.*, 1949, p. 960. Article 289 became article 324 of the Constitution of India.
[16] New article 289A. Constituent Assembly Debates, 16th June, 1949, p. 931. This became article 325 of the Constitution of India.

and that elections to the House of the People and to the Legislative Assemblies of States should be on the basis of adult suffrage.[17] The Assembly also empowered Parliament and Legislatures of the States to make provisions, subject to the provisions of the Constitution, with respect to elections to Parliament and Legislatures.[18] The Assembly further decided to oust the jurisdiction of courts in electoral matters.[19]

Thus, on 15th and 16th June, 1949, the Constituent Assembly of India thought of the mere ordinary men and women who would ultimately decide the destiny of the future Republic of India, namely, the voters in India. Adult franchise, the Constituent Assembly thought, would bring millions of voters to the polls, mostly uneducated and unfamiliar with electoral processes. It was necessary, therefore, to make suitable provisions so that elections conducted with such limitations would, as far as possible, reflect a true expression of what the voters would want. The decisions of the Constituent Assembly were aimed at achieving that. In spite of protests about encroachment on provincial autonomy, the Constituent Assembly decided—we think very wisely—to make the preparation of electoral rolls and the conduct of elections, whether federal or State, a function of the Centre. It is necessary that basic electoral processes should be managed by an outside authority free from any possible local prejudices or influences. An independent supervisory authority of great abilities is essential. Any legislation restraining the President in making appointments should be directed towards this end. An independent electoral machinery is necessary for the successful working of a democracy.

[17] New article 289B, Constituent Assembly Debates, 16th June, 1949, p. 932. This became article 326 of the Constitution of India.

[18] Constituent Assembly Debates, 16th June, 1949, pp. 933, 936. These became articles 327 and 328 of the Constitution of India.

[19] Constituent Assembly Debates, 16th June, 1949, p. 936. This became article 239 of the Constitution of India.

CHAPTER XVII

MINORITIES

I

We propose to deal in this chapter with the special provisions in the proposed Constitution relating to minorities.

We have stated before[1] that the Advisory Committee on minorities, fundamental rights, *etc.*, submitted its report[2] to the Constituent Assembly on 27th August, 1947. The report dealt with "political safeguards" of the minorities. The Committee made its recommendations on the following matters, namely:—

(1) representation of minorities in the legislatures; joint *versus* separate electorates and weightage;
(2) reservation of seats for minorities in Cabinets;
(3) reservation for minorities in public services; and
(4) administrative machinery to ensure protection of minority rights.

The Committee rightly observed that elections on the basis of separate electorates had been "one of the main stumbling blocks to the development of a healthy national life" in India. Hence, it recommended elections on the basis of joint electorates. It also recommended that for a period of ten years there should be reservation of seats in the Legislatures for the "recognised minorities" and that the position should be reconsidered at the end of that period. It was opposed to weightage for any minority. The minorities were classified by it according to their population, into three groups. Group A consisted of those with a population of less than ·5 *per cent.* in the Indian Dominion excluding the Indian States. That group included Anglo-Indians, Parsees and plains' tribesmen in Assam. Group B consisted of those with a population of more than .5 *per cent.* in the Indian Dominion excluding the

[1] See page 52.
[2] Constituent Assembly of India, Reports of Committees, Second Series, pp. 30-34.

Indian States, and included Indian Christians and Sikhs. Group C consisted of those with a population exceeding 1.5 *per cent.* in the Indian Dominion excluding the Indian States, and included Muslims and Scheduled Castes. The Committee recommended: (a) that there should be no reservation of seats in the Legislatures for the Anglo-Indian and the Parsee communities but the President and the Governors should be given the power to nominate representatives of the Anglo-Indian community to the Lower House of Parliament and to the Lower Houses of the Provincial Legislatures, and if after a period of ten years it was found that the Parsee community had not secured proper representation the position should be reconsidered; (b) that there should be reservation of seats in the Central and Provincial Legislatures for the Muslims and the Scheduled Castes, and in the Central Legislature and the Legislatures of Bombay and Madras seats should be reserved for the Indian Christians; (c) that a convention should be established for including, as far as practicable, representatives of important minority communities in the Cabinet, and (d) that the Central and the Provincial Governments should, in making appointments to public services, keep in view the claims of the minorities. The Anglo-Indian community used to enjoy certain facilities in the matter of employment in certain services. Certain percentages of the posts were reserved for it. The educational institutions of the Anglo-Indian community also used to get special grants from the Government. The Committee recommended gradual curtailment of these facilities and gradual reduction of the grants. At the time of discussion of the report in the Constituent Assembly, Shri K. M. Munshi pointed out that[3] the Scheduled Castes, in the strict sense of the term, were not a minority. They were, he said, "neither a racial minority nor a linguistic minority, not certainly a religious minority". It was, therefore, decided by the Assembly that they should not be regarded as a minority but that there should be reservation of seats for the Scheduled Castes in the Central and Provincial Legislatures on the basis of their population.[4] The Committee also recommended that a Statu-

[3] Constituent Assembly Debates, 27th August, 1947, p. 248.
[4] *Ibid.*, pp. 258, 261.

tory Commission should be set up to investigate the conditions of the socially and educationally backward classes, to study the difficulties under which they labour and to recommend to the Union Government or the Unit Government the steps that should be taken to eliminate those difficulties and that an officer should be appointed by the President at the Centre and by the Governors in the Provinces to report about the working of the safeguards provided for the minorities.[5] The recommendations of the Committee were accepted by the Constituent Assembly on 27th and 28th August 1947.

The decisions of the Assembly on this subject were incorporated by the Drafting Committee in articles 292 to 299 and 301 in Part XIV of the Draft Constitution. The decisions of the Assembly regarding reservation of seats in the Legislatures for the 'recognised minorities' were incorporated by the Drafting Committee in articles 292 and 294 of the Draft Constitution. The matter was, however, reconsidered by the Advisory Committee in May, 1949. Some members of the Committee then felt that,[6] "conditions having drastically changed since the Advisory Committee made their recommendations in 1947, it was no longer appropriate in the context of free India and of present conditions that there should be reservation of seats for Muslims, Christians, Sikhs or any other religious minority. Although the abolition of separate electorates had removed much of the poison from the body politic, the reservation of seats for religious communities, it was felt, did lead to a certain degree of separatism and was to that extent contrary to the conception of a secular democratic State". Accordingly, the Committee decided that there should not be any reservation of seats for minorities other than Scheduled Castes in the Legislatures.[7] The Committee, therefore, recommended that the provisions of Part XIV of the Draft Constitution should be amended in the light of the new decision taken by it. In this connection it may be stated that Mr Frank Anthony, who was then the leader of the Anglo-Indian Community in India and a member of the Advisory Committee, stated in an article published in the Statesman[8]

[5] Constituent Assembly Debates, 27th and 28th August, 1947.
[6] Reports of Committees of the Constituent Assembly, Third Series, pp. 240-5.
[7] *Ibid.*, p. 241.
[8] *The Statesman*, Calcutta, 17th August, 1949, Independence Day Supplement.

that it was essentially in the Advisory Committee that the fate of the minorities of India, so far as the proposed Constitution was concerned, was decided.

Part XIV of the Draft Constitution came up for discussion in the Constituent Assembly on 23rd August, 1949.[9] On 24th August, 1949, the Assembly decided[10] that seats should be reserved in the House of the People for—

"(a) The Scheduled Castes;
(b) The Scheduled Tribes except the Scheduled Tribes in the Tribal areas of Assam;
(c) The Scheduled Tribes in the autonomous districts of Assam".[11]

On that day the Assembly also decided[12] that seats should be reserved for "the Scheduled Castes and Scheduled Tribes, except the Scheduled Tribes in the Tribal areas of Assam, in the Legislative Assembly of every State for the time being specified in Part I or III of the First Sechedule" and that seats should also be reserved for the autonomous districts in the State of Assam. On 25th August, 1949, the Assembly adopted a new article[13] which provided that such reservation of seats for the Scheduled Castes and Scheduled Tribes either in the House of the People or in the Legislative Assembly of a State should cease to have effect on the expiration of a period of ten years[14] from the commencement of the Constitution.

It has been stated before that in August, 1947, the Constituent Assembly had decided that there should be some special provisions regarding the representation of the Anglo-Indian Community in the House of the People and in the Legislative Assemblies of the States. Those decisions had been incorporated in articles 293 and 295 of the Draft Constitution which were

[9] Constituent Assembly Debates, 23rd August, 1949, p. 632.
[10] Constituent Assembly Debates, 24th August, 1949, p. 659.
[11] This became article 330 of the Constitution of India.
[12] Constituent Assembly Debates, 24th August, 1949, pp. 663, 674. This became article 332 of the Constitution of India.
[13] Article 295A. Constituent Assembly Debates, 24th August, 1949, p. 674. Constituent Assembly Debates, 25th August, 1949, p. 698. This became article 334 of the Constitution of India.
[14] The period has been made "twenty years" by the Constitution (Eighth Amendment) Act, 1959. See Appendix 8.

adopted by the Assembly on 24th August, 1949.[15] Articles 297 and 298 of the Draft Constitution incorporated the decisions of the Assembly taken in August, 1947, with regard to the special provisions for the Anglo-Indian Community in certain services and with regard to educational grants for the benefit of that community. Those articles were adopted on 16th June, 1949.[16] On 14th October, 1949, the Assembly decided[17] that the claims of the members of the Scheduled Castes and the Scheduled Tribes should be taken into consideration, "consistently with the maintenance of efficiency of administration" in the making of appointments to services and posts in connection with the affairs of the Union or of a State. It also decided that a Special Officer should be appointed by the President "to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes" under the Constitution. It further decided that the Special Officer should report to the President "upon the working of those safeguards at such intervals as the President may direct" and that the President should cause such reports to be laid before each House of Parliament.[18] The Assembly also agreed upon the appointment of a Commission to investigate the conditions of backward classes within the territory of India.[19]

The abolition of communal representation and separate electorates was one of the great achievements of our Constituent Assembly. The Assembly also rightly abolished the system of reservation of seats for minorities other than Scheduled castes and Scheduled tribes in the Legislatures. In fact, the minorities had themselves felt[20] that in their own interests, no less than in the interests of the country as a whole, the statutory reservation of seats for religious minorities should be abolished. The Anglo-Indians have been given, as observed

[15] Constituent Assembly Debates, 24th August, 1949, pp. 659, 662, 674. Articles 293 and 295 became articles 331 and 333 of the Constitution of India.

[16] Constituent Assembly Debates, 16th June, 1949, pp. 937, 941. These articles became articles 336 and 337 of the Constitution of India.

[17] Constituent Assembly Debates, 14th October, 1949, p. 251. This became article 335 of the Constitution of India.

[18] Constituent Assembly Debates, 14th October, 1949, p. 264. This became article 338 of the Constitution of India.

[19] Constituent Assembly Debates, 16th June, 1949, pp. 943, 948. This became article 340 of the Constitution of India.

[20] Reports of Committees of the Constituent Assembly of India, Third Series, p. 242.

by Mr Frank Anthony, "a place of self-respect and of no negligible importance in the Constitution of free India"[21] and they have been treated in the new Constitution with what he called "exceptional generosity."[22]

[21] *The Statesman*, Calcutta, 9th October, 1949.
[22] *The Statesman*, Calcutta, 17th August, 1949, Independence Day Supplement.

CHAPTER XVIII

LANGUAGE

We shall now deal with the question of the language of the Union.

The Draft Constitution did not contain any provision regarding the official language of the Union. The question as to what should be the national language of India agitated the minds of the members of the Constituen Assembly for a long time. On 8th November, 1948, during the general discussion of the Draft Constitution, Pandit Jawaharlal Nehru had emphasised[1] the need of an all-India language. He had then expressed the opinion that an independent country should function in its own language. In his opinion, however, "language ultimately grows from the people" and that it should not be imposed on an unwilling people. "It is an obvious thing", he had said, "and a vital thing" that any country, much more so a free and independent country, must function in its own language. Pandit Nehru had not then been in favour of an immediate change because, in his opinion, that would not be a "wise step" to take. He, however, had observed that[2] any attempt to impose a particular form of language on an unwilling people had usually met with strong opposition and had actually resulted in something the very reverse of what the promoters had thought. He had then requested the House to consider that fact and to realise that "the surest way of developing a natural all-India language is not so much to pass resolutions and laws on the subject but to work to that end in other ways".

The Working Committee of the Congress adopted a resolution[3] in which it was declared that there should be a State language for all-India purposes. But during the transitional period, which should not exceed a period of fifteen years from the commencement of the new Constitution, the English Language might be used at the Centre and for inter-provincial

[1] Constituent Assembly Debates, 8th November, 1948, p. 321.
[2] *Ibid.*
[3] *The Statesman*, Calcutta, the 6th August, 1949.

affairs. The State language should, however, be progressively used until it replaced the English Language. The National Language Convention organised by the All-India Hindi Sahitya Sammelan resolved[4] that "Hindi with Devanagari as its character" should be adopted in the new Constitution as the national language of the Indian Union. The Sanskrit scholars from different parts of the country, on the other hand, held a meeting[5] at New Delhi and urged the Constituent Assembly to adopt the Sanskrit language as the national language of India.

On 12th September, 1949,[6] the Constituent Assembly began discussing the question of the official language of India. At the outset, Dr Rajendra Prasad, President of the Constituent Assembly, advised the members[7] of the Assembly to remember that their decisions on the issue of language should be acceptable to the country as a whole. "Even if we succeed", he added, "in getting a particular proposition passed by majority, if it does not meet with the approval of any considerable section of people in the country—either in the north or in the south, the implementation of the Constitution will become a most difficult problem". Shri N. Gopalaswami Ayyangar, a member of the Drafting Committee, then suggested the adoption of a number of articles which stated,[8] *inter alia*, (1) that the official language of the Union should be Hindi in Devanagari script and the form of numerals to be used for official purposes of the Union should be the "international form of Indian numerals"; (2) that for a period of fifteen years from the commencement of the new Constitution the English language should continue to be used for all those official purposes for which it was being used at the commencement of the Constitution; (3) that a State might adopt any of the languages in use in that State or Hindi as the language to be used for official purposes; (4) that the language for the time being authorised for use in the Union should be the official language for communication between one State and another State, and between one State and the Union; (5) that if the President

[4] *The Statesman*, Calcutta, 8th August, 1949.
[5] *The Statesman*, Calcutta, 15th September, 1949.
[6] Constituent Assembly Debates, 12th September, 1949, p. 1312.
[7] *Ibid.*
[8] *Ibid.*, pp. 1321-3.

was satisfied that a substantial proportion of the population of a State desired the use of any language spoken by them to be recognised by that State, he might direct that such language should also to be recognised throughout that State or any part thereof for such purposes as he might specify; (6) that until Parliament of India otherwise provided, all proceedings of the Supreme Court and of every High Court, the authoritative texts (a) of all Bills to be moved in Parliament or in the Legislatures of the States, (b) of all Acts and Ordinances, and (c) of all Rules, Regulations and Orders to be issued under the new Constitution or under any law made by Parliament or by the Legislatures of the States, should be in the English language; (7) that the Union should promote the spread of Hindi; and (8) that the President should, at the expiration of five years from the commencement of the Constitution and thereafter at the expiration of ten years from such commencement, constitute a Commission whose function should be, *inter alia*, to make recommendations to the President as to the progressive use of the Hindi language for official purposes of the Union and the restrictions on the use of the English language for all or any of the official purposes of the Union. Shri Ayyangar observed that[9] the problem had been before the Drafting Committee for a long time and that opinion had not been unanimous on the question of the national language of India. The Drafting Committee, however, unanimously agreed that the Constituent Assembly should select one of the languages in India as the common language for the whole of India, the language that should be used for official purposes of the Union. In selecting that language the Drafting Committee had taken into account various considerations. Speaking about the Hindi language, Shri Ayyangar said that the Assembly should recognise the very "broad fact" that the Hindi language was not yet "sufficiently developed". Hence, the Drafting Committee provided that the Union should promote the development of the Hindi language so that it might replace the English language. The draft articles, Shri Ayyangar said,[10] were the "result of a great deal of thought, a great deal of discussion". They were the result of "a compro-

[9] *Ibid.*, p. 1317.
[10] *Ibid.*, p. 1319.

mise between opinions which were not easily reconcilable", and "very great cherished views and interests...have been sacrificed" for the purpose of achieving the draft articles. He appealed[11] to the members of the Assembly to look at the problem from a "purely objective standpoint" and not to be carried away by mere sentiment or "any kind of allegiance to revivalism of one kind or another". He requested the members to look at the problem from a practical point of view. In reply to a question put by Pandit Lakshmi Kanta Maitra as to whether any portion of the draft could be considered separately or in isolation, Shri Ayyangar said[12] that the scheme should be looked as a whole. He added that it was "an integrated whole and if you touch one part of it the other things fall to pieces".

