

(1)

I

File No.CA.18/47-Cons.

-II

Original note of the Constitutional Adviser and
on Constitution-making
Questionnaire issued to the Members of the Central and
Provincial Legislatures.

Keep

w

Commission

Strictly Confidential

(2)

I saw the Hon'ble the President this morning, as he was anxious to discuss what we should do now in view of the Prime Minister's statement of February 20, 1947, and the subsequent developments.

Assuming that the Muslim League does not change its decision not to participate in the Constituent Assembly, the position will be that any Constitution that may be framed by that Assembly will not be binding upon the "unwilling parts" of the country. How these unwilling parts will be determined and what Constitution they will have is at present unknown. One thing, however, seems to be reasonably certain in view of the statements of December 6 and February 20, the debates in the Houses of Parliament and the Congress Working Committee's resolution: namely, that there will be some kind of ~~free~~ division of India. If so, the task of framing a new Constitution with all its immense mass of detail will be a formidable one. The defence forces will have to be divided, the all-India civil services will have to be redistributed, railways and, speaking generally, property and liabilities of all kinds, will have to be apportioned. Agreements with the Indian States will have to be revised and renewed whether with one part of India or the other or with both. There will also have to be agreements between the new parts of India inter se relating to defence, customs, currency, income-tax and other matters of common concern. Boundaries between the new parts will have to be determined, perhaps, by a Boundary Commission.

Part XIII of the Government of India Act, 1935, which is a warning that a provisional Constitution may last longer than we think.

Let us now consider the nature of this provisional Constitution. Ex hypothesi, the ultimate Constitution providing for all the parts of a divided India may not be ready on the due date; if it is ready, there is of course no difficulty. But we are proceeding on the assumption that it may not be ready in the time prescribed. What then? Obviously, if a Constitution for a divided India is not ready, we shall have to have a provisional Constitution for an undivided India. In other words, the provisional Constitution will have to be that of a single Federation embracing the whole of what is now British India. This is the first point.

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

The third point that emerges from the debates in Parliament is that even for the transfer of power to a provisional Government, H.M.G. will require a fair measure of agreement between the different parties in India. Presumably, that agreement will be easier to obtain so far as the Muslim League is concerned.

if an ultimate division of India is provided for and if it is made clear that the provisional Government is only for the interim period, during which the ultimate Constitution is being hammered out. Be that as it may, H.M.G. obviously expect some degree of agreement, judging from Cripps's speech in the House of Commons:

"In our statement of December 6, we stressed the fact that if a large section of the Indian population had not been fully represented in the Constituent Assembly, we could not accept the forcing of unwilling Provinces into a united Indian Government if they have not been represented in the making of the Constitution. To that principle, which has the assent of the Congress we understand, we adhere and if it should eventuate that a large group of Provinces - but not all - agree upon the form of Constitution, then it may be necessary to hand over separately in areas which have not been fully represented.

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

In other words, the uncertainty ~~xxx~~ as to the transfer of power in the absence of an agreed final

Constitution is to be removed by agreement, which can only mean that there must be at least an agreed provisional Constitution.

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

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

For the purpose of facilitating the framing of the final Constitution, it may be of assistance if a questionnaire bearing on the salient features of the Constitution were sent round to all the members of the various legislatures. They would be requested to send in their answers before April 10, 1947, so that we might be in a position to tabulate the answers before the next session of the Constituent Assembly. I have already taken in hand the preparation of such a questionnaire and hope to issue it in the course of the next few days. As most of the legislatures would be in session, we should be able to get into touch with the members quickly and they would have about a

fortnight in which to send in their answers. It is, of course, possible that a good many members will not be able, or will not care, to answer the questions; even so, the answers of the others may supply us with sufficient material in the light of which to prepare a draft of the new Constitution. A draft so prepared is more likely to find acceptance when it is subsequently circulated to the Provinces and we may thus save valuable time.

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

The President's idea is that at the end of the next session of the Constituent Assembly, it should divide up into Sections and the Sections should frame the Provincial Constitutions for each of the Provinces included therein before, say, the end of June. Assam may take a little longer because of the preliminary touring in the tribal and excluded areas that will be required. Sections B and C will be functioning under obvious difficulties and the Constitutions they frame for some of their Provinces may not be regarded as valid. But in any case, it may help the Sections in their task to have before them the answers to the questionnaire. Assuming that the Sections will be ready with their drafts of the Provincial Constitutions before the end of June or the middle of July, it may be possible to have the

Serial no 1

(25)

No. CA./18/Cