

CHAPTER 2

THE MAKING OF THE CONSTITUTION

Demand for a Constitution framed by a Constituent Assembly

THE demand that India's political destiny should be determined by the Indians themselves had been put forward by Mahatma Gandhi as early as in 1922.

"Swaraj will not be a free gift of the British Parliament; it will be a declaration of India's full self-expression. That it will be expressed through an Act of Parliament is true but it will be merely a courteous ratification of the declared wish of the people of India even as it was in the case of the Union of South Africa."

The failure of the Statutory Commission and the Round Table Conference which led to the enactment of the Government of India Act, 1935, to satisfy Indian aspirations ^{to stress/ emphasize} accentuated the demand for a Constitution made by the people of India without outside interference, which was officially asserted by the National Congress in 1935. In 1938, Pandit Nehru definitely formulated his demand for a Constituent Assembly thus:

"The National Congress stands for independence and democratic state. It has proposed that the constitution of free India must be framed, without outside interference, by a Constituent Assembly elected on the basis of adult franchise."

This was reiterated by the Working Committee of the Congress in 1939. *Ludhiana Session, Nehru presided.*

This demand was, however, resisted by the British Government until the outbreak of World War II when external circumstances forced them to realise the urgency of solving the Indian constitutional problem. In 1940, the Coalition Government in England recognised the principle that Indians should themselves frame a new Constitution for autonomous India, and in March 1942, when the Japanese were at the doors of India, they sent Sir Stafford Cripps, a member of the Cabinet, with a draft declaration on the proposals of the British Government which were to be adopted (at the end of the War) provided the two major political parties (Congress and the Muslim League)¹ could come to an agreement to accept them, viz.:-

(a) that the Constitution of India was to be framed by an elected Constituent Assembly of the Indian people;

(b) that the Constitution should give India Dominion Status,—equal partnership of the British Commonwealth of Nations;

(c) that there should be one Indian Union comprising all the Provinces and Indian States; but

(d) that any province (or Indian State) which was not prepared to accept the Constitution would be free to retain its constitutional position existing at that time and with such non-acceding Provinces the British Government could enter into separate constitutional arrangements.

But the two parties failed to come to an agreement to accept the proposals, and the Muslim League urged—

(a) that India should be divided into two autonomous States on communal lines, and that some of the Provinces, earmarked by Mr. Jinnah, should form an independent Muslim State, to be known as Pakistan;

(b) that instead of one Constituent Assembly, there should be two Constituent Assemblies, i.e., a separate Constituent Assembly for building Pakistan.

After the rejection of the Cripps proposals (followed by the dynamic 'Quit India' campaign launched by the Congress), various attempts to reconcile the two parties were made including the **Cabinet Delegation**. Simla Conference held at the instance of the Governor-General, Lord WAVELL. These having failed, the British Cabinet sent three of its own members² including Cripps himself, to make another serious attempt. But the Cabinet Delegation, too, failed in making the two major parties come to any agreement and were, accordingly, obliged to put forward their own proposals, which were announced simultaneously in India and in England on the 16th May, 1946.

The proposals of the Cabinet Delegation sought to effect a compromise between a Union of India and its division. While the Cabinet Delegation definitely rejected the claim for a separate Constituent Assembly and a separate State for the Muslims, the scheme which they recommended involved a virtual acceptance of the principle underlying the claim of the Muslim League.

The broad features of the scheme were—

(a) There would be a Union of India, comprising both British India and the States, and having jurisdiction over the subjects of Foreign Affairs, Defence and Communications. All residuary powers would belong to the Provinces and the States.

(b) The Union would have an Executive and a Legislature consisting of representatives of the Provinces and States. But any question raising a major communal issue in the Legislature would require for its decision a majority of the representatives of the two major communities present and voting as well as a majority of all the members present and voting.

The Provinces would be free to form Groups with executives and legislatures, and each Group would be competent to determine the provincial subjects which would be taken up by the Group organisation.

The scheme laid down ^{to observe the will fully} by the Cabinet Mission was, however, recommendatory, and it was contemplated by the Mission that it would be adopted by agreement between the two major parties. **H.M.G.'s statement of December 6, 1946** A curious situation, however, arose after an election for forming the Constituent Assembly was held. The Muslim League joined the election and its candidates were returned. But a difference of opinion had in the meantime arisen between the Congress and the League regarding the interpretation of the

'Grouping clauses' of the proposals of the Cabinet Mission. The British Government intervened at this stage, and explained to the leaders in London that they upheld the contention of the League as correct, and on December 6, 1946, the British Government published the following statement—

"Should a constitution come to be framed by the Constituent Assembly in which a large section of the Indian population had not been represented. His Majesty's Government would not contemplate forcing such a constitution upon any unwilling part of the country."