The discussion began on 12th September and continued up to 14th September, 1949, and in the course of the discussion different views were expressed on the question of national language of India. One view was that the Constituent Assembly should not make a declaration of an all-India language[13], that Hindi was yet to establish its claim for being recognised as the national language of India[14] and that Hindi was admittedly "a provincial language".[15] Supporters of this view argued that the English language should continue as the official language of India for all purposes for which it was being used until "an all-India language is evolved, which will be capable of expressing the thoughts and ideas on various subjects, scientific, mathematical, literary, historical, philosophical, political".[16] According to the second view, the *status quo* should be maintained and that the question of language should be left to be decided by Parliament.[17] According to the third view, the Sanskrit language should be made the national language of India.[18]

Pandit Jawaharlal Nehru supported the articles suggested

[11] *Ibid.*, p. 1321.
[12] *Ibid.*, pp. 1322-3.
[13] *Ibid.*, p. 1330.
[14] *Ibid.*
[15] Constituent Assembly Debates, 13th September, 1949, p. 1371.
[16] Constituent Assembly Debates, 12th September, 1949, p. 1330.
[17] Constituent Assembly Debates, 12th September, 1949, p. 1335, and 13th September, 1949, p. 1394.
[18] Constituent Assembly Debates, 13th September, 1949, pp. 1348, 1353.

by Shri Ayyangar but at the same time he expressed the opinion that the English language should continue to be a "most important language for India". He observed that[19] the Hindi language would undoubtedly grow into a very great language if the House proceeded wisely over the issue. Two factors should, however, be borne in mind, namely, that the Hindi language should be an "inclusive language" and not an "exclusive" one—inclusive not by statute but by its freedom to develop normally and that the language should not be forced upon an unwilling people. How far the Hindi language would be able to "push out" the use of the English language he did not know, but he was sure that even if it pushed out the English language completely the English language would remain an important language for India in "world contact and in the international sphere". We agree with this observation of Pandit Nehru.

On 14th September, 1949, immediately after the motion for closure was accepted by the Assembly, Shri K. M. Munshi, a member of the Drafting Committee, requested the President of the Assembly to adjourn[20] the Assembly for half an hour. He also informed the President that, except on one or two points, most of the members of the Assembly had come "almost to a unanimous decision" on the question of national language. The Assembly was then adjourned[21] by the President. When it reassembled the debate was reopened.[22] Shri Munshi then moved certain amendments which stated:[23] (1) that Parliament might after the period of fifteen years by law provide for the use of the English language, or the Devanagari form of numerals, for such purposes as might be specified in such law; (2) that a State should have the power to prescribe, with the consent of the President, the use of the Hindi language or any other language recognised for official purposes in the State for proceedings in the High Court of the State other than judgment, decrees, and orders; and (3) that when the Legislature of a State had prescribed the use of any language other than English for Bills, Acts, Ordinances, etc., a translation

[19] *Ibid.*, p. 1414.
[20] Constituent Assembly Debates, 14th September, 1949, p. 1463.
[21] *Ibid.*, p. 1465.
[22] *Ibid.*, p. 1466.
[23] *Ibid.*, pp. 1466-7.

of the same in English, certified by the Governor or Ruler of the State, should be published and the same should be deemed to be the authoritative text in English. The amendments of Shri Munshi were accepted by the Assembly and the articles, as amended, were adopted[24] by the Assembly on 14th September, 1949.[25] After the articles had been adopted, Dr Rajendra Prasad, President of the Constituent Assembly, appealed to the members of the Assembly to work the agreement incorporated in the articles on language in a co-operative spirit.[26]

In accepting Hindi as the future national language of India the representatives of those areas where Hindi was not spoken showed laudable willingness to compromise while supporters of Hindi did not press their demand with regard to the question of numerals. It should, however, be remembered that language can be both a unifying and a disintegrating factor. Reactions, we think, would have been wide and to some extent unfortunate if the Constituent Assembly had decided to impose immediately the use of the Hindi language for official purposes. The Assembly very wisely refrained from taking that decision. The articles adopted by the Assembly provided for the recognition in States of any language spoken by "a substantial proportion of the population". The articles have enabled the country to proceed gradually, to consider each step with care and to adjust it to popular sentiments and the requirements of the country as a whole. Much has recently been written and said about the national language of India. The fact, however, remains that Hindi has not yet been able to take the place of English and that there has been a talk to retain English even beyond the period of fifteen years from the commencement of the Constitution.[27] The immediate task, therefore, is not only to spread the use of Hindi but also to develop it so that it may serve for intercourse between different parts in the country. Hindi should not be indifferent to the genius of other Indian

[24] *Ibid.*, pp. 1480, 1489 .

[25] The articles became articles 343 to 351 of the Constitution of India.

[26] Constituent Assembly Debates, 14th September, 1949, pp. 1489-91.

[27] On 19th October, 1962, the Executive Committee of the Congress Parliamentary Party agreed unanimously that the English Language should continue to be used after the Republic Day in 1965 (i.e. 26th January) as an additional official language and for the transaction of business in Parliament (*The Statesman*, Calcutta, the 20th October, 1962).

languages and the development of Hindi should be by natural evolution.[28]

[28] Shri Lal Bahadur Shastri, Union Home Minister (and now Prime Minister) is reported to have declared that "unless Hindi is developed and people have learnt it well, English will have to continue". See *The Statesman*, Calcutta, dated the 24th September, 1962.

It may be noted that in the year, 1963, our Parliament passed the Official Language Act, 1963. Section 3 of this Act lays down:—

"Notwithstanding the expiration of the period of fifteen years from the commencement of the Constitution, the English language may, as from the appointed day, continue to be used, in addition to Hindi,—

(*a*) for all the official purposes of the Union for which it was being used immediately before that day; and

(*b*) for the transaction of business in Parliament.".

"Appointed day" means 26th January, 1965.

Chapter XIX

AMENDMENT OF THE CONSTITUTION

In this chapter we shall refer to the deliberations of the Constituent Assembly with regard to the procedure for amendment of the Constitution.

Article 304 of the Draft Constitution, which contained provisions for amendment of the Constitution, came up for discussion on 17th September, 1949. On that day, Dr B. R. Ambedkar, Chairman of the Drafting Committee, moved an amendment[1] for the substitution of the following article for article 304, namely:—

> "304. An amendment of the Constitution may be initiated by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill the Constitution shall stand amended in accordance with the terms of the Bill:
>
> Provided that if such amendment seeks to make any change in—
>
> (a) article 43, article 44, article 60, article 142 or article 213A of this Constitution,[2] or
> (b) Chapter IV of Part V, Chapter VII of Part VI, or Chapter I of Part IX of this Constitution,[3] or
> (c) any of the Lists in the Seventh Schedule, or

[1] Constituent Assembly Debates, 17th September, 1949, p. 1643.

[2] Articles 43, 44 dealt with the election of the President. Article 60 dealt with the extent of the executive power of the Union. Article 142 dealt with the extent of the executive power of the States.

213A dealt with High Courts in States in Part II of the First Schedule, Constituent Assembly Debates, 2nd August, 1949, p. 102.

[3] Chapter IV of Part V dealt with Federal Judicature, Chapter VII of Part VI dealt with High Courts in the States, Chapter I of Part IX dealt with legislative relations between the Union and the States.

(d) the representation of States in Parliament, or
(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States for the time being specified in Parts I and III of the First Schedule by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.".

In the course of the discussion different suggestions were made through amendments. According to one suggestion,[4] the amendment of the Constitution should not be made as "difficult" as was sought to be done by the article proposed by Dr Ambedkar. It was suggested that Parliament alone should have the power to amend the Constitution, but no amendment which was "calculated to infringe or restrict or diminish the scope of any individual rights, any rights of a person or persons with respect to property or otherwise" should be permissible under the Constitution.[5] It was also said that the provision for two-thirds majority would act as a "break" and that no amendment of the Constitution would be possible if that requirement was adhered to.[6] According to the second suggestion, in the process of amendments the Legislatures of the States should not be associated.[7] According to the third suggestion,[8] a period of not less than six months should intervene between the initiation of the Bill for amending the Constitution and its final passage in Parliament. It was argued that if a period of six months was guaranteed under the Constitution between the initiation and the final passage of the Bill, then it would "ensure a proper and adequate discussion in the country by the people at large. The people can express their views upon the Bill for an amendment initiated in Parliament".[9]

None of the suggestions made by different members was accepted by the Assembly and it adopted the article suggested

[4] Constituent Assembly Debates, 17th September, 1949, p. 1644.
[5] *Ibid.*, p. 1641.
[6] *Ibid.*, p. 1647.
[7] *Ibid.*, p. 1646.
[8] *Ibid.*, p. 1650.
[9] *Ibid.*, p. 1652.

by Dr Ambedkar.[10] Article 304 became article 368 of the Constitution of India.

Thus, the Constituent Assembly provided for some special procedure for the amendment of the Constitution. It may be stated here that Lord Birkenhead[11] described the Constitution which could be altered with some special formality as a "controlled" Constitution and the Constitution which could be altered without any such formality as an "uncontrolled" Constitution. Sapru J. of the Allahabad High Court has observed that[12] our Constitution is a controlled Constitution in the sense that "its terms can only be altered with some formality".

The framers of our Constitution have divided the articles of the Constitution into three categories for purposes of amendments. In the case of first category of articles, changes may be made by Parliament by a simple majority. Reference may be made to articles 4, 169 and 240[12A] of the Constitution. But such changes are not to be treated as amendments of the Constitution as contemplated by article 368. In the case of second category of articles, a majority of two-thirds of the members present and voting of each House and a majority of total membership of each House of Parliament is necessary for amending them. In the case of third category of articles, ratification by not less than one half of the legislatures of the States is also necessary. Ratification is necessary in the following cases, namely:—

(a) election and the manner of election of the President (articles 54 and 55);
(b) extent of the executive power of the Union and of the States (article 73 and 162);
(c) constitution, jurisdiction and powers of the Supreme Court and High Courts (articles 241, Chapter IV of Part V and Chapter V of Part VI);
(d) distribution of legislative powers (Chapter I of Part XI);
(e) lists in the Seventh Schedule;
(f) representation of States in Parliament; and

[10] *Ibid.*, p. 1665.
[11] *McCawlay* vs. *The King*, A.I.R., 1920 (P.C.) pp. 96-7.
[12] *Moti Lal* vs. *the Government of the State of Uttar Pradesh*, A.I.R. 1951, Allahabad 257 (295)
[12A] As originally adopted. See new article 239A.

(g) provisions of article 368 which lays down the procedure for amendments.

The framers of the Constitution have thus made the amending process simple and less difficult than what has been provided in the Constitution of the United States of America. They have made our Constitution not so flexible as the Constitution of the United Kingdom and not so rigid as the Constitution of the United States of America.[13] They have struck a good balance. In this connexion we may mention that in November 1948, during the general discussion of the Draft Constitution Pandit Jawaharlal Nehru[14] expressed his opinion in favour of a flexible Constitution for India. He said that a rigid Constitution would stop the growth of a nation, "the growth of a living vital organic people". Speaking on this subject Dr B. R. Ambedkar, Chairman of the Drafting Committee, said on 25th November, 1949, during the Third Reading of the Constitution Bill,[15] that the Constituent Assembly had not only "refrained from putting a seal of finality and infallibility" upon the proposed Constitution but had actually provided a "most facile procedure" for amending the proposed Constitution. He added: "Those who are dissatisfied with the Constitution have only to obtain a two-thirds majority, and if they cannot obtain even a two-thirds majority in the Parliament elected on adult franchise in their favour, their dissatisfaction with the Constitution cannot be deemed to be shared by the general public". We agree with this view of Dr Ambedkar.

[13] Article V.
[14] Constituent Assembly Debates, 8th November, 1948, pp. 322-3.
[15] Constituent Assembly Debates, 25th November, 1948, pp. 975-6.

CHAPTER XX

TEMPORARY AND TRANSITIONAL PROVISIONS

We may now refer to the deliberations of the Constituent Assembly with regard to the temporary and transitional provisions of the Constitution.

The State of Jammu and Kashmir acceded to the Indian Union on 26th October, 1947,[1] and the Instrument of Accession was signed by the Maharaja of that State. That was a critical period in the history of Jammu and Kashmir. We are not concerned here with the political aspect of the question. We may only say that there was an all-out invasion of Jammu and Kashmir by raiders which started on 22nd October, 1947.[2] It was decided by the Government of India that accession of Jammu and Kashmir should be subject to the condition that a plebiscite would be held in that State on the issue of accession after the raiders were driven out of the State and law and order were restored.[3] The accession which occurred under section 6 of the Government of India Act, 1935, as adapted by the Governor-General of India in the exercise of the powers conferred on him by the Indian Independence Act, 1947, was, however, unconditional and the constitutional position was that the State of Jammu and Kashmir became a part of the territory of India. Accordingly, that State was included by the Drafting Committee in Part III of the Draft Constitution along with other former Indian States. But in view of the special problem arising in respect of that State and in view of the fact that the Government of India assured the people of that State that they would themselves determine finally their political future, the Constituent Assembly decided to make special provisions in the proposed Constitution for that State. The Assembly decided:[4] (a) that the provisions of article 211A of the Draft Constitution, which contained provisions relating to the constitution of the States specified in

[1] See *White Paper on Indian States*, 1950, p. 111.
[2] See V. P. Menon, *The Story of the Integration of the Indian States*, p. 396.
[3] See *White Paper on Indian States*, 1950, p. 111. See V. P. Menon, *The Story of the Integration of the Indian States*, pp. 399-400.
[4] Constituent Assembly Debates, 17th October, 1949, pp. 421-9.

Part III of the Draft Constitution (i.e. former Indian States),[4A] should not apply in relation to the State of Jammu and Kashmir; (b) that the power of Parliament to make laws for that State should be limited to those matters in the Union List and the Concurrent List which, in consultation with the Government of that State, were declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature might make laws for that State, and such other matters in the said Lists as, with the concurrence of the Government of that State, the President might by order specify; (c) that the provisions of article 1 should apply in relation to that State; (d) that the application of the other articles of the proposed Constitution would be determined by the President in consultation with the Government of that State; and (e) that this interim arrangement would continue until the Constituent Assembly for Jammu and Kashmir was convened and that Assembly made its decisions. These decisions were incorporated in a new article, namely, article 306A. It was also decided by the Constituent Assembly that the President might, on the recommendations of the Constituent Assembly of the State of Jammu and Kashmir, declare that article 306A should cease to be operative or should be operative only with such exceptions and modifications as the President might specify.

Explaining the reasons for making special provisions for Jammu and Kashmir Shri Gopalaswamy Ayyangar,[5] a member of the Drafting Committee, said in the Constituent Assembly on 17th October, 1949, that the "discrimination" was due to the special conditions of that State. There was a "war" going on within the State and the conditions were still "unusual and abnormal". Some parts of the State were still in the hands of "enemies". He also said that the Government of India had committed itself to the position that an opportunity would be given to the people of that State to decide whether they would remain within the Indian Union or would go out of it. The Government of India also agreed to ascertain the will of the people by means of a plebiscite, provided

[4A] See pages 153 to 156.
[5] *Ibid.*, pp. 424-7.

that peaceful and normal conditions were restored and "the impartiality of the plebiscite could be guaranteed." It was agreed that the Constituent Assembly of Jammu and Kashmir would determine the constitution of that State as well as the sphere of the jurisdiction of the Union over that State. Hence, the Constituent Assembly of India could only provide for an interim arrangement for Jammu and Kashmir. It may be noted here that in the exercise of the power conferred by article 370 of the Constitution of India (which was article 306A of the Draft Constitution, as adopted by the Constituent Assembly) the President of India, in consultation with the Government of Jammu and Kashmir, made the Constitution (Application to Jammu and Kashmir) Order, 1950. This order has been superseded by the Constitution (Application to Jammu and Kashmir) Order, 1954,[6] made by the President of India with the concurrence of the Government of Jammu and Kashmir. It is stated in this Order that articles 1 and 370 shall apply in relation to the State of Jammu and Kashmir and that other provisions of the Constitution of India shall apply to that State subject to the exceptions and modifications mentioned in the Order.

On 10th October, 1949, the Assembly decided that, subject to the other provisions of the Constitution, all laws in force in the territory of India immediately before the commencement of the Constitution should remain in force until altered or repealed or amended by a competent Legislature or other competent authority.[7] On 7th October, 1949, the Assembly decided that "such person as the Constituent Assembly of the Dominion of India shall have elected in this behalf shall be the President of India until a President has been elected in accordance with the provisions" of the Constitution.[8] It also agreed upon[9] other provisions of the Constitution relating to the transitional period.

[6] See The Constitution of India (As modified up to 1st July, 1960) published by Government of India (Appendix).

[7] Constituent Assembly Debates, 10th October, 1949, pp. 53, 72. This became article 372 of the Constitution of India.

[8] Constituent Assembly Debates, 7th October, 1949, pp. 9-11. This became article 380 of the Constitution of India.

[9] Constituent Assembly Debates, 7th October, 1949, pp. 23-7. Articles 312A, 312B, 312C, 312D, 312E, 312G, 312H. These became articles 383, 384, 385, 386, 387, 389, 390 of the Constitution of India.

Chapter XXI

COMMENCEMENT, REPEALS AND THIRD READING

On the 17th October, 1949, the Constituent Assembly decided[1] that the articles of the Draft Constitution relating to citizenship and certain other articles relating to the transitional provisions should come into force at once and the remaining provisions should come into force on 26th January, 1950. It also decided that the Indian Independence Act, 1947, and the Government of India Act, 1935, should be repealed.

We may mention here that the Second Reading of the Constitution Bill was concluded on this day and the Assembly adjourned to a date in November, 1949, to be fixed by the President.[2]

The Third Reading of the Constitution Bill began on 17th November, 1949[3] and continued up to 26th November, 1949. A number of members spoke on different provisions of the Draft Constitution and appreciated the work of the Drafting Committee. On 26th November, Dr Rajendra Prasad, President of the Constituent Assembly, addressed[4] the Assembly. In his address he reviewed the salient features of the Constitution. After the address of the President, the motion "That the Constitution as settled by the Assembly be passed", was adopted by the Assembly.[5] The President then authenticated the Constitution.[6] After that the Assembly adjourned till such date before 26th January, 1950, as the President might fix.[7]

The Assembly met on 24th January, 1950, at 11 a.m. The President called upon Shri H. V. R. Iengar, Returning Officer and Secretary to the Constituent Assembly, "to make an announcement."[8] Shri Iengar declared Dr Rajendra Prasad

[1] Constituent Assembly Debates, 17th October, 1949, pp. 412, 421.
[2] *Ibid.*, p. 457.
[3] Constituent Assembly Debates, 17th November, 1949, p. 607.
[4] Constituent Assembly Debates, 26th November, 1949, p. 984.
[5] *Ibid.*, p. 995.
[6] *Ibid.*, p. 995.
[7] *Ibid.*, p. 996.
[8] Constituent Assembly Debates, 24th January, 1950, p. 2.

to be duly elected to the office of the President of India.[9] Two hand-written copies of the Constitution, in English and Hindi, and also a printed copy in English were then signed by the members of the Assembly.[10] The first to sign was Pandit Jawaharlal Nehru. After the members had signed the President signed the copies of the Constitution.

The Constituent Assembly of India then adjourned *sine die*.[11]

[9] *Ibid.*, p. 3.
[10] *Ibid.*, p. 6.
[11] *Ibid.*, p. 7.

Chapter XXII

CONCLUSION

In the preceding chapters we have referred to the deliberations of the Constituent Assembly of India from 9th December, 1946 to 24th January, 1950. We have also referred therein to subsequent developments in the constitutional sphere.

When the Constituent Assembly met on 9th December, 1946, out of 296 members representing British India 205 members belonged to the Congress Party. The respective positions of the parties in the Constituent Assembly were as follows[1]:—

Section A — (MADRAS, BOMBAY, ORISSA, U.P., C.P. and BERAR, BIHAR, COORG, DELHI, AJMER-MERWARA)		
Congress	164	(162 General, 2 Muslim).
Muslim League	19	(Muslim).
Independent	7	(General).
Section B — PUNJAB, N.W.F. PROVINCE, SIND, BALUCHISTAN)		
Congress	9	(7 General, 2 Muslim).
Muslim League	19	(Muslim).
Unionist Party	3	(2 General, 1 Muslim).
Independent	1	(Muslim).[2]
(All Sikh seats	4	were vacant).
Section C — (BENGAL, ASSAM)		
Congress	32	(General)
Muslim League	35	(Muslim)[3]
Communist	1	(General).

[1] Indian Annual Register, 1946, ii, pp. 54, 317-325. *The Statesman*, Calcutta, 2nd December, 1946. See page 17.

[2] The Muslim member representing Baluchistan became the supporter of the Muslim League—*The Statesman*, Calcutta, 2nd December, 1946.

[3] It was reported in the Statesman that in section C all 36 Muslim members were Leaguers. See *The Statesman*, 2nd December, 1946.

Scheduled Castes Federation	..	1 (General).
Krishak Proja Party	..	1 (Muslim).

Congress	..	205
Muslim League	..	73
Unionist Party	..	3
Independent	..	8
Communist	..	1
Scheduled Castes Federation		1
Krishak Proja Party	..	1
		292
Sikhs (Vacant)	..	4
GRAND TOTAL ..	..	296

After the partition of the country the number of Muslim League members became far less as most of the Muslim League members went over to Pakistan. In this connexion it may be mentioned that on 23rd November, 1946, the Congress at its Meerut session took decisions on certain fundamentals of the future constitution of India. It adopted the following resolution[4]:—

> "On the eve of the summoning of the Constituent Assembly to frame a constitution for India, this Congress declares that it stands for an independent sovereign Republic wherein all powers and authority are derived from the people, and for a constitution wherein social objectives are laid down to promote freedom, progress and equal opportunity for all the people of India, so that this ancient land attains its rightful and honoured place in the world and makes its full contribution to the promotion of world peace and the progress and welfare of mankind, and directs all congressmen to work to this end.".

[4] Indian Annual Register, 1946, ii, pp. 121, 292.

The Objectives Resolution moved by Pandit Jawaharlal Nehru on 13th December, 1946,[5] was on the lines of the above resolution of the Congress Party adopted on 23rd November, 1946. Thus, decisions on the fundamentals of the future constitution had been first taken by the Congress Party and then it was accepted by the Constituent Assembly. It was observed by Syed Muhammad Sa'adulla,[6] a member of the Drafting Committee, that all important decisions relating to the proposed Constitution were taken by the Constituent Assembly after they had been thoroughly considered separately by the Congress. We have shown some instances of this before.[7] The following extract from the speech of Shri K. Santhanam also shows that the provisions of the proposed Constitution were thoroughly examined by the Congress a its party meetings:

> "I should also mention that it was not only on the open floor of the House that the Constitution has been scrutinised, but much more severe within the Congress Party meetings. I do not want to mention names, but a group of people in the Party took greatest pains to scrutinise every clause and every article and a great deal of improvement was made in those meetings. But for their scrutiny the Constitution would not have been as good as it is."[8]

Prof. Shibban Lal Saksena observed[9] that the meetings of the Congress Party became really the meetings of the Constituent Assembly and that in the Constituent Assembly the decisions reached at the meetings of the Congress Party were only "registered". He also said that the Drafting Committee could not get the advantage of the free opinion of the whole House and decisions of the Congress Party alone became binding on it. Speaking on the role played by the Congress Party in the Constituent Assembly, Dr B. R. Ambedkar, Chairman of the Drafting Committee said on 25th November, 1949:

[5] See page 33-34.
[6] Constituent Assembly Debates, 21st November, 1949, p. 733.
[7] See pages 60, 97, 316.
[8] Constituent Assembly Debates, 19th November, 1949, p. 720.
[9] *Ibid.*, p. 704. Prof. Saksena belonged to the Congress Party. See Indian Annual Register, 1946, ii, p. 319.

"The task of the Drafting Committee would have been a very difficult one if this Constituent Assembly has been merely a motley crowd, a tasseleted pavement without cement, a black stone here and a white stone there in which each member or each group was a law unto itself. There would have nothing else but chaos. This possibility of chaos was reduced to nil by the existence of the Congress Party inside the Assembly which brought into its proceedings a sense of order and discipline. It is because of the discipline of the Congress Party that the Drafting Committee was able to pilot the Constitution in the Assembly with the sure knowledge as to the fate of each article and each amendment. The Congress Party is, therefore, entitled to all the credit for the smooth sailing of the Draft Constitution in the Assembly."[10]

From what we have shown above it may be said that the Constitution was framed practically by the members of one political party in India, namely, the Indian National Congress.

Next comes the Drafting Committee and its Chairman, Dr B. R. Ambedkar. The Committee and its Chairman made a great contribution to the making of the new Constitution of India so far as the actual drafting of the Constitution was concerned. This was acknowledged by a number of members during the Third Reading of the Constitution Bill. Paying tribute to the Drafting Committee and its Chairman, President of the Constituent Assembly, Dr Rajendra Prasad said[11] that with great "zeal and devotion" the members of the Drafting Committee and specially its Chairman, Dr Ambedkar, had worked. He added: "We could never make a decision which was or could be ever so right as when we put him on the Drafting Committee and made him its Chairman. He has not only justified his selection but added lustre to the work which he has done. In this connection, it would be invidious to make any distinction as among the other members of the Committee. I know they have all worked with the same zeal and devotion as its Chairman, and they deserved the thanks of the country". No greater tribute perhaps could have been given to the Drafting Committee and its Chairman. We have shown in the preceding chapters how the Drafting Committee ably piloted

[10] Constituent Assembly Debates, 25th November, 1949, p. 974.
[11] Constituent Assembly Debates, 26th November, 1949, p. 994.

the Constitution Bill in the Assembly. In fact, it was not an easy task to deal with approximately 7635 amendments[12] to the Draft Constitution. Dr Ambedkar was described by a member as "the Manu of the present age."[13] Whatever the connotation of the expression chosen, we may say that Dr Ambedkar deserved to be praised for the work he did. We may mention here that Dr Ambedkar did not belong to the Congress Party. He was a member of the Scheduled Castes Federation. He joined the Constituent Assembly in order to fight for the rights and privileges of the Scheduled Caste minority and when he joined the Assembly he did it "under protest".[14] Subsequently, however, he became Chairman of the Drafting Committee.

The members of the Drafting Committee did not always express the same opinion on all issues. We have seen[15] that during the discussion on fundamental rights Shri K. M. Munshi, a member of the Drafting Committee, pleaded for the acceptance of the "due process" clause but he was opposed by Shri Alladi Krishnaswami Ayyar, another member of the Drafting Committee. Dr Ambedkar, on the other hand, did not express any definite opinion on the issue and he preferred to leave the matter to be decided by the Assembly. We have also seen[16] how two members of the Drafting Committee, namely, Shri Alladi Krishnaswami Ayyar and Dr Ambedkar, found themselves in opposition to each other on the question of civil appellate jurisdiction of the Supreme Court. This shows that the members of the Drafting Committee expressed freely their views on issues that came before the Constituent Assembly. We have also shown how on a number of occasions Shri T. T. Krishnamachari, who originally had not been a member of the Drafting Committee but became later on a member of the Drafting Committee, justified different provisions of the proposed Constitution.[16A]

It is not possible to make an assessment of the contribution of each individual member of the Constituent Assembly to

[12] Constituent Assembly Debates, 25th November, 1949, p. 972.
[13] Seth Govind Das, see Constituent Assembly Debates, 17th November, 1949, p. 610.
[14] *The Statesman*. Calcutta, 7th December, 1946.
[15] See pages 84-86.
[16] See page 246.
[16A] See pages 75, 101, 140, 197, 248.

the making of the Constitution. Among the members who materially contributed to the making of the new Constitution of India we may mention the names of Pandit Jawaharlal Nehru, Sardar Vallabhbhai Patel, Shri Thakurdas Bhargava, Shri H. V. Kamath, Prof. Shibban Lal Saksena, Kazi Syed Karimuddin, Shri Hirday Nath Kunzru, Shri Damodar Swarup Seth, Shri Naziruddin Ahmad, Shri Mahabir Tyagi, Prof. K. T. Shah, Shri Govind Ballabh Pant, and Shri Punjub Rao Deshmukh. Pandit Jawaharlal Nehru and Sardar Ballabhbhai Patel were the Chairmen of many Committees[17] of the Constituent Assembly. Pandit Nehru expressed his opinion on many important issues. It may be recalled[18] that Pandit Nehru moved article 24 of the Draft Constitution which dealt with the right to property and he pleaded for its acceptance by the House. He opposed the idea of setting up of a non-parliamentary executive at the Centre and also the idea that the ministers should be elected by proportional representation by single transferable Vote.[19] During discussion on the question of the national language of India he emphasised the need of proceeding cautiously on the issue of national language.[20] His suggestions were always accepted by the Assembly.

We may now turn to Sardar Vallabhbhai Patel. The Constituent Assembly had to deal with many difficult problems. Two of such problems were the problem relating to the former Indian States and the problem relating to minorities. The credit for solving these problems was entirely due to Sardar Patel. It was due to the effort of Sardar Patel that integration of the former Indian States was possible[21] which enabled the Constituent Assembly to bring those States into line with other States of the Indian Union. It was again due to the effort of Sardar Patel that the

[17] Pandit Nehru was the Chairman of the following Committees, namely:—Union Powers Committee, Negotiating Committee, Union Constitution Committee.
Sardar Patel was the Chairman of the following Committees, namely:—Advisory Committee on Minorities, Fundamental Rights, etc., Provincial Constitution Committee, Advisory Committee on North East Frontier (Assam) Tribal and Excluded and Partially Excluded Areas (other than Assam).

[18] See page 95.

[19] See page 121.

[20] See Chapter XVIII.

[21] Constituent Assembly Debates, 19th November, 1949, p. 691.

system of separate electorate and the system of reservation of seats for minorities other than Scheduled Castes and Scheduled Tribes were abolished. Speaking about the integration of the former Indian States Dr Rajendra Prasad, President of the Constituent Assembly, said:[22] "It must be said to the credit of the Princes and the people of the States no less than to the credit of the States Ministry under the wise and far-sighted guidance of Sardar Vallabhbhai Patel that by the time we have been able to pass this Constitution, the States are now more or less in the same position as the Provinces and it has become possible to describe all of them including the Indian States and the Provinces as States in the Constitution." Speaking about the contribution of Sardar Patel in solving communal problem in India, President of the Assembly said:[23] "What had proved insoluble at the Round Table Conference and had resulted in the division of the country has been solved with consent of all parties concerned, and again under the wise guidance of the Honourable Sardar Vallabhbhai Patel".

We may now turn to some other members of the Constituent Assembly. It was Pandit Thakur Das Bhargava[24] who suggested that the State should be empowered to impose "reasonable" restrictions on the exercise of fundamental rights by the citizens. We have seen that his suggestion was accepted by the Assembly.[24A] We have stated before how the expression "reasonable restrictions" was interpreted by our Supreme Court[24B] and how that resulted in subsequent amendments of the Constitution.

Shri H. V. Kamath, Prof. Shibban Lal Saksena, Prof. K. T. Shah and Shri Hirday Nath Kunzru made several suggestions through amendments. They moved the amendments because they wanted to lay their points of view before the Assembly. The points of view they raised were, as Dr Ambedkar observed, "mostly ideological".[25] But almost all of their suggestions were not accepted by the Assembly. The fact that the Assembly could not accept their suggestions did not diminish the value

[22] Constituent Assembly Debates, 26th November, 1949, p. 986.
[23] *Ibid.*
[24] See page 75.
[24A] See page 77.
[24B] See pages 77-78.
[25] Constituent Assembly Debates, 25th November, 1949, p. 974.

of their suggestions nor lessen the services they had rendered to the Assembly in "enlivening its proceedings". Dr Ambedkar expressed his gratefulness[26] to those members and said that but for those members he would not have got the opportunity of expounding the principles underlying the proposed Constitution, which in his opinion was "more important than the mere mechanical work of passing the Constitution". It may be mentioned in this connexion that the suggestion of Shri Kamath and Shri Kunzru that provisions should not be made in the Constitution for suspending all the fundamental rights during emergency was accepted by the Assembly. As a result, a new article was substituted for article 280.[27] We have also seen that the Assembly accepted the suggestion of Shri H. N. Kunzru and agreed that Parliament should be authorised to make provisions in relation to matters connected with the appointment of the Election Commissioners and their conditions of service.[27A] Pandit Gobind Ballabh Pant seriously opposed the provisions of clause 15 of the report of the Provincial Constitutional Committee which sought to vest special responsibilities in the Governor under certain circumstances.[28] His suggestion was not accepted by the Assembly in July, 1947, and the provisions of clause 15 were incorporated by the Drafting Committee in article 188 of the Draft Constitution. But we have seen that article 188 was subsequently deleted from the Constitution.[28A]

Kazi Syed Karimuddin and Shri Z. H. Lari fought for the protection of cultural rights of minorities and their suggestions were ultimately accepted by the Assembly.[29]

We have seen how a sharp debate developed over the suggestion of Shri Mahavir Tyagi that there should not be any constitutional prohibition against imposing tax on salt and how his suggestion was accepted by the Assembly.[30]

The name of Shri B. N. Rau,[31] Constitutional Adviser of the Constituent Assembly, should also be mentioned in this

[26] *Ibid.*
[27] See pages 218-9.
[27A] See pages 307-8.
[28] See page 147.
[28A] See page 215.
[29] See pages 92-93.
[30] See pages 277-9.
[31] Constituent Assembly Debates, 18th November, 1949, pp. 648, 683, 21st

connexion. He prepared a rough draft of the proposed Constitution on the basis of the reports of the various committees of the Constituent Assembly for the consideration of the Drafting Committee. He enabled the members of the Assembly to perform their duties with thoroughness by supplying them with materials on which they could work. Dr Rajendra Prasad rightly said[32] that if Dr B. R. Ambedkar was "the skilful pilot of the Constitution throug its different stages, Shri B. N. Rau was the person who visualised the plan and laid its foundation".

We must also mention that the contribution of Dr Rajendra Prasad to the making of the Constitution was also very great. He conducted the proceedings of the Assembly with dignity, impartiality and firmness. On the one and he "liberally"[33] allowed members opposed to the recommendations of the Drafting Committee to place their viewpoints before the Assembly and on the other hand he did not disallow amendments of the Drafting Committee on merely technical grounds. Dr. Ambedkar expressed his gratitude to the President for "not permitting legalism to defeat the work of the constitution-making".

We have finished our labour and shown how the present Constitution of India has been framed down to date. On a very careful examination of what the Constituent Assembly of India did we fully agree with the view of Dr Rajendra Prasad, President of the Constituent Assembly, when he observed on 26th November, 1949, that the Assembly had accomplished a task of "tremendous magnitude". We sincerely hope that the Constitution framed by the Assembly will be devotedly worked by the people of India. We cannot do better than conclude our work with the following observation of Dr Rajendra Prasad, made on 26th November, 1949, in the Assembly[34]:—

"Whatever the Constitution may or may not provide,

November, 1949, pp. 758, 840, 25th November, 1949, p. 974., 26th November, 1949, p. 986.

[32] See B. N. Rau, *Indian Constitution in the Making*, Foreword VI.

[33] Constituent Assembly Debates, 17th November, 1949, p. 634. Constituent Assembly Debates, 25th November, 1949, p. 975.

[34] Constituent Assembly Debates, 26th November, 1949, pp. 993-4.

the welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves.... After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them....We can only hope that the country will throw up such men in abundance.".

THE CONSTITUTION (FIRST AMENDMENT), ACT, 1951

[*18th June, 1951*]

AN ACT TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament as follows:—

1. Short title.—This Act may be called the Constitution (First Amendment) Act, 1951.

2. Amendment of article 15.—To article 15 of the Constitution, the following clause shall be added:—

"(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

3. Amendment of article 19 and validation of certain laws.—(1) In article 19 of the Constitution,—

(*a*) for clause (2), the following clause shall be substituted, and the said clause shall be deemed always to have been enacted in the following form, namely:—

"(2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

(*b*) in clause (6), for the words beginning with the words "nothing in the said sub-clause" and ending with the words "occupation, trade or business", the following shall be substituted, namely:—

"nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(*i*) the professional or technical qualifications necessary for

practising any profession or carrying on any occupation, trade or business, or

(*ii*) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise "

(2) No law in force in the territory of India immediately before the commencement of the Constitution which is inconsistent with the provisions of article 19 of the Constitution as amended by sub-section (1) of this section shall be deemed to be void, or ever to have become void, on the ground only that, being a law which takes away or abridges the right conferred by sub-clause (*a*) of clause (1) of the said article, its operation was not saved by clause (2) of that article as originally enacted.