For the first time, thus, the British Government acknowledged the possibility of two Constituent Assemblies and two States. The result was that on December 9, 1946, when the Constituent Assembly first met, the Muslim League members did not attend, and the Constituent Assembly began to function with the non-Muslim League members.

The Muslim League next urged for the dissolution of the Constituent Assembly of India on the ground that it was not full representative of all sections of the people of India. On the other hand, the British Government, by their Statement of the 20th February, 1947, declared,—

**H.M.G.'s statement
of February 20,
1947.**

(a) that British rule in India would in any case end by June, 1948, after which the British would certainly transfer authority to Indian hands;

(b) that if by that time a fully representative Constituent Assembly failed to work out a constitution in accordance with the proposals made by the Cabinet Delegation,—

"H.M.G. will 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 Government, or in such other way as seems most reasonable and in the best interests of the Indian people."

The result was inevitable and the League did not consider it necessary to join this Assembly, and went on pressing for another Constituent Assembly for 'Muslim India'.

The British Government next sent Lord MOUNTBATTEN to India as the Governor-General, in place of Lord WAVELL, in order to expedite the preparations for the transfer of power, for which they had fixed a rigid time limit. Lord MOUNTBATTEN brought the Congress and the League into a definite agreement that the two 'problem' provinces of the Punjab and Bengal would be partitioned so as to form absolute Hindu and Muslim majority blocks within these Provinces. The League would then get its Pakistan—which the Cabinet Mission had so ruthlessly denied it,—minus Assam, East Punjab and West Bengal, while the Congress which was taken as the representative of the people of India other than the Muslims would get the rest of India where the Muslims were in minority.

The actual decisions as to whether the two Provinces of the Punjab and Bengal were to be partitioned was, however, left to the vote of the members of the Legislative Assemblies of these two Provinces, meeting in two parts, according to a plan known as the 'Mountbatten Plan'. It was given a formal shape by a Statement made by the British Government of June 3, 1947, which provided, *inter alia*, that:

**and of June 3,
1947.**

**The Mountbatten
Plan.**

"The Provincial Legislative Assemblies of Bengal and the Punjab (excluding European members) will, therefore, each be asked to meet in two parts, one representing the Muslim majority districts and the other the rest of the Province.... The members of the two parts of each Legislative Assembly sitting separately will be empowered to vote whether or not the Province should be partitioned. If a simple majority of *either* Part decides in favour of Partition, division will take place and arrangements will be made accordingly. If partition were decided upon, each part of the Legislative Assembly would decide, on behalf of the areas it represented, whether it would join the existing or a new and separate Constituent Assembly."

It was also proposed that there would be a referendum in the North Western Frontier Province and in the Muslim majority district of Sylhet as to whether they would join India or Pakistan. The Statement further declared H.M.G.'s intention "to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according to decisions taken as a result of the announcement."

The result of the vote according to the above Plan was a foregone conclusion as the representatives of the Muslim majority areas of the two Provinces (*i.e.*, West Punjab and East Bengal) voted for partition and for joining a new Constituent Assembly. The referendum in the North Western Frontier and Sylhet was in favour of Pakistan.

On the 26th July, 1947, the Governor-General announced the setting up of a separate Constituent Assembly for Pakistan. The Plan of June 3, 1947, having been carried out, nothing stood in the way of effecting the transfer of power by enacting a statute of the British Parliament in accordance with the declaration.

It must be said to the credit of the British Parliament that it lost no time to draft the Indian Independence Bill upon the basis of the above Plan, and **The Indian Independence Act, 1947.** this Bill was passed and placed on the Statute Book, with amazing speed, as the Indian Independence Act, 1947 (10 & 11 Geo. VI, c. 30). The Bill, which was introduced in Parliament on July 4, received the Royal Assent on July 18, 1947, and came into force from that date.

The most outstanding characteristics of the Indian Independence Act was that while other Acts of Parliament relating to the Government of India (such as the Government of India Acts from 1858 to 1935) sought to lay down a Constitution for the governance of India by the legislative will of the British Parliament,—this Act of 1947 did not lay down any such constitution. The Act provided that as from the 15th August, 1947 (which date is referred to in the Act as the 'appointed date'), in place of 'India' as defined in the Government of India Act, 1935, there would be set up two independent Dominions, to be known as *India* and *Pakistan*, and the Constituent Assembly of each Dominion was to have unlimited power to frame and adopt any constitution and to repeal any Act of the British Parliament, including the Indian Independence Act.