Explanation.—In this sub-section, the expression "law in force" has the same meaning as in clause (1) of article 13 of the Constitution.

4. Insertion of new article 31A.—After article 31 of the Constitution, the following article shall be inserted, and shall be deemed always to have been inserted, namely:—

"31A. *Saving of laws providing for acquisition of estates, etc.*—(1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

(2) In this article,—

(*a*) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any *jagir*, *inam* or *muafi* or other similar grant;

(*b*) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under

proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue."

5. Insertion of new article 31B.—After article 31A of the Constitution as inserted by section 4, the following article shall be inserted, namely:—

"31B. *Validation of certain Acts and Regulations.*—Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

6. Amendment of article 85.—For article 85 of the Constitution, the following article shall be substituted, namely:—

"85. *Sessions of Parliament, prorogation and dissolution.*—(1) The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The President may from time to time—

(*a*) prorogue the Houses or either House,

(*b*) dissolve the House of the People."

7. Amendment of article 87.—In article 87 of the Constitution,—

(1) in clause (1), for the words "every session" the words "the first session after each general election to the House of the People and at the commencement of the first session of each year" shall be substituted;

(2) in clause (2), the words "and for the precedence of such discussion over other business of the House" shall be omitted.

8. Amendment of article 174.—For article 174 of the Constitution, the following article shall be substituted, namely:—

"174. *Sessions of the State Legislature, prorogation and dissolution.*—(1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.

(2) The Governor may from time to time-

(*a*) prorogue the House or either House,

(*b*) dissolve the Legislative Assembly."

9. Amendment of article 176.—In article 176 of the Constitution,—

(1) in clause (1), for the words "every session" the words "the first session after each general election to the Legislative Assembly and at the commencement of the first session of each year" shall be substituted;

(2) in clause (2) the words "and for the precedence of such discussion over other business of the House" shall be omitted.

10. Amendment of article 341.—In clause (1) of article 341 of the Constitution, for the words "may, after consultation with the Governor or Rajpramukh of a State," the words "may with respect to any State, and where it is a State specified in Part A or Part B of the First Schedule, after consultation with the Governor or Rajpramukh thereof;" shall be substituted.

11. Amendment of article 342.—In clause (1) of article 342 of the Constitution, for the words "may, after consultation with the Governor or Rajpramukh of a State," the words "may with respect to any State, and where it is a State specified in Part A or Part B of the First Schedule, after consultation with the Governor or Rajpramukh thereof," shall be substituted.

12. Amendment of article 372.—In sub-clause (*a*) of clause (3) of article 372 of the Constitution, for the words "two years" the words "three years" shall be substituted.

13. Amendment of article 376.—At the end of clause (1) of article 376 of the Constitution, the following shall be added, namely:—

"Any such Judge shall, notwithstanding that he is not a citizen

of India, be eligible for appointment as Chief Justice of such High Court, or as Chief Justice or other Judge of any other High Court."

14. Addition of Ninth Schedule.—After the Eighth Schedule to the Constitution, the following Schedule shall be added, namely:—

"NINTH SCHEDULE

[*Article 31B*]

1. The Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950).
2. The Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act LXVII of 1948).
3. The Bombay Maleki Tenure Abolition Act, 1949 (Bombay Act LXI of 1949).
4. The Bombay Taluqdari Tenure Abolition Act, 1949 (Bombay Act LXII of 1949).
5. The Panch Mahals Mehwassi Tenure Abolition Act, 1949 (Bombay Act LXIII of 1949).
6. The Bombay Khoti Abolition Act, 1950 (Bombay Act VI of 1950).
7. The Bombay Paragana and Kulkarni Watan Abolition Act, 1950 (Bombay Act LX of 1950).
8. The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951).
9. The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948).
10. The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras Act I of 1950).
11. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act I of 1951).
12. The Hyderabad (Abolition of Jagirs) Regulation, 1358F. (No. LXIX of 1358, Fasli).
13. The Hyderabad Jagirs (Commutation) Regulation, 1359F. (No. XXV of 1359, Fasli)."

APPENDIX 2

THE CONSTITUTION (SECOND AMENDMENT) ACT, 1952

[*1st May 1953*]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament as follows:—

1. Short title.—This Act may be called the Constitution (Second Amendment) Act, 1952.

2. Amendment of article 81.—In sub-clause (*b*) of clause (1) of article 81 of the Constitution, the words and figures "not less than one member for every 750,000 of the population and" shall be omitted.

APPENDIX 3

THE CONSTITUTION (THIRD AMENDMENT) ACT, 1954

[*22nd February, 1955*]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Fifth Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Third Amendment) Act, 1954.

2. Amendment of the Seventh Schedule.—In the Seventh Schedule to the Constitution, for entry 33 of List III, the following entry shall be substituted, namely:—

"33. Trade and commerce in, and the production, supply and distribution of,—

(*a*) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(*b*) foodstuffs, including edible oilseeds and oils;

(*c*) cattle fodder, including oilcakes and other concentrates;

(*d*) raw cotton, whether ginned or unginned, and cotton seed, and

(*e*) raw jute."

APPENDIX 4

THE CONSTITUTION (FOURTH AMENDMENT) ACT, 1955

[*27th April, 1955*]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Sixth Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Fourth Amendment) Act, 1955.

2. Amendment of article 31.—In article 31 of the Constitution, for clause (2), the following clauses shall be substituted, namely:—

"(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

3. Amendment of article 31A.—In article 31A of the Constitution.—

(*a*) for clause (1), the following clause shall be, and shall be deemed always to have been, substituted namely:—

"(1) Notwithstanding anything contained in article 13, no law providing for—

(*a*) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(*b*) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(*c*) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(*d*) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(*e*) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."; and

(*b*) in clause (2),—

(i) in sub-clause (a), after the word "grant", the words "and in the States of Madras and Travancore-Cochin, any *janmam* right" shall be, and shall be deemed always to have been, inserted; and

(ii) in sub-clause (b), after the word "tenure-holder", the words "*raiyat, under-raiyat*" shall be, and shall be deemed always to have been, inserted.

4. Substitution of new article for article 305.—For article

305 of the Constitution, the following article shall be substituted, namely:–

"**305.** *Saving of existing laws and laws providing for State monopolies.*—Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct; and nothing in article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955, in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub-clause (*ii*) of clause (6) of article 19.".

5. Amendment of the Ninth Schedule.—In the Ninth Schedule to the Constitution, after entry 13, the following entries shall be added, namely:—

"14. The Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 (Bihar Act XXXVIII of 1950).

15. The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U.P. Act XXVI of 1948).

16. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act LX of 1948).

17. Sections 52A to 52G of the Insurance Act, 1938 (Act IV of 1938), as inserted by section 42 of the Insurance (Amendment) Act, 1950 (Act XLVII of 1950).

18. The Railway Companies (Emergency Provisions) Act, 1951 (Act LI of 1951).

19. Chapter III-A of the Industries (Development and Regulation) Act, 1951 (Act LXV of 1951), as inserted by section 13 of the Industries (Development and Regulation) Amendment Act, 1953 (Act XXVI of 1953).

20. The West Bengal Land Development and Planning Act, 1948 (West Bengal Act XXI of 1948), as amended by West Bengal Act XXIX of 1951.".

APPENDIX 5

THE CONSTITUTION (FIFTH AMENDMENT) ACT, 1955

[*24th December, 1955*]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA

BE it enacted by Parliament in the Sixth Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Fifth Amendment) Act, 1955.

2. Amendment of article 3.—In article 3 of the Constitution, for the proviso, the following proviso shall be substituted, namely:—

"Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States specified in Part A or Part B of the First Schedule, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired."

APPENDIX 6

THE CONSTITUTION (SIXTH AMENDMENT) ACT, 1956

[*11th September, 1955*]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Seventh Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Sixth Amendment) Act, 1956.

2. Amendment of the Seventh Schedule.—In the Seventh Schedule to the Constitution,—

(*a*) in the Union List, after entry 92, the following entry shall be inserted, namely:—

"92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce."; and

(*b*) in the State List, for entry 54, the following entry shall be substituted, namely:—

"54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.".

3. Amendment of article 269.—In article 269 of the Constitution,—

(*a*) in clause (1), after sub-clause (*f*), the following sub-clause shall be inserted, namely:—

"(*g*) taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce."; and

(*b*) after clause (2), the following clause shall be inserted, namely:—

"(3) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce.".

4. Amendment of article 286.—In article 286 of the Constitution,—

(*a*) in clause (1), the *Explanation* shall be omitted; and

(*b*) for clauses (2) and (3), the following clauses shall be substituted, namely:—

"(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of, a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.".

APPENDIX 7

THE CONSTITUTION (SEVENTH AMENDMENT) ACT, 1956

[*19th October, 1956*]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Seventh Year of the Republic of India as follows:—

1. Short title and commencement. (1) This Act may be called the Constitution (Seventh Amendment) Act, 1956.

(2) It shall come into force on the 1st day of November, 1956.

2. Amendment of article 1 and First Schedule. (1) In article 1 of the Constitution,—

(*a*) for clause (2), the following clause shall be substituted, namely:—

"(2) The States and the territories thereof shall be as specified in the First Schedule."; and

(*b*) in clause (3), for sub-clause (*b*), the following sub-clause shall be substituted, namely:—

"(*b*) the Union territories specified in the First Schedule: and".

(2) For the First Schedule to the Constitution as amended by the States Reorganisation Act, 1956, and the Bihar and West Bengal (Transfer of Territories) Act, 1956, the following Schedule shall be substituted, namely:—

"First Schedule

[Articles 1 and 4]

1. THE STATES

Name	*Territories*
1. Andhra Pradesh	The territories specified in sub-section (1) of section 3 of the Andhra State Act, 1953 and the territories specified in sub-section (1) of section 3 of the States Reorganisation Act, 1956.

Name	*Territories*
2. Assam	The territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas, but excluding the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951.
3. Bihar	The territories which immediately before the commencement of this Constitution were either comprised in the Province of Bihar or were being administered as if they formed part of that Province, but excluding the territories specified in sub-section (1) of section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956.
4. Bombay	The territories specified in sub-section (1) of section 8 of the States Reorganisation Act, 1956.
5. Kerala	The territories specified in sub-section (1) of section 5 of the States Reorganisation Act, 1956.
6. Madhya Pradesh	The territories specified in sub-section (1) of section 9 of the States Reorganisation Act, 1956.
7. Madras	The territories which immediately before the commencement of this Constitution were either comprised in the Province of Madras or were being administered as if they formed part of that Province and the territories specified in section 4 of the States Reorganisation Act, 1956, but excluding the territories specified in sub-section (1) of section 3 and sub-section (1) of section 4 of the Andhra State Act, 1953 and the territories specified in clause

Name	*Territories*
	(*b*) of sub-section (1) of section 5, section 6 and clause (*d*) of sub-section (1) of section 7 of the States Reorganisation Act, 1956.
8. Mysore	The territories specified in sub-section (1) of section 7 of the States Reorganisation Act, 1956.
9. Orissa	The territories which immediately before the commencement of this Constitution were either comprised in the Province of Orissa or were being administered as if they formed part of that Province.
10. Punjab	The territories specified in section 11 of the States Reorganisation Act, 1956.
11. Rajasthan	The territories specified in section 10 of the States Reorganisation Act, 1956.
12. Uttar Pradesh	The territories which immediately before the commencement of this Constitution were either comprised in the Province known as the United Provinces or were being administered as if they formed part of that Province.
13. West Bengal	The territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province and the territory of Chandernagore as defined in clause (*c*) of section 2 of the Chandernagore (Merger) Act, 1954, and also the territories specified in sub-section (1) of section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956.
14. Jammu and Kashmir	The territory which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir.

II. THE UNION TERRITORIES

Name	*Extent*
1. Delhi	The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of Delhi.
2. Himachal Pradesh	The territories which immediately before the commencement of this Constitution were being administered as if they were Chief Commissioners' Provinces under the names of Himachal Pradesh and Bilaspur.
3. Manipur	The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Manipur.
4. Tripura	The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Tripura.
5. The Andaman and Nicobar Islands	The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of the Andaman and Nicobar Islands.
6. The Laccadive, Minicoy and Amindivi Islands.	The territory specified in section 6 of the States Reorganisation Act, 1956."

3. Amendment of article 80 and Fourth Schedule.—(1) In article 80 of the Constitution,—

(*a*) in sub-clause (*b*) of clause (1), after the word "States", the words "and of the Union territories" shall be added;

(*b*) in clause (2), after the words "of the States", the words "and of the Union territories" shall be inserted;

(*c*) in clause (4), the words and letters "specified in Part A or Part B of the First Schedule" shall be omitted; and

(*d*) in clause (5), for the words and letter "States specified in Part C of the First Schedule", the words "Union territories" shall be substituted.

(2) For the Fourth Schedule to the Constitution as amended by the States Reorganisation Act, 1956 and the Bihar and West Bengal (Transfer of Territories) Act, 1956, the following Schedule shall be substituted, namely:—

"Fourth Schedule

[Articles 4(1) and 80(2)]

Allocation of seats in the Council of States

To each State or Union territory specified in the first column of the following table, there shall be allotted the number of seats specified in the second column thereof opposite to that State or that Union territory, as the case may be.

TABLE

1. Andhra Pradesh	18
2. Assam	7
3. Bihar	22
4. Bombay	27
5. Kerala	9
6. Madhya Pradesh	16
7. Madras	17
8. Mysore	12
9. Orissa	10
10. Punjab	11
11. Rajasthan	10
12. Uttar Pradesh	34
13. West Bengal	16
14. Jammu and Kashmir	4
15. Delhi	3
16. Himachal Pradesh	2
17. Manipur	1
18. Tripura	1
TOTAL ..	220"

4. Substitution of new articles for articles 81 and 82.—For articles 81 and 82 of the Constitution, the following articles shall be substituted, namely:—

"81. *Composition of the House of the People.*—(1) Subject to the provisions of article 331, the House of the People shall consist of–

(*a*) not more than five hundred members chosen by direct election from territorial constituencies in the States, and

(*b*) not more than twenty members to represent the Union territories, chosen in such manner as Parliament may by law provide.

(2) For the purposes of sub-clause (*a*) of clause (1),—

(*a*) there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and

(*b*) each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the State.

(3) In this article, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.

82. *Readjustment after each census.*—Upon the completion of each census, the allocation of seats in the House of the People to the States and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the People until the dissolution of the then existing House.".

5. Amendment of article 131.—In article 131 of the Constitution, for the proviso, the following proviso shall be substituted, namely:—

"Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engage-

ment, *sanad* or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.".

6. Amendment of article 153.—To article 153 of the Constitution, the following proviso shall be added, namely:—

'Provided that nothing in this article shall prevent the appointment of the same person as Governor for two or more States.".

7. Amendment of article 158.—In article 158 of the Constitution, after clause (3), the following clause shall be inserted, namely:—

"(3A) Where the same person is appointed as Governor of two or more States, the emoluments and allowances payable to the Governor shall be allocated among the States in such proportion as the President may by order determine.".

8. Amendment of article 168.—(1) In clause (1) of article 168 of the Constitution, in sub-clause (*a*), after the word "Madras", the word "Mysore" shall be inserted.

(2) In the said sub-clause, as from such date as the President may by public notification appoint, after the word "Bombay", the words "Madhya Pradesh" shall be inserted.

9. Substitution of new article for article 170.—For article 170 of the Constitution, the following article shall be substituted, namely:—

"170. *Composition of the Legislative Assemblies.*—(1) Subject to the provisions of article 333, the Legislative Assembly of each State shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State.

(2) For the purposes of clause (1), each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State.

Explanation.—In this clause, the expression "population"

means the population as ascertained at the last preceding census of which the relevant figures have been published.

(3) Upon the completion of each census, the total number of seats in the Legislative Assembly of each State and the division of each State into territorial constituencies shall be readjusted by such authority and in such manner as Parliament may by law determine:

Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly.".

10. Amendment of article 171.—In clause (1) of article 171 of the Constitution, for the word "one-fourth", the word "one-third" shall be substituted.

11. Amendment of article 216.—In article 216 of the Constitution, the proviso shall be omitted.

12. Amendment of article 217.—In article 217 of the Constitution, in clause (1), for the words "shall hold office until he attains the age of sixty years", the following words and figures shall be substituted, namely:—

"shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty years".

13. Substitution of new article for article 220.—For article 220 of the Constitution, the following article shall be substituted, namely:—

"220. *Restriction on practice after being a permanent Judge.*—No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts.

Explanation.—In this article, the expression "High Court" does not include a High Court for a State specified in Part B of the First Schedule as it existed before the commencement of the Constitution (Seventh Amendment) Act, 1956."

14. Amendment of article 222.—In article 222 of the Constitution,—

(*a*) in clause (1), the words "within the territory of India" shall be omitted; and

(*b*) clause (2) shall be omitted.

15. Substitution of new article for article 224.—For article 224 of the Constitution, the following article shall be substituted, namely:—

"224. *Appointment of additional and acting Judges.*— (1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.

(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a judge of that Court until the permanent Judge has resumed his duties.

(3) No person appointed as an additional or acting Judge of a High Court shall hold office after attaining the age of sixty years.".

16. Substitution of new articles for articles 230, 231 and 232.—For articles 230, 231 and 232 of the Constitution, the following articles shall be substituted, namely:—

"230. *Extension of jurisdiction of High Courts to Union territories.*—(1) Parliament may by law extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union territory.

(2) Where the High Court of a State exercises jurisdiction in relation to a Union territory,—

(*a*) nothing in this Constitution shall be construed as empowering the Legislature of the State to increase, restrict or abolish that jurisdiction; and

(*b*) the reference in article 227 to the Governor shall, in relation to any rules, forms or tables for subordinate courts in that territory, be construed as a reference to the President.

231. *Establishment of a common High Court for two or more States.*—(1) Notwithstanding anything contained in the preceding provisions of this Chapter, Parliament may by law establish a common High Court for two or more States or for two or more States and a Union territory.

(2) In relation to any such High Court,—

(*a*) the reference in article 217 to the Governor of the State shall be construed as a reference to the Governors of all the States in relation to which the High Court exercises jurisdiction;

(*b*) the reference in article 227 to the Governor shall, in relation to any rules, forms or tables for subordinate courts, be construed as a reference to the Governor of the State in which the subordinate courts are situate; and

(*c*) the references in articles 219 and 229 to the State shall be construed as a reference to the State in which the High Court has its principal seat:

Provided that if such principal seat is in a Union territory, the references in articles 219 and 229 to the Governor, Public Service Commission, Legislature and Consolidated Fund of the State shall be construed respectively as references to the President, Union Public Service Commission, Parliament and Consolidated Fund of India.".

17. Amendment of Part VIII.—In Part VIII of the Constitution,—

(*a*) for the heading "THE STATES IN PART C OF THE FIRST SCHEDULE", the heading "THE UNION TERRITORIES" shall be substituted; and

(*b*) for articles 239 and 240, the following articles shall be substituted, namely:—

"239. *Administration of Union territories.*—(1) Save as otherwise provided by Parliament by law, every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.

(2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union territory, and where a Governor

is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers.

240. *Power of President to make regulations for certain Union territories.*—(1) The President may make regulations for the peace, progress and good government of the Union territory of—

(*a*) the Andaman and Nicobar Islands;

(*b*) the Laccadive, Minicoy and Amindivi Islands.

(2) Any regulation so made may repeal or amend any Act made by Parliament or any existing law which is for the time being applicable to the Union territory and, when promulgated by the President, shall have the same force and effect as an Act of Parliament which applies to that territory.".

18. Insertion of new article 258A.—After article 258 of the Constitution, the following article shall be inserted, namely:—

"258A. *Power of the States to entrust functions to the Union.*—Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends."

19. Insertion of new article 290A.—After article 290 of the Constitution, the following article shall be inserted, namely:—

"290A. *Annual payment to certain Devaswom Funds.*— A sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom Fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Madras every year to the Devaswom Fund established in that State for the maintenance of Hindu temples and shrines in the territories transferred to that State on the 1st day of November, 1956, from the State of Travancore-Cochin."

20. Substitution of new article for article 298.—For article 298 of the Constitution, the following article shall be substituted, namely:—

"298. *Power to carry on trade, etc.*—The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose:

Provided that:—

(*a*) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and

(*b*) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament."

21. Insertion of new articles 350A and 350B.—After article 350 of the Constitution, the following articles shall be inserted, namely:—

"350A. *Facilities for instruction in mother-tongue at primary stage.*—It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.

350B. *Special Officer for linguistic minorities.*—(1) There shall be a Special Officer for linguistic minorities to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned."

22. Substitution of new article for article 371.—For article 371 of the Constitution, the following article shall be substituted, namely:—

"371. *Special provision with respect to the States of Andhra Pradesh, Punjab and Bombay.*—(1) Notwithstanding anything in the Constitution, the President may, by order made with respect to the State of Andhra Pradesh or Punjab, provide for the constitution and functions of regional committees of the Legislative Assembly of the State, for the modifications to be made in the rules of business of the Government and in the rules of procedure of the Legislative Assembl of the State and for any special responsibility of the Governor in order to secure the proper functioning of the regional committees.

(2) Notwithstanding anything in this Constitution, the President may by order made with respect to the State of Bombay, provide for any special responsibility of the Governor for—

(*a*) the establishment of separate development boards for Vidarbha, Marathwada, the rest of Maharashtra, Saurashtra, Kutch and the rest of Gujarat with the provision that a report on the working of each of these boards will be placed each year before the State Legislative Assembly;

(*b*) the equitable allocation of funds for developmental expenditure over the said areas, subject to the requirements of the State as a whole; and

(*c*) an equitable arrangement providing adequate facilities for technical education and vocational training, and adequate opportunities for employment in services under the control of the State Government, in respect of all the said areas, subject to the requirements of the State as a whole."

23. Insertion of new article 372A.—After article 372 of the Constitution, the following article shall be inserted, namely:—

"372A. *Power of the President to adapt laws.*—(1) For the purposes of bringing the provisions of any law in force in India or in any part thereof, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, into accord with the provisions of this Constitution as amended by that Act, the President may by order made before the 1st day of November, 1957, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any

such adaptation or modification shall not be questioned in any court of law.

(2) Nothing in clause (1) shall be deemed to prevent a competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.".

24. Insertion of new article 378A.—After article 378 of the Constitution, the following article shall be inserted, namely:—

"378A. *Special provisions as to duration of Andhra Pradesh Legislative Assembly.*—Notwithstanding anything contained in article 172, the Legislative Assembly of the State of Andhra Pradesh as constituted under the provisions of sections 28 and 29 of the States Reorganisation Act, 1956, shall, unless sooner dissolved, continue for a period of five years from the date referred to in the said section 29 and no longer and the expiration of the said period shall operate as a dissolution of that Legislative Assembly.".

25. Amendment of Second Schedule.—In the Second Schedule to the Constitution,—

(*a*) in the heading of Part D, the words and letter "in States in Part A of the First Schedule" shall be omitted;

(*b*) in sub-paragraph (1) of paragraph 9, for the words "shall be reduced by the amount of that pension", the following shall be substituted, namely:—

"shall be reduced—

(*a*) by the amount of that pension, and

(*b*) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and

(*c*) if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity."; and

(*c*) in paragraph 10—

(*i*) for sub-paragraph (1), the following sub-paragraph shall be substituted, namely:—

"(1) There shall be paid to the Judges of High Courts,

in respect of time spent on actual service, salary at the following rates per mensem, that is to say,—

The Chief Justice	..	rupees 4,000:
Any other Judge	..	rupees 3,500:

Provided that if a Judge of a High Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the High Court shall be reduced-

(*a*) by the amount of that pension, and

(*b*) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and

(*c*) if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity."; and

(*ii*) for sub-paragraphs (3) and (4), the following sub-paragraph shall be substituted, namely:—

"(3) Any person who, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, was holding office as the Chief Justice of the High Court of a State specified in Part B of the First Schedule and has on such commencement become the Chief Justice of the High Court of a State specified in the said Schedule as amended by the said Act, shall, if he was immediately before such commencement drawing any amount as allowance in addition to his salary, be entitled to receive in respect of time spent on actual service as such Chief Justice, the same amount as allowance in addition to the salary specified in sub-paragraph (1) of this paragraph."

26. Modification of entries in the Lists relating to acquisition and requisitioning of property.—In the Seventh Schedule to the Constitution, entry 33 of the Union List and entry 36 of the

State List shall be omitted and for entry 42 of the Concurrent List, the following entry shall be substituted namely:—

"42. Acquisition and requisitioning of property."

27. Amendment of certain provisions relating to ancient and historical monuments, etc.—In each of the following provisions of the Constitution, namely:—

(*i*) entry 67 of the Union List,
(*ii*) entry 12 of the State List,
(*iii*) entry 40 of the Concurrent List, and
(*iv*) article 49,

for the words "declared by Parliament by law", the words "declared by or under law made by Parliament" shall be substituted.

28. Amendment of entry 24 of State List.—In the Seventh Schedule to the Constitution, in entry 24 of the State List, for the word and figures "entry 52", the words and figures "entries 7 and 52" shall be substituted.

29. Consequential and minor amendments and repeals and savings.—(1) The consequential and minor amendments and repeals directed in the Schedule shall be made in the Constitution and in the Constitution (Removal of Difficulties) Order, No. VIII, made under article 392 of the Constitution.

(2) Notwithstanding the repeal of article 243 of the Constitution by the said Schedule all regulations made by the President under that article and in force immediately before the commencement of this Act shall continue in force until altered or repealed or amended by a competent Legislature or other competent authority.

The Schedule

(*See* section 29)

CONSEQUENTIAL AND MINOR AMENDMENTS AND REPEALS IN THE CONSTITUTION

Article 3.—In the proviso, omit "specified in Part A or Part B of the First Schedule"

Article 16.—In clause (3), for "under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State", substitute—

"under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory".

Article 31A.—In sub-clause (*a*) of clause (2), for "Travancore-Cochin", substitute "Kerala".

Article 58.—In the *Explanation*, omit "or Rajpramukh or Uparajpramukh".

Article 66.—In the *Explanation*, omit "or Rajpramukh or Uparajpramukh".

Article 72.—In clause (3), omit "or Rajpramukh".

Article 73.—In the proviso to clause (1), omit "specified in Part A or Part B of the First Schedule".

Article 101.—In clause (2), omit "specified in Part A or Part B of the First Schedule", and for "such a State", substitute "a State".

Article 112.—In sub-clause (*d*)(*iii*) of clause (3), for "a Province corresponding to a State specified in Part A of the First Schedule", substitute "a Governor's Province of the Dominion of India".

Article 143.—In clause (2), omit "clause (*i*) of" and for "said clause", substitute "said proviso".

Article 151.—In clause (2), omit "or Rajpramukh."

Part VI.—In the heading, omit "IN PART A OF THE FIRST SCHEDULE".

Article 152.—For "means a State specified in Part A of the First Schedule", substitute "does not include the State of Jammu and Kashmir".

Article 214.—Omit "(1)" and clauses (2) and (3).

Article 217.—In sub-clause (*b*) of clause (2), omit "in any State specified in the First Schedule".

Article 219.—Omit "in a State".

Article 229.—In the proviso to clause (1) and in the proviso to clause (2), omit "in which the High Court has its principal seat".

Omit Part VII.

Article 241.—(*a*) In clause (1), for "State specified in Part C of the First Schedule", substitute "Union territory", and for "such State", substitute "such territory".

(*b*) For clauses (3) and (4), substitute—

"(3) Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by or under

this Constitution, every High Court exercising jurisdiction immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, in relation to any Union territory shall continue to exercise such jurisdiction in relation to that territory after such commencement.

(4) Nothing in this article derogates from the power of Parliament to extend or exclude the jurisdiction of a High Court for a State to, or from, any Union territory or part thereof."

Omit article 242.

Omit Part IX.

Article 244.—Omit "specified in Part A or Part B of the First Schedule".

Article 246.—In clauses (2) and (3), omit "specified in Part A or Part B of the First Schedule" and in clause (4), for "in Part A or Part B of the First Schedule", substitute "in a State".

Article 254.—In clause (2), omit "specified in Part A or Part B of the First Schedule".

Article 255.—Omit "specified in Part A or Part B of the First Schedule".

Omit article 259.

Article 264.—For article 264, substitute—

"264. *Interpretation.*—In this Part 'Finance Commission' means a Finance Commission constituted under article 280."

Article 267.—In clause (2), omit "or Rajpramukh".

Article 268.—In clause (1), for "State specified in Part C of the First Schedule", substitute "Union territory".

Article 269.—In clause (2), for "States specified in Part C of the First Schedule", substitute "Union territories".

Article 270.—In clauses (2) and (3), for "States specified in Part C of the First Schedule" substitute "Union territories".

Omit article 278.

Article 280.—In clause (3), omit sub-clause (*c*) and re-letter sub-clause (*d*) as sub-clause (*c*).

Article 283.—In clause (2), omit "or Rajpramukh".

Article 291.—Omit "(1)" and clause (2).

Article 299.—In clause (1), omit "or the Rajpramukh", and in clause (2), omit "nor the Rajpramukh".

Article 304.—In clause (*a*), after "other States", insert "or the Union territories".

Omit article 306.

Article 308.—For "means a State specified in Part A or Part B of the First Schedule", substitute "does not include the State of Jammu and Kashmir".

Article 309.—Omit "or Rajpramukh".

Article 310.—In clause (1), omit "or, as the case may be, the Rajpramukh", and in clause (2), omit "or Rajpramukh" and "or the Rajpramukh".

Article 311.—In clause (2), omit "or Rajpramukh".

Article 315.—In clause (4), omit "or Rajpramukh".

Article 316.—In clauses (1) and (2), omit "or Rajpramukh".

Article 317.—In clause (2), omit "or Rajpramukh".

Article 318.—Omit "or Rajpramukh".

Article 320.—In clause (3), omit "or Rajpramukh" and "or Rajpramukh, as the case may be", and in clause (5), omit "or Rajpramukh".

Article 323.—In clause (2), omit "or Rajpramukh" and "or Rajpramukh, as the case may be".

Article 324.—In clause (6), omit "or Rajpramukh".

Article 330.—In clause (2), after "State" wherever it occurs, insert "or Union territory".

Article 332.—In clause (1), omit "specified in Part A or Part B of the First Schedule".

Article 333.—Omit "or Rajpramukh".

Article 337.—Omit "specified in Part A or Part B of the First Schedule".

Article 339.—In clause (1), omit "specified in Part A and Part B of the First Schedule" and in clause (2), for "any such State", substitute "a State".

Article 341.—In clause (1), after "any State" insert "or Union territory", omit "specified in Part A or Part B of the First Schedule", omit "or Rajpramukh" and after "that State" insert "or Union territory, as the case may be".

Article 342.—In clause (1), after "any State" insert "or Union territory", omit "specified in Part A or Part B of the First Schedule", omit "or Rajpramukh" and after "that State" insert "or Union territory, as the case may be".

Article 348.—Omit "or Rajpramukh".

Article 356.—In clause (1), omit "or Rajpramukh" and "or Rajpramukh, as the case may be".

Article 361.—In clauses (2), (3) and (4), omit "or Rajpramukh" and in clause (4), omit "or the Rajpramukh".

Article 362.—Omit "clause (1) of".

Article 366.—Omit clause (21), and for clause (30), substitute—

"(30) 'Union territory' means any Union territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that Schedule".

Article 367.—In clause (2), omit "specified in Part A or Part B of the First Schedule" and "or Rajpramukh".

Article 368.—Omit "specified in Parts A and B of the First Schedule".

Omit articles 379 to 391, both inclusive.

Second Schedule.—(*a*) In the heading of Part A and in paragraph 1. omit "specified in Part A of the First Schedule";

(*b*) in paragraph 2, omit "so specified";

(*c*) in paragraph 3, for "such States", substitute "the States";

(*d*) omit Part B;

(*e*) in the heading of Part C, omit "of a State in Part A of the First Schedule", and for "any such State" substitute "a State"; and

(*f*) in paragraph 8, omit "of a State specified in Part A of the First Schedule", and for "such State" substitute "a State".

Fifth Schedule.—(*a*) In paragraph 1, omit "means a State specified in Part A or Part B of the First Schedule but";

(*b*) in paragraph 3, omit "or Rajpramukh";

(*c*) in paragraph 4, in sub-paragraph (2), omit "or Rajpramukh, as the case may be" and in sub-paragraph (3), omit "or Rajpramukh";

(*d*) in paragraph 5, in sub-paragraphs (1) and (2), omit "or Rajpramukh, as the case may be", in sub-paragraph (3), omit "or Rajpramukh" and in sub-paragraph (5), omit "or the Rajpramukh".

Sixth Schedule.—In paragraph 18, in sub-paragraph (2), for "Part IX" substitute "article 240", and for "territory specified in Part D of the First Schedule" substitute "Union territory specified in that article".

Seventh Schedule.—In List I,—

(*a*) in entry 32, omit "specified in Part A or Part B of the First Schedule"; and

(*b*) for entry 79, substitute—

"79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory."

CONSEQUENTIAL AMENDMENTS IN THE CONSTITUTION (REMOVAL OF DIFFICULTIES) ORDER NO. VIII

In the Constitution (Removal of Difficulties) Order No. VIII, for sub-paragraphs (1), (2) and (3) of paragraph 2, substitute—

"(1) In article 81,—

(*a*) in sub-clause (*b*) of clause (1) after the words "Union territories", the words, letter and figures "and the tribal areas specified in Part B of the Table appended to paragraph 20 of the Sixth Schedule" shall be inserted; and

(*b*) to clause (2), the following proviso shall be added, namely:—

"Provided that the constituencies into which the State of Assam is divided shall not comprise the tribal areas specified in Part B of the Table appended to paragraph 20 of the Sixth Schedule".

(2) In clause (2) of article 170, after the words "throughout the State", the following proviso shall be inserted, namely:—

"Provided that the constituencies into which the State of Assam is divided shall not comprise the tribal areas specified in Part B of the Table appended to paragraph 20 of the Sixth Schedule."

APPENDIX 8

THE CONSTITUTION (EIGHTH AMENDMENT) ACT, 1959

[*5th January, 1960*]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Tenth Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Eighth Amendment) Act, 1959.

2. Amendment of article 334.—In article 334 of the Constitution, for the words "ten years", the words "twenty years" shall be substituted.

APPENDIX 9

THE CONSTITUTION (NINTH AMENDMENT) ACT, 1960

[*28th December, 1960*]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA TO GIVE EFFECT TO THE TRANSFER OF CERTAIN TERRITORIES TO PAKISTAN IN PURSUANCE OF THE AGREEMENTS ENTERED INTO BETWEEN THE GOVERNMENTS OF INDIA AND PAKISTAN.

BE it enacted by Parliament in the Eleventh Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Ninth Amendment) Act, 1960.