Under the Act, the Dominion of India got the residuary territory of India excluding the Provinces of Sind, Baluchistan, West Punjab, East Bengal, and the North Western Frontier Province and the district of Sylhet in Assam (which had voted in favour of Pakistan at a referendum, before the Act came into force).

Constituent Assembly of India.

The Constituent Assembly, which had been elected for undivided India and held its first sitting on the 9th December, 1946, reassembled on the 14th August, 1947, as the sovereign Constituent Assembly for the Dominion of India.

As to its composition, it should be remembered, that it had been elected by indirect election by the members of the Provincial Legislative Assemblies (Lower House only), according to the scheme recommended by the Cabinet Delegation [see Table II, in the Appendix]. The essentials of this scheme were as follows:—

- (1) Each province and each Indian State or group of States were allotted the total number of seats proportional to their respective populations roughly in the ratio of one to a million. As a result, the Provinces were to elect 292 members while the Indian States were allotted a minimum of 93 seats.
- (2) The seats in each province were distributed among the three main communities, Muslim, Sikh and General, in proportion to their respective populations.
- (3) Members of each community in the Provincial Legislative Assembly elected their own representatives by the method of proportional representation with single transferable vote.
- (4) The method of selection in the case of representatives of Indian States was to be determined by consultation.

As a result of the Partition under the Plan of June 3, 1947, a separate Constituent Assembly was set up for Pakistan, as stated earlier. The representatives of Bengal, Punjab, Sind, North Western Frontier Province, Baluchistan and the Sylhet district of Assam (which had joined Pakistan by a referendum) ceased to be members of the Constituent Assembly of India, and there was a fresh election in the new Provinces of West Bengal and East Punjab. In the result, when the Constituent Assembly reassembled on the 31st October, 1947, the membership of the House was reduced to 299, as in Table II, *post*. Of these, 284 were actually present on the 26th November, 1949, and appended their signatures to the Constitution as finally passed.

The salient principles of the proposed Constitution had been outlined by various committees of the Assembly³ such as the Union Constitution Committee, the Union Powers Committee, Committee on Fundamental Rights, and, after a general discussion of the reports of these Committees, the Assembly appointed a Drafting Committee on the 29th August, 1947. The Drafting Committee, under the Chairmanship of Dr. Ambedkar, embodied the decision of the Assembly with alternative and additional proposals in the form of a 'Draft Constitution of India' which was published in February, 1948. The Constituent Assembly next met in November, 1948, to consider the provisions of the Draft, clause by clause. After several sessions the consideration of the clauses or second reading was completed by the 17th October, 1949.

The Constituent Assembly again sat on the 14th November, 1949, for the third reading and finished it on the 26th November, 1949, on which date the Constitution received the signature of the President of the Assembly and was declared as passed.

The provisions relating to citizenship, elections, provisional Parliament, temporary and transitional provisions, were given immediate effect, i.e., from November 26, 1949. The rest of the Constitution came into force on the 26th January, 1950, and this date is referred to in the Constitution as the Date of its Commencement.⁴

REFERENCES

1. As stated earlier, the Muslim League, professedly a communal party, was formed in 1906. While its earlier objective was to secure separate representation of the Muslims in the political system, in its Lahore Resolution of 1940, it asserted its demand for the creation of a separate Muslim State in the Muslim majority areas. This idea was developed into the claim for dividing India into two independent States, when the Cripps offer was announced.
2. The Cabinet Mission consisted of Lord PETHICK-LAWRENCE, Sir Stafford Cripps and Mr. A.V. Alexander.
3. The important committees of the Constituent Assembly were,—

(a) Union Powers Committee. It had 9 members. Shri Jawaharlal Nehru was its chairman. (b) Committee on Fundamental Rights and Minorities. It had 54 members. Sardar Vallabhbhai Patel was its chairman. (c) Steering Committee. It had 3 members. Dr. K.M. Munshi (chairman), Shri Gopalswamy Ayyangar and Shri Bishwanath Das. (d) Provincial Constitution Committee. 25 members. Sardar Patel as chairman. (e) Committee on Union Constitution. 15 members. Pt. Nehru as chairman.

The draft was prepared by Sir B.N. Rau, Adviser to the Constituent Assembly. A 7-member committee chaired by Sir Alladi Krishnaswamy Iyer was set up to examine the draft. Dr. B.R. Ambedkar who was minister for law from 15-8-1947 to 26-1-1950 piloted the draft constitution in the Assembly.

4. Since that date, the Constitution has been freely amended, according to the procedure laid down in Art. 368,—no less than 94 times, by 2006 (see Table IV, *post*). For a text of the original Constitution, with its subsequent amendments, see Author's *Constitution Amendment Acts; Constitutional Law of India*, 6th Ed. (Prentice-Hall of India).