2. Definitions.—In this Act—

(*a*) "appointed day" means such date as the Central Government may, by notification in the Official Gazette, appoint as the date for the transfer of territories to Pakistan in pursuance of the Indo-Pakistan agreements, after causing the territories to be so transferred and referred to in the First Schedule demarcated for the purpose, and different dates may be appointed for the transfer of such territories from different States and from the Union territory of Tripura;

(*b*) "Indo-Pakistan agreements" mean the Agreements dated the 10th day of September, 1958, the 23rd day of October, 1959 and the 11th day of January, 1960, entered into between the Governments of India and Pakistan, the relevant extracts of which are set out in the Second Schedule;

(*c*) "transferred territory" means so much of the territories comprised in the Indo-Pakistan agreements and referred to in the First Schedule as are demarcated for the purpose of being transferred to Pakistan in pursuance of the said agreements.

3. Amendment of the First Schedule to the Constitution.— As from the appointed day, in the First Schedule to the Constitution,—

(*a*) in the paragraph relating to the territories of the State of Assam, the words, brackets and figures "and the territories referred to in Part I of the First Schedule to the Constitution (Ninth Amendment) Act, 1960" shall be added at the end;

(*b*) in the paragraph relating to the territories of the State of Punjab, the words, brackets and figures "but excluding the territories referred to in Part II of the First Schedule to the Constitution (Ninth Amendment) Act, 1960" shall be added at the end;

(*c*) in the paragraph relating to the territories of the State of West Bengal, the words, brackets and figures "but excluding the territories referred to in Part III of the First Schedule to the Constitution (Ninth Amendment) Act, 1960" shall be added at the end;

(*d*) in the paragraph relating to the extent of the Union territory of Tripura, the words, brackets and figures "but excluding the territories referred to in Part IV of the First Schedule to the Constitution (Ninth Amendment) Act, 1960" shall be added at the end.

The First Schedule

[*See* sections 2(*a*), 2(*c*) and 3]

PART I

The transferred territory in relation to item (7) of paragraph 2 of the Agreement dated the 10th day of September, 1958, and item (i) of paragraph 6 of the Agreement dated the 23rd day of October, 1959.

PART II

The transferred territory in relation to item (i) and item (iv) of paragraph 1 of the Agreement dated the 11th day of January, 1960.

PART III

The transferred territory in relation to item (3), item (5) and

item (10) of paragraph 2 of the Agreement dated the 10th day of September, 1958, and paragraph 4 of the Agreement dated the 23rd day of October, 1959.

PART IV

The transferred territory in relation to item (8) of paragraph 2 of the Agreement dated the 10th day of September, 1958.

The Second Schedule

[*See* section 2(*b*)]

1. EXTRACTS FROM THE NOTE CONTAINING THE AGREEMENT DATED THE 10TH DAY OF SEPTEMBER, 1958

* * * * *

2. As a result of the discussions, the following agreements were arrived at:—

* * * * *

(3) *Berubari Union No.* 12

This will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. The division of Berubari Union No. 12 will be horizontal, starting from the north-east corner of Debiganj thana.

The division should be made in such a manner that the Cooch Behar enclaves between Pachagar thana of East Pakistan and Berubari Union No. 12 of Jalpaiguri thana of West Bengal will remain connected as at present with Indian territory and will remain with India. The Cooch Behar enclaves lower down between Boda thana of East Pakistan and Berubari Union No. 12 will be exchanged along with the general exchange of enclaves and will go to Pakistan.

* * * * *

(5) 24 Parganas — Khulna
24 Parganas — Jessore } Boundary disputes

It is agreed that the mean of the two respective claims of India and Pakistan should be adopted, taking the river as a

guide, as far as possible, in the case of the latter dispute. (Ichhamati river).

* * * * *

(7) Piyain and Surma river regions to be demarcated in accordance with the relevant notifications, cadastral survey maps and, if necessary, record of rights. Whatever the result of this demarcation might be, the nationals of both the Governments to have the facility of navigation on both these rivers.

(8) Government of India agree to give in perpetual right to Pakistan the land belonging to Tripura State to the west of the railway line as well as the land appurtenant to the railway line at Bhagalpur.

* * *

(10) Exchange of old Cooch Behar enclaves in Pakistan and Pakistan enclaves in India without claim to compensation for extra area going to Pakistan, is agreed to.

* * * *

(Sd.) M. S. A. BAIG,
Foreign Secretary,
Ministry of Foreign Affairs and Commonwealth Relations,
Government of Pakistan.

(Sd.) M. J. DESAI,
Commonwealth Secretary,
Ministry of External Affairs,
Government of India.

NEW DELHI, THE SEPTEMBER 10, 1958.

2. EXTRACTS FROM AGREEMENT ENTITLED "AGREED DECISIONS AND PROCEDURES TO END DISPUTES AND INCIDENTS ALONG THE INDO-EAST PAKISTAN BORDER AREAS" DATED THE 23RD DAY OF OCTOBER, 1959.

* * * * *

4. *West Bengal-East Pakistan Boundary*

Over 1,200 miles of this boundary have already been demarcated. As regards the boundary between West Bengal and East Pakistan in the areas of Mahananda, Burung and Karatoa rivers, it was agreed that demarcation will be made in accordance with the latest cadastral survey maps supported by relevant notifications and record-of-rights.

* * * * *

6. *Assam-East Pakistan Boundary*

* * * * *

(*i*) The dispute concerning Bagge Award III has been settled by adopting the following rational boundary in the Patharia Forest Reserve region:

From a point marked X (H522558) along the Radcliffe Line BA on the old Patharia Reserve Boundary as shown in the topographical map sheet No. 83D/5, the boundary line shall run in close proximity and parallel to the cart road to its south to a point A (H531554); thence in a southerly direction up the spur and along the ridge to a hill top marked B (H523529); thence in a south-easterly direction along the ridge down the spur across a stream to a hill top marked C (H532523); thence in a southerly direction to a point D (H530517); thence in a south-westerly direction to a flat top E (H523507); thence in a southerly direction to a point F (H524500); thence in a south-easterly direction in a straight line to the midstream point of the Gandhai Nala marked G (H540494); thence in south-westerly direction up the mid-stream of Gandhai Nala to a point H (H533482); thence in a south-westerly direction up a spur and along the ridge to a point I (H517460); thence in a southerly direction to a point on the ridge marked J (H518455); thence in a south-westerly direction along the ridge to a point height 364 then continues along the same direction along the same ridge to a point marked K (H500428); thence in a south and south-westerly direction along the same ridge to a point marked L (H496420); thence in a south-easterly direction along the same ridge to a point marked M (H499417); thence in a south-westerly direction along the ridge to a point on the bridle path with a height 587; then up the spur to the hill top marked N (H487393); then in a south-easterly and southerly direction along the ridge to the hill top with height 692; thence in a southerly direction down the spur to a point on Buracherra marked O (H484344); thence in a south-westerly direction up the spur along the ridge to the trigonometrical survey station with height 690; thence in a southerly direction along the ridge to a point height 490 (H473292); thence in a straight line due south to a point

on the eastern boundary of the Patharia Reserve Forest marked Y (H473263); along the Radcliffe Line BA.

The line described above has been plotted on two copies of topographical map sheets Nos. 83D/5, 83D/6, and 83D/2.

The technical experts responsible for the ground demarcation will have the authority to make minor adjustments in order to make the boundary alignment agree with the physical features as described.

The losses and gains to either country as a result of these adjustments with respect to the line marked on the map will be balanced by the technical experts.

(Sd.) J. G. KHARAS,
Acting Foreign Secretary,
Ministry of Foreign Affairs
and Commonwealth Relations,
Karachi.

(Sd.) M. J. DESAI,
Commonwealth Secretary,
Ministry of External Affairs,
New Delhi.

NEW DELHI
October 23, 1959

3. EXTRACTS FROM THE AGREEMENT ENTITLED "AGREED DECISIONS AND PROCEDURES TO END DISPUTES AND INCIDENTS ALONG THE INDO-WEST PAKISTAN BORDER AREAS", DATED THE 11TH DAY OF JANUARY, 1960.

"1. *West Pakistan-Punjab border.*—Of the total of 325 miles of the border in this sector, demarcation has been completed along about 252 miles. About 73 miles of the border has not yet been demarcated due to differences between the Governments of India and Pakistan regarding interpretation of the decision and Award of the Punjab Boundary Commission presented by Sir Cyril Radcliffe as Chairman of the Commission. These differences have been settled along the lines given below in a spirit of accommodation:

(*i*) *Theh Sarja Marja, Rakh Hardit Singh and Pathanke (Amritsar-Lahore border).*—The Governments of India and Pakistan agree that the boundary between West Pakistan and India in this region should follow the boundary between the Thesils of Lahore and Kasur as laid down under Punjab Govern-

ment Notification No. 2183-E, dated 2nd June, 1939. These three villages will in consequence, fall within the territorial jurisdiction of the Government of Pakistan.

* * * * *

(*iv*) *Suleimanke (Ferozepur-Montgomery border.*)—The Governments of India and Pakistan agree to adjust the district boundaries in this region as specified in the attached Schedule and as shown in the map appended thereto as Annexure I.

* * * * *

(Sd.) M. J. DESAI,
Commonwealth Secretary
Ministry of External Affairs,
Government of India.

(Sd.) J. G. KHARAS,
Joint Secretary.
Ministry of Foreign Affairs and Commonwealth Relations,
Government of Pakistan.

NEW DELHI
January 11, 1960.

APPENDIX 10

THE CONSTITUTION (TENTH AMENDMENT) ACT, 1961

[16*th August*, 1961]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Twelfth Year of the Republic of India as follows:—

1. Short title and commencement.—(1) This Act may be called the Constitution (Tenth Amendment) Act, 1961.

(2) It shall be deemed to have come into force on the 11th day of August, 1961.

2. Amendment of the First Schedule to the Constitution.—In the First Schedule to the Constitution, under the heading "THE UNION TERRITORIES", after entry 6, the following entry shall be inserted, namely:—

"7. DADRA AND NAGAR HAVELI. The territory which immediately before the eleventh day of August, 1961 was comprised in Free Dadra and Nagar Haveli."

3. Amendment of article 240. —In article 240 of the Constitution, in clause (1), after entry (*b*), the following entry shall be inserted, namely:

"(*c*) Dadra and Nagar Haveli."

APPENDIX II

THE CONSTITUTION (ELEVENTH AMENDMENT) ACT, 1961

[*19th December*, 1961]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Twelfth year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Eleventh Amendment) Act, 1961.

2. Amendment of article 66.- In article 66 of the Constitution, in clause (1), for the words "members of both Houses of Parliament assembled at a joint meeting", the words "members of an electoral college consisting of the members of both Houses of Parliament" shall be substituted.

3. Amendment of article 71.—In article 71 of the Constitution, after clause (3), the following clause shall be inserted, namely:—

"(4) The election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him."

APPENDIX 12

THE CONSTITUTION (TWELFTH AMENDMENT) ACT, 1962

[27*th March*, 1962]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Thirteenth Year of the Republic of India as follows:—

1. Short title and commencement.—(1) This Act may be called the Constitution (Twelfth Amendment) Act, 1962.

(2) It shall be deemed to have come into force on the 20th day of December, 1961.

2. Amendment of the First Schedule to the Constitution.—In the First Schedule to the Constitution, under the heading "THE UNION TERRITORIES", after entry 7, the following entry shall be inserted, namely:—

"8. GOA, DAMAN AND DIU. The territories which immediately before the twentieth day of December, 1961 were comprised in Goa, Daman and Diu."

3. Amendment of article 240.—In article 240 of the Constitution, in clause (1), after entry (*c*), the following entry shall be inserted, namely:—

"(*d*) Goa, Daman and Diu."

APPENDIX 13

THE CONSTITUTION (THIRTEENTH AMENDMENT) ACT, 1962

[28*th December*, 1962]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Thirteenth Year of the Republic of India as follows:—

1. Short title and commencement.—(1) This Act may be called the Constitution (Thirteenth Amendment) Act, 1962.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of Part XXI.—In PART XXI of the Constitution:—

(*a*) for the heading, the following heading shall be substituted, namely:—

'TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS";

(*b*) after article 371, the following article shall be inserted, namely:—

"371A. *Special provision with respect to the State of Nagaland.* (1) Notwithstanding anything in this Constitution,—

(*a*) no Act of Parliament in respect of–

(*i*) religious or social practices of the Nagas,

(*ii*) Naga customary law and procedure,

(*iii*) administration of civil and criminal justice involving decisions according to Naga customary law,

(*iv*) ownership and transfer of land and its resources,

shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides;

(*b*) the Governor of Nagaland shall have special responsibility with respect to law and order in the State of Nagaland for so long as in his opinion internal disturbances occurring in the Naga Hills-Tuensang Area immediately before the formation of that State continue therein or in any part thereof and in the discharge of his functions in relation thereto the Governor shall, after consulting the Council of Ministers, exercise his individual judgment as to the action to be taken:

Provided that if any question arises whether any matter is or is not a matter as respects which the Governor is under this sub-clause required to act in the exercise of his individual judgment, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought

or ought not to have acted in the exercise of his individual judgment:

Provided further that if the President on receipt of a report from the Governor or otherwise is satisfied that it is no longer necessary for the Governor to have special responsibility with respect to law and order in the State of Nagaland, he may by order direct that the Governor shall cease to have such responsibility with effect from such date as may be specified in the order;

(*c*) in making his recommendation with respect to any demand for a grant, the Governor of Nagaland shall ensure that any money provided by the Government of India out of the Consolidated Fund of India for any specific service or purpose is included in the demand for a grant relating to that service or purpose and not in any other demand;

(*d*) as from such date as the Governor of Nagaland may by public notification in this behalf specify, there shall be established a regional council for the Tuensang district consisting of thirty-five members and the Governor shall in his discretion make rules providing for—

(*i*) the composition of the regional council and the manner in which the members of the regional council shall be chosen:

Provided that the Deputy Commissioner of the Tuensang district shall be the Chairman *ex officio* of the regional council and the Vice-Chairman of the regional council shall be elected by the members thereof from amongst themselves;

(*ii*) the qualifications for being chosen as, and for being, members of the regional council;

(*iii*) the term of office of, and the salaries and allowances, if any, to be paid to members of, the regional council;

(*iv*) the procedure and conduct of business of the regional council;

(*v*) the appointment of officers and staff of the regional council and their conditions of services; and

(*vi*) any other matter in respect of which it is necessary to make rules for the constitution and proper functioning of the regional council.

(2) Notwithstanding anything in this Constitution, for a period of ten years from the date of the formation of the State of Naga-

land or for such further period as the Governor may, on the recommendation of the regional council, by public notification specify in this behalf,—

(*a*) the administration of the Tuensang district shall be carried on by the Governor;

(*b*) where any money is provided by the Government of India to the Government of Nagaland to meet the requirements of the State of Nagaland as a whole, the Governor shall in his discretion arrange for an equitable location of that money between the Tuensang district and the rest of the State;

(*c*) no Act of the Legislature of Nagaland shall apply to the Tuensang district unless the Governor, on the recommendation of the regional council, by public notification so directs and the Governor in giving such direction with respect to any such Act may direct that the Act shall in its application to the Tuensang district or any part thereof have effect subject to such exceptions or modifications as the Governor may specify on the recommendation of the regional council:

Provided that any direction given under this sub-clause may be given so as to have restrospective effect;

(*d*) the Governor may make regulations for the peace, progress and good government of the Tuensang district and any regulations so made may repeal or amend with retrospective effect, if necessary, any Act of Parliament or any other law which is for the time being applicable to that district;

(*e*) (*i*) one of the members representing the Tuensang district in the Legislative Assembly of Nagaland shall be appointed Minister for Tuensang affairs by the Governor on the advice of the Chief Minister and the Chief Minister in tendering his advice shall act on the recommendation of the majority of the members as aforesaid;

(*ii*) the Minister for Tuensang affairs shall deal with, and have direct access to the Governor on, all matters relating to the Tuensang district but he shall keep the Chief Minister informed about the same;

(*f*) notwithstanding anything in the foregoing provisions of this clause, the final decision on all matters relating to the Tuensang district shall be made by the Governor in his discretion;

(*g*) in articles 54 and 55 and clause (4) of article 80, references to the elected members of the Legislative Assembly of a State or to each such member shall include references to the members or member of the Legislative Assembly of Nagaland elected by the regional council established under this article;

(*h*) in article 170—

(*i*) clause (1) shall, in relation to the Legislative Assembly of Nagaland, have effect as if for the word 'sixty', the words 'forty-six' had been substituted;

(*ii*) in the said clause, the reference to direct election from territorial constituencies in the State shall include election by the members of the regional council established under this article;

(*iii*) in clauses (2) and (3), references to territorial constituencies shall mean references to territorial constituencies in the Kohima and Mokokchung districts.

(3) If any difficulty arises in giving effect to any of the foregoing provisions of this article, the President may by order do anything (including any adaptation or modification of any other article) which appears to him to be necessary for the purpose of removing that difficulty.

Provided that no such order shall be made after the expiration of three years from the date of the formation of the State of Nagaland.

Explanation.—In this article, the Kohima, Mokokchung and Tuensang districts shall have the same meanings as in the State of Nagaland Act, 1962.".

APPENDIX 14

THE CONSTITUTION (FOURTEENTH AMENDMENT) ACT, 1962

[*28th December*, 1962]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Thirteenth Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Fourteenth Amendment) Act, 1962.

2. Amendment of article 81.—In article 81 of the Constitution in sub-clause (b) of clause (1), for the words "twenty members", the words "twenty-five members" shall be substituted.

3. Amendment of the First Schedule.—In the First Schedule to the Constitution, under the heading "II. THE UNION TERRITORIES", after entry 8, the following entry shall be inserted, namely:—

'9. PONDICHERRY. The territories which immediately before the sixteenth day of August, 1962, were comprised in the French Establishments in India known as Pondicherry, Karikal, Mahe and Yanam.'.

4. Insertion of new article 239A.—After article 239 of the Constitution, the following article shall be inserted, namely:—

"239A. *Creation of local Legislatures or Council of Ministers or both for certain Union territories.*—(1) Parliament may by law create for any of the Union territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu, and Pondicherry—

(*a*) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the Union territory, or

(*b*) a Council of Ministers,

or both with such constitution, powers and functions, in each case, as may be specified in the law.

(2) Any such law as is referred to in clause (1) shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution."

5. Amendment of article 240.—In article 240 of the Constitution, in clause (1),—

(*a*) after entry (*d*), the following entry shall be inserted, namely:—

"(*e*) Pondicherry:";

(*b*) the following proviso shall be inserted at the end, namely:—

"Provided that when any body is created under article 239A to function as a Legislature for the Union territory of Goa, Daman and Diu or Pondicherry, the President shall not make any regulation for the peace, progress and good government of that Union territory with effect from the date appointed for the first meeting of the Legislature."

6. Amendment of the Fourth Schedule.—In the Fourth Schedule to the Constitution, in the Table,—

(*a*) after entry 20, the entry

"21. Pondicherry... 1" shall be inserted;

(*b*) for the figures "225", the figures "226" shall be substituted.

7. Retrospective operation of certain provisions.—Section 3 and clause (*a*) of section 5 shall be deemed to have come into force on the 16th day of August, 1962.

APPENDIX 15

THE CONSTITUTION (FIFTEENTH AMENDMENT) ACT, 1963

[*5th October*, 1963]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Fourteenth Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Fifteenth Amendment) Act, 1963.

2. Amendment of article 124.—In article 124 of the Constitution, after clause (2), the following clause shall be inserted, namely:—

"(2A) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide".

3. Amendment of article 128.—In article 128 of the Constitution, after the words "Federal Court", the words "or who has held the office of a Judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court" shall be inserted.

4. Amendment of article 217.—In article 217 of the Constitution,—

(*a*) in clause (1), for the words "sixty years", the words "sixty-two years" shall be substituted;

(*b*) after clause (2), the following clause shall be inserted and shall be deemed always to have been inserted, namely:—

"(3) If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.".

5. Amendment of article 222.—In article 222 of the Constitution, after clause (1), the following clause shall be inserted, namely:—

"(2) When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.".

6. Amendment of article 224.—In article 224 of the Constitution, in clause (3), for the words "sixty years", the words "sixty-two years" shall be substituted.

7. Insertion of new article 224A.—After article 224 of the Constitution, the following article shall be inserted, namely:—

"**224A.** *Appointment of retired Judges at sittings of High Courts.*—Notwithstanding anything in this Chapter, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as

the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court:

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that High Court unless he consents so to do."

8. Amendment of article 226.—In article 226 of the Constitution,—

(*a*) after clause (1), the following clause shall be inserted, namely:—

"(1A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.";

(*b*) in clause (2), for the word, brackets and figure "clause (1)", the words, brackets, figures and letter "clause (1) or clause (1A)" shall be substituted.

9. Amendment of article 297.—In article 297 of the Constitution, after the words "territorial waters", the words "or the continental shelf" shall be inserted.

10. Amendment of article 311.—In article 311 of the Constitution, for clauses (2) and (3), the following clauses shall be substituted, namely:—

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply—

(*a*) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(*b*) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(*c*) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

11. Amendment of article 316.—In article 316 of the Constitution, after clause (1), the following clause shall be inserted, namely:—

"(1A) If the office of the Chairman of the Commission becomes vacant or if any such Chairman is by reason of absence or for any other reason unable to perform the duties of his office, those duties shall, until some person appointed under clause (1) to the vacant office has entered on the duties thereof or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission as the President, in the case of the Union Commission or a Joint Commission, and the Governor of the State in the case of a State Commission, may appoint for the purpose.".

12. Amendment of the Seventh Schedule.—In the Seventh Schedule to the Constitution, in List I, in entry 78, after the word "organisation", the brackets and words "(including vacations)" shall be inserted and shall be deemed always to have been inserted.

APPENDIX 16

THE CONSTITUTION (SIXTEENTH AMENDMENT) ACT, 1963

[*5th October*, 1963]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Fourteenth Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Sixteenth Amendment) Act, 1963.

2. Amendment of article 19.—In article 19 of the Constitution,—

(*a*) in clause (2), after the words "in the interests of", the words "the sovereignty and integrity of India," shall be inserted;

(*b*) in clauses (3) and (4), after the words "in the interests of", the words "the sovereignty and integrity of India or" shall be inserted.

3. Amendment of article 84.—In article 84 of the Constitution, for clause (*a*), the following clause shall be substituted, namely:—

"(*a*) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;".

4. Amendment of article 173.—In article 173 of the Constitution, for clause (*a*), the following clause shall be substituted, namely:—

"(*a*) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;".

5. Amendment of Third Schedule.—In the Third Schedule to the Constitution,—

(*a*) in Form 1, after the words "Constitution of India as by

law established," the words "that I will uphold the sovereignty and integrity of India," shall be inserted;

(*b*) for Form III, the following shall be substituted, namely:—

'III

A

Form of oath or affirmation to be made by a candidate for election to Parliament:—

"I, A.B., having been nominated as a candidate to fill a seat in the Council of States (or the House of the People) do swear in the name of God / solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India.".

B

Form of oath or affirmation to be made by a member of Parliament:—

"I, A.B., having been elected (or nominated) a member of the Council of States (or the House of the People) do swear in the name of God / solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter." ' ;

(*c*) in Forms IV, V and VIII, after the words "the Constitution of India as by law established", the words "that I will uphold the sovereignty and integrity of India," shall be inserted;

(*d*) for Form VII, the following shall be substituted, namely:—

'VII

A

Form of oath or affirmation to be made by a candidate for election to the Legislature of a State:—

"I, A.B., having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do swear in the name of God / solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India".

B

Form of oath or affirmation to be made by a member of the Legislature of a State:

"I, A.B., having been elected (or nominated) a member of the Legislative Assembly (or Legislative Council), do swear in the name of God / solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter." '.

APPENDIX 17

THE CONSTITUTION (SEVENTEENTH AMENDMENT) ACT, 1964

[20*th June*, 1964]

AN ACT FURTHER TO AMEND THE CONSTITUTION OF INDIA.

BE it enacted by Parliament in the Fifteenth Year of the Republic of India as follows:—

1. Short title.—This Act may be called the Constitution (Seventeenth Amendment) Act, 1964.

2. Amendment of article 31A.— In article 31A of the Constitution,—

(*i*) in clause (1), after the existing proviso, the following proviso shall be inserted, namely:—

"Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.";

(*ii*) in clause (2), for sub-clause (*a*), the following sub-clause shall be substituted and shall be deemed always to have been substituted, namely:—

'(*a*) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(*i*) any *jagir*, *inam* or *muafi* or other similar grant and in the States of Madras and Kerala, any *janmam* right;

(*ii*) any land held under ryotwari settlement;

(*iii*) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;'.

3. Amendment of Ninth Schedule.—In the Ninth Schedule to the Constitution, after entry 20, the following entries shall be added, namely:—

"21. The Andhra Pradesh Ceiling on Agricultural Holdings Act, 1961 (Andhra Pradesh Act X of 1961).

22. The Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands (Validation) Act, 1961 (Andhra Pradesh Act XXI of 1961).
23. The Andhra Pradesh (Telangana Area) Ijara and Kowli Land Cancellation of Irregular Pattas and Abolition of Concessional Assessment Act, 1961 (Andhra Pradesh Act XXXVI of 1961).
24. The Assam State Acquisition of Lands Belonging to Religious or Charitable Institution of Public Nature Act, 1959 (Assam Act IX of 1961).
25. The Bihar Land Reforms (Amendment) Act, 1953 (Bihar Act XX of 1954).
26. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), (except section 28 of this Act).
27. The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1954 (Bombay Act I of 1955).
28. The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1957 (Bombay Act XVIII of 1958).
29. The Bombay Inams (Kutch Area) Abolition Act, 1958 (Bombay Act XCVIII of 1958).
30. The Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1960 (Gujarat Act XVI of 1960).
31. The Gujarat Agricultural Lands Ceiling Act, 1960 (Gujarat Act XXVII of 1961).
32. The Sagbara and Mehwassi Estates (Proprietary Rights Abolition, etc.) Regulation, 1962 (Gujarat Regulation I of 1962).
33. The Gujarat Surviving Alienations Abolition Act, 1963 (Gujarat Act XXXIII of 1963), except in so far as this Act relates to an alienation referred to in sub-clause (*d*) of clause (3) of section 2 thereof.
34. The Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (Maharashtra Act XXVII of 1961).
35. The Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and Further Amendment) Act, 1961 (Maharashtra Act XLV of 1961).
36. The Hyderabad Tenancy and Agricultural Lands Act, 1950 (Hyderabad Act XXI of 1950).
37. The Jenmikaram Payment (Abolition) Act, 1960 (Kerala Act III of 1961).

38. The Kerala Land Tax Act, 1961 (Kerala Act XIII of 1961).
39. The Kerala Land Reforms Act, 1963 (Kerala Act I of 1964).
40. The Madhya Pradesh Land Revenue Code, 1959 (Madhya Pradesh Act XX of 1959).
41. The Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960 (Madhya Pradesh Act XX of 1960).
42. The Madras Cultivating Tenants Protection Act, 1955 (Madras Act XXV of 1955).
43. The Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956 (Madras Act, XXIV of 1956).
44. The Madras Occupants of Kudiyiruppu (Protection from Eviction) Act, 1961 (Madras Act XXVIII of 1961).
45. The Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961 Madras Act LVII of 1961).
46. The Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 (Madras Act LVIII of 1961).
47. The Mysore Tenancy Act, 1952 (Mysore Act XIII of 1952).
48. The Coorg Tenants Act, 1957 (Mysore Act XIV of 1957).
49. The Mysore Village Offices Abolition Act, 1961 (Mysore Act XIV of 1961).
50. The Hyderabad Tenancy and Agricultural Lands (Validation) Act, 1961 (Mysore Act XXXVI of 1961).
51. The Mysore Land Reforms Act, 1961 (Mysore Act X of 1962).
52. The Orissa Land Reforms Act, 1960 (Orissa Act XVI of 1960).
53. The Orissa Merged Territories (Village Offices Abolition) Act, 1963 (Orissa Act X of 1963).
54. The Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953).
55. The Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955).
56. The Rajasthan Zamindari and Biswedari Abolition Act, 1959 (Rajasthan Act VIII of 1959).
57. The Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 (Uttar Pradesh Act XVII of 1960).

58. The Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (Uttar Pradesh Act I of 1961).
59. The West Bengal Estates Acquisition Act, 1953 (West Bengal Act I of 1954).
60. The West Bengal Land Reforms Act, 1955 (West Bengal Act X of 1956).
61. The Delhi Land Reforms Act, 1954 (Delhi Act VIII of 1954).
62. The Delhi Land Holdings (Ceiling) Act, 1960 (Central Act 24 of 1960).
63. The Manipur Land Revenue and Land Reforms Act, 1960 (Central Act 33 of 1960).
64. The Tripura Land Revenue and Land Reforms Act, 1960 (Central Act 43 of 1960).

Explanation.—Any acquisition made under the Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955), in contravention of the second proviso to clause (1) of article 31A shall, to the extent of the contravention, be void.".

APPENDIX 18

STATEMENT BY THE CABINET MISSION TO INDIA AND HIS EXCELLENCY THE VICEROY, DATED 16TH MAY, 1946

1. On the 15th March last, just before the despatch of the Cabinet Mission to India, Mr Attlee, the British Prime Minister, used these words:—

> "My colleagues are going to India with the intention of using their utmost endeavours to help her to attain her freedom as speedily and fully as possible. What form of Government is to replace the present regime is for India to decide; but our desire is to help her to set up forthwith the machinery for making that decision....
>
> "I hope that the Indian people may elect to remain within the British Commonwealth. I am certain that she will find great advantages in doing so....

"But if she does so elect, it must be by her own free will. The British Commonwealth and Empire is not bound together by chains of external compulsion. It is a free association of free peoples. If, on the other hand, she elects for independence, in our view she has a right to do so. It will be for us to help to make the transition as smooth and easy as possible."

2. Charged in these historic words, we—the Cabinet Ministers and the Viceroy—have done our utmost to assist the two main political parties to reach agreement upon the fundamental issue of the unity or division of India. After prolonged discussions in New Delhi we succeeded in bringing the Congress and the Muslim League together in conference at Simla. There was a full exchange of views and both parties were prepared to make considerable concessions in order to try to reach a settlement, but it ultimately proved impossible to close the remainder of the gap between the parties and so no agreement could be concluded. Since no agreement has been reached, we feel that it is our duty to put forward what we consider are the best arrangements possible to ensure a speedy setting up of the new constitution. This statement is made with the full approval of His Majesty's Government in the United Kingdom.

3. We have accordingly decided that immediate arrangements should be made whereby Indians may decide the future constitution of India, and an interim Government may be set up at once to carry on the administration of British India until such time as a new constitution can be brought into being. We have endeavoured to be just to the smaller as well as to the larger sections of the people; and to recommend a solution which will lead to a practicable way of governing the India of the future, and will give a sound basis for defence and a good opportunity for progress in the social, political and economic field.

4. It is not intended in this statement to review the voluminous evidence which has been submitted to the Mission; but it is right that we should state that it has shown an almost universal desire, outside the supporters of the Muslim League, for the unity of India.

5. This consideration did not, however, deter us from examining closely and impartially the possibility of a partition of India; since we were greatly impressed by the very genuine and acute anxiety of the Muslims lest they should find themselves subjected to a perpetual Hindu-majority rule. This feeling has become so strong and

widespread amongst the Muslims that it cannot be allayed by mere paper safeguards. If there is to be internal peace in India it must be secured by measures which will assure to the Muslims a control in all matters vital to their culture, religion, and economic or other interests.

6. We, therefore, examined in the first instance the question of a separate and fully independent sovereign state of Pakistan as claimed by the Muslim League. Such a Pakistan would comprise two areas: one in the North-West consisting of the provinces of the Punjab, Sind, North-West Frontier, and British Baluchistan; the other in the North-East consisting of the provinces of Bengal and Assam. The League were prepared to consider adjustment of boundaries at a later stage, but insisted that the principle of Pakistan should first be acknowledged. The argument for a separate state of Pakistan was based, first, upon the right of the Muslim majority to decide their method of government according to their wishes, and, secondly, upon the necessity to include substantial areas in which Muslims are in a minority, in order to make Pakistan administratively and economically workable.

The size of the non-Muslim minorities in a Pakistan comprising the whole of the six provinces enumerated above would be very considerable as the following figures* show:—

	Muslim	*Non-Muslim*
North-Western Area		
Punjab	16,217,242	12,201,577
North-West Frontier Province	2,788,797	249,270
Sind	3,208,325	1,326,683
British Baluchistan	438,930	62,701
	22,653,294	13,840,231
	62.07 per cent	37.93 per cent
North-Eastern Area		
Bengal	33,005,434	27,301,091
Assam	3,442,479	6,762,254
	36,447,913	34,063,345
	51.69 per cent	48.31 per cent

* All population figures in this statement are from the most recent census taken in 1941.

The Muslim minorities in the remainder of British India number some 20 million dispersed amongst a total population of 188 million.

The figures show that the setting up of a sovereign state of Pakistan on the lines claimed by the Muslim League would not solve the communal minority problem; nor can we see any justification for including within a sovereign Pakistan those districts of the Punjab and of Bengal and Assam in which the population is predominantly non-Muslim. Every argument that can be used in favour of Pakistan can equally, in our view, be used in favour of the exclusion of the non-Muslim areas from Pakistan. This point would particularly affect the position of the Sikhs.

7. We, therefore, considered whether a smaller sovereign Pakistan confined to the Muslim majority areas alone might be a possible basis of compromise. Such a Pakistan is regarded by the Muslim League as quite impracticable because it would entail the exclusion from Pakistan of (*a*) the whole of the Ambala and Jullundur divisions in the Punjab; (*b*) the whole of Assam except the district of Sylhet; and (*c*) a large part of Western Bengal, including Calcutta, in which city the percentage of the Muslim population is 23.6 per cent. We ourselves are also convinced that any solution which involves a radical partition of the Punjab and Bengal, as this would do, would be contrary to the wishes and interests of a very large proportion of the inhabitants of these provinces. Bengal and the Punjab each has its own common language and a long history and tradition. Moreover, any division of the Punjab would of necessity divide the Sikhs, leaving substantial bodies of Sikhs on both sides of the boundary. We have therefore been forced to the conclusion that neither a larger nor a smaller sovereign state of Pakistan would provide an acceptable solution for the communal problem.

8. Apart from the great force of the foregoing arguments there are weighty administrative, economic and military considerations. The whole of the transportation and postal and telegraph systems of India have been established on the basis of a united India. To disintegrate them would gravely injure both parts of India. The case for a united defence is even stronger. The Indian Armed Forces have been built up as a whole for the defence of India as a whole, and to break them in two would inflict a deadly blow on the long traditions and high degree of efficiency of the Indian Army and would entail the gravest dangers. The Indian Navy and Indian Air Force would become much less effective. The two sections of

the suggested Pakistan contain the two most vulnerable frontiers in India and for a successful defence in depth the area of Pakistan would be insufficient.

9. A further consideration of importance is the greater difficulty which the Indian States would find in associating themselves with a divided British India.

10. Finally, there is the geographical fact that the two halves of the proposed Pakistan state are separated by some seven hundred miles and the communications between them both in war and peace would be dependent on the goodwill of Hindustan.

11. We are, therefore, unable to advise the British Government that the power which at present resides in British hands should be handed over to two entirely separate sovereign States.

12. This decision does not, however, blind us to the very real Muslim apprehensions that their culture and political and social life might become submerged in a purely unitary India, in which the Hindus with their greatly superior numbers must be a dominating element. To meet this the Congress have put forward a scheme under which provinces would have full autonomy subject only to a minimum of central subjects, such as foreign affairs, defence and communications.

Under this scheme provinces, if they wish to take part in economic and administrative planning on a large scale, could cede to the centre optional subjects in addition to the compulsory ones mentioned above.

13. Such a scheme would, in our view, present considerable constitutional disadvantages and anomalies. It would be very difficult to work a central executive and legislature in which some ministers, who dealt with compulsory subjects, were responsible to the whole of India while other ministers, who dealt with optional subjects, would be responsible only to those provinces who had elected to act together in respect of such subjects. This difficulty would be accentuated in the central legislature, where it would be necessary to exclude certain members from speaking and voting when subjects with which their provinces were not concerned were under discussion. Apart from the difficulty of working such a scheme, we do not consider that it would be fair to deny to other provinces, which did not desire to take the optional subjects at the centre, the right to form themselves into a group for a similar purpose. This would

indeed be no more than the exercise of their autonomous powers in a particular way.

14. Before putting forward our recommendations we turn to deal with the relationship of the Indian States to British India. It is quite clear that with the attainment of independence by British India, whether inside or outside the British Commonwealth, the relationship which has hitherto existed between the Rulers of the States and the British Crown will no longer be possible. Paramountcy can neither be retained by the British Crown nor transferred to the new government. This fact has been fully recognised by those whom we interviewed from the States. They have at the same time assured us that the States are ready and willing to co-operate in the new development of India. The precise form which their co-operation will take must be a matter for negotiation during the building up of the new constitutional structure and it by no means follows that it will be identical for all the States. We have not, therefore, dealt with the States in the same detail as the provinces of British India in the paragraphs which follow.

15. We now indicate the nature of a solution which in our view would be just to the essential claims of all parties and would at the same time be most likely to bring about a stable and practicable form of constitution for All-India.

We recommend that the constitution should take the following basic form:—

(1) There should be a Union of India, embracing both British India and the States which should deal with the following subjects: foreign affairs, defence, and communications; and should have the powers necessary to raise the finances required for the above subjects.

(2) The Union should have an executive and a legislature constituted from British Indian and States representatives. Any question raising a major communal issue in the legislature should require for its decision a majority of the representatives present and voting of each of the two major communities as well as a majority of all the members present and voting.

(3) All subjects other than the Union subjects and all residuary powers should vest in the provinces.

(4) The States will retain all subjects and powers other than those ceded to the Unions.

(5) Provinces should be free to form groups with executives and legislatures, and each group could determine the provincial subjects to be taken in common.

(6) The constitutions of the Union and of the groups should contain a provision whereby any province could by a majority vote of its legislative assembly call for a reconsideration of the terms of the constitution after an initial period of ten years and at ten-yearly intervals thereafter.

16. It is not our object to lay out the details of a constitution on the above programme but to set in motion machinery whereby a constitution can be settled by Indians for Indians.

It has been necessary, however, for us to make this recommendation as to the broad basis of the future constitution because it became clear to us in the course of our negotiations that not until that had been done was there any hope of getting the two major communities to join in the setting up of the constitution-making machinery.

17. We now indicate the constitution-making machinery which we propose should be brought into being forthwith in order to enable a new constitution to be worked out.

18. In forming any assembly to decide a new constitutional structure the first problem is to obtain as broad-based and accurate a representation of the whole population as is possible. The most satisfactory method obviously would be by election based on adult franchise, but any attempt to introduce such a step now would lead to a wholly unacceptable delay in the formulation of the new constitution. The only practicable course is to utilise the recently elected Provincial Legislative Assemblies as electing bodies. There are, however, two factors in their composition which make this difficult. First, the numerical strengths of Provincial Legislative Assemblies do not bear the same proportion to the total population in each province. Thus, Assam, with a population of 10 million, has a Legislative Assembly of 108 members, while Bengal, with a population six times as large, has an Assembly of only 250. Secondly, owing to the weightage given to minorities by the Communal Award, the strengths of the several communities in each Provincial Legislative Assembly are not in proportion to their numbers in the province. Thus the number of seats reserved for Moslems in the Bengal Legislative Assembly is only 48 per cent. of the total, although

they form 55 per cent. of the provincial population. After a most careful consideration of the various methods by which these points might be corrected, we have come to the conclusion that the fairest and most practicable plan would be:—

(*a*) to allot to each province a total number of seats proportional to its population, roughly in the ratio of one to a million, as the nearest substitute for representation by adult suffrage.

(*b*) to divide this provincial allocation of seats between the main communities in each province in proportion to their population.

(*c*) to provide that the representatives allocated to each community in a province shall be elected by members of that community in its Legislative Assembly.

We think that for these purposes it is sufficient to recognise only three main communities in India, General, Moslem and Sikh, the "General" Community including all persons who are not Moslems or Sikhs. As smaller minorities would upon a population basis have little or no representation, since they would lose the weightage which assures them seats in Provincial Legislatures, we have made the arrangements set out in paragraph 20 below to give them a full representation upon all matters of special interest to minorities.

19. (*i*) We, therefore, propose that there shall be elected by each Provincial Legislative Assembly the following numbers of representatives, each part of the Legislative Assembly (General, Moslem or Sikh) electing its own representatives by the method of proportional representation with single transferable vote:—

Table of Representation

SECTION A

Province	*General*	*Muslim*	*Total*
Madras	45	4	49
Bombay	19	2	21
United Provinces	47	8	55
Bihar	31	5	36
Central Provinces	16	1	17
Orissa	9	0	9
TOTAL	167	20	187

SECTION B

Province	*General*	*Muslim*	*Sikhs*	Total
Punjab	8	16	4	28
North-West Frontier Province	0	3	0	3
Sind	1	3	0	4
TOTAL	9	22	4	35

SECTION C

Province	*General*	*Muslim*	*Total*
Bengal	27	33	60
Assam	7	3	10
TOTAL	34	36	70

Total for British India	292
Maximum for Indian States	93
TOTAL	385

Note:—In order to represent the Chief Commissioners' Provinces there will be added to Section A the member representing Delhi in the Central Legislative Assembly, the member representing Ajmer-Merwara in the Central Legislative Assembly and a representative to be elected by the Coorg Legislative Council.

To Section B will be added a representative of British Baluchistan.

(*ii*) It is the intention that the States would be given in the final Constituent Assembly appropriate representation which would not, on the basis of the calculation of population adopted for British India, exceed 93; but the method of selection will have to be determined by consultation. The States would in the preliminary stage be represented by a negotiating committee.

(*iii*) Representatives thus chosen shall meet at New Delhi as soon as possible.

(*iv*) A preliminary meeting will be held at which the general order of business will be decided, a chairman and other officers elected and an Advisory Committee (see paragraph 20 below) on rights of citizens, minorities and tribal and excluded areas set up. Thereafter the provincial representatives will divide up into three sections shown under A, B and C in the Table of Representation in sub-paragraph (*i*) of this paragraph.

(*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 should have power to opt out of groups in accordance with the provisions of sub-clause (viii) below.

(*vi*) The representatives of the sections and the Indian States shall reassemble for the purpose of settling the Union constitution.

(*vii*) In the Union Constituent Assembly resolution varying the provisions of paragraph 15 above or raising any major communal issue shall require a majority of the representatives present and voting of each of the two major communities. The Chairman of the Assembly shall decide which, if any, resolutions raise major communal issues and shall, if so requested by a majority of the representatives of either of the major communities, consult the Federal Court before giving his decision.

(*viii*) As soon as the 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 legislature of the province after the first general election under the new constitution.

20. The Advisory Committee on the rights of citizens, minorities and tribal and excluded areas will contain due representation of the interests affected and their function will be to report to the Union Constituent Assembly upon the list of fundamental rights, clauses for protecting minorities, and a scheme for the administration of tribal and excluded areas, and to advise whether these rights should be incorporated in the provincial, the group or the Union constitutions.

21. His Excellency the Viceroy will forthwith request the provincial legislatures to proceed with the election of their representatives and the States to set up a negotiating committee.

It is hoped that the process of constitution-making can proceed

as rapidly as the complexities of the task permit so that the interim period may be as short as possible.

22. It will be necessary to negotiate a treaty between the Union Constituent Assembly and the United Kingdom to provide for certain matters arising out of the transfer of power.

23. While the constitution-making proceeds the administration of India has to be carried on. We attach the greatest importance, therefore, to the setting up at once of an interim Government having the support of the major political parties. It is essential during the interim period that there should be the maximum of co-operation in carrying through the difficult tasks that face the Government of India. Besides the heavy tasks of day-to-day administration, there is the grave danger of famine to be countered, there are decisions to be taken in many matters of post-war development which will have a far-reaching effect on India's future and there are important international conferences in which India has to be represented. For all these purposes a government having popular support is necessary. The Viceroy has already started discussions to this end and hopes soon to form an interim Government in which all the portfolios, including that of War Member, will be held by Indian leaders having the full confidence of the people. The British Government, recognising the significance of the changes, will give the fullest measure of co-operation to the Government so formed in the accomplishment of its tasks of administration and in bringing about as rapid and smooth a transition as possible.

24. To the leaders and people of India, who now have the opportunity of complete independence, we would finally say this. We and our Government and countrymen hoped that it would be possible for the Indian people themselves to agree upon the method of framing the new Constitution under which they will live. Despite the labours which we have shared with the Indian parties and the exercise of much patience and goodwill by all, this has not been possible. We, therefore, now lay before you proposals which, after listening to all sides and after much earnest thought, we trust will enable you to attain your independence in the shortest time and with the least danger of internal disturbance and conflict. These proposals may not, of course, completely satisfy all parties, but you will recognise with us that, at this supreme moment in Indian history, statesmanship demands mutual accommodation and we ask you to consider the alternative to the acceptance of these proposals.

After all the efforts which we and the Indian parties have made together for agreement, we must state that, in our view, there is small hope of a peaceful settlement by the agreement of the Indian parties alone. The alternative would, therefore, be a grave danger of violence, chaos and even civil war. The gravity and duration of such a disturbance cannot be foreseen, but it is certain that it would be a terrible disaster for many millions of men, women and children. This is a possibility which must be regarded with equal abhorrence by the Indian people, our own countrymen and the world as a whole. We, therefore, lay these proposals before you in the profound hope that they will be accepted and operated by you in the spirit of accommodation and goodwill in which they are offered. We appeal to all who have the future good of India at heart to extend their vision beyond their own community or interest to the interests of the whole 400 millions of Indian people.

We hope that the new independent India may choose to be a member of the British Commonwealth. We hope, in any event, that you will remain in close and friendly association with our people. But these are matters for your own free choice. Whatever that choice may be, we look forward with you to your ever-increasing prosperity among the greatest nations of the world and to a future even more glorious than your past.

APPENDIX 19

ARTICLE 13 OF THE DRAFT CONSTITUTION

13. (1) Subject to the other provisions of this article, all citizens shall have the right:

(*a*) to freedom of speech and expression;
(*b*) to assemble peaceably and without arms;
(*c*) to form associations or unions;
(*d*) to move freely throughout the territory of India;
(*e*) to reside and settle in any part of the territory of India;
(*f*) to acquire, hold and dispose of property; and
(*g*) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (*a*) of clause (1) of this article shall

affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, sedition or any other matter which offends against decency or morality or undermines the authority or foundation of the State.

(3) Nothing in sub-clause (*b*) of the said clause shall affect the operation of any existing law, or prevent the State from making any law, imposing in the interests of public order restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law, or prevent the State from making any law, imposing, in the interests of the general public, restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law, or prevent the State from making any law, imposing restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any aboriginal tribe.

(6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law, or prevent the State from making any law, imposing in the interests of public order, morality or health, restrictions on the exercise of the right conferred by the said sub-clause and in particular prescribing, or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

APPENDIX 20

THE DADRA AND NAGAR HAVELI ACT, 1961
NO. 35 OF 1961

[*2nd September*, 1961]

AN ACT TO MAKE PROVISION FOR THE REPRESENTATION OF THE UNION TERRITORY OF DADRA AND NAGAR HAVELI IN PARLIAMENT AND FOR THE ADMINISTRATION OF THAT UNION TERRITORY AND FOR MATTERS CONNECTED THEREWITH.

BE it enacted by Parliament in the Twelfth Year of the Republic of India as follows:—

1. Short title, extent and commencement.—(1) This Act may be called the Dadra and Nagar Haveli Act, 1961.

(2) It extends to the whole of the Union territory of Dadra and Nagar Haveli.

(3) It shall be deemed to have come into force on the 11th day of August, 1961.

2. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) "Administrator" means the Administrator of the Union territory of Dadra and Nagar Haveli appointed by the President under article 239 of the Constitution;

(*b*) "appointed day" means the eleventh day of August, 1961;

(*c*) "Dadra and Nagar Haveli" means the Union territory of Dadra and Nagar Haveli;

(*d*) "Varishta Panchayat" means the Varishta Panchayat as in existence immediately before the appointed day.

3. Representation in the House of the People.—(1) There shall be allotted one seat to the Union territory of Dadra and Nagar Haveli in the House of the People.

(2) In the Representation of the People Act, 1950,—

(*a*) in section 4, in sub-section (1), after the words "to the Laccadive, Minicoy and Amindivi Islands", the words, "to Dadra and Nagar Haveli" shall be inserted;

(*b*) in the First Schedule,—

(*i*) after entry 21, the following entry shall be inserted, namely:—

"22. Dadra and Nagar Haveli...1";

(*ii*) entries 22 and 23 shall be re-numbered as entries 23 and 24 respectively.

(3) In the Representation of the People Act, 1951, in section 4, after the words "to the Laccadive, Minicoy and Amindivi Islands", the words, ", to Dadra and Nagar Haveli" shall be inserted.

4. Varishta Panchayat.—(1) Until other provision is made by law, as from the commencement of this Act the Varishta Panchayat shall have the right to discuss and make recommendations to the Administrator on,—

(*a*) matters of administration involving general policy and schemes of development;

(*b*) any other matter referred to it by the Administrator.

(2) The functions of the Varishta Panchayat referred to in this section will be advisory only but due regard shall be given to such advice by the Administrator in reaching decisions on the matter in relation to which the advice is given.

(3) No act or proceeding of the Varishta Panchayat shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof.

(4) Every member of the Varishta Panchayat shall before entering upon his duties under this Act make and subscribe before the Administrator an oath or affirmation in the following form, namely:—

"I, A.B., a member of the Varishta Panchayat of the Union territory of Dadra and Nagar Haveli, do swear in the name of God

solemnly affirm

that I will bear true faith and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter.".

5. Other functionaries.—Without prejudice to the powers of the Central Government to appoint from time to time such officers and authorities as may be necessary for the administration of Dadra and Nagar Haveli, all judges, magistrates and other officers and authorities who immediately before the appointed day were exercising lawful functions in Free Dadra and Nagar Haveli or any part thereof shall, until other provision is made by law, continue to exercise in connection with the administration of Dadra and Nagar Haveli their respective functions in the same manner and to the same extent as before the appointed day.

6. Property and assets.—It is hereby declared that all property and assets which immediately before the appointed day vested in the Varishta Panchayat or the Administrator of Free Dadra and Nagar Haveli shall, as from that day, vest in the Union.

7. Rights and obligations.—All rights, liabilities and obligations of the Varishta Panchayat or the Administrator of Free Dadra and Nagar Haveli in relation to Free Dadra and Nagar Haveli shall, as from the appointed day, be the rights, liabilities and obligations of the Central Government.

8. Continuance of existing laws.—Save as otherwise provided in this Act all laws in force in Free Dadra and Nagar Haveli immediately before the appointed day shall continue to be in force until repealed or amended by Parliament or other competent authority.

9. Continuance of existing taxes.—All taxes, duties, cesses or fees which, immediately before the appointed day, were being lawfully levied in Free Dadra and Nagar Haveli or any part thereof shall continue to be levied and to be applied to the same purposes, until other provision is made by Parliament or other competent authority.

10. Power to extend enactments to Dadra and Nagar Haveli.—The Central Government may, by notification in the Official Gazette, extend with such restrictions or modifications as it thinks fit, to Dadra and Nagar Haveli any enactment which is in force in a State at the date of the notification.

11. Extension of the jurisdiction of Bombay High Court to Dadra and Nagar Haveli.—As from such date as the Central Government may, by notification in the Official Gazette, specify the jurisdiction of the High Court at Bombay shall extend to Dadra and Nagar Haveli.

12. Powers of courts and other authorities for purposes of facilitating the application of laws.—For the purpose of facilitating the application of any law in Dadra and Nagar Haveli, any court or other authority may construe any such law with such alterations not affecting the substance, as may be necessary or proper to adapt it to the matter before the court or other authority.

13. Power to remove difficulties.—(1) If any difficulty arises in giving effect to the provisions of this Act or in connection with the administration of Dadra and Nagar Haveli, the Central Government may, by order, make such further provision as appears to it to be necessary or expedient for removing the difficulty.

(2) Any order under sub-section (1) may be made so as to be retrospective to any date not earlier than the appointed day.

14. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the

foregoing powers, such rules may provide for all or any of the following matters, namely:—

(*a*) the manner in which casual vacancies in the Varishta Panchayat may be filled;

(*b*) the meetings of the Varishta Panchayat, the conduct of business and the procedure to be followed at such meetings;

(*c*) any other matter which has to be, or may be, prescribed.

(3) Every rule made under this Act shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if before the expiry of that session in which it is so laid or the session immediately following both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

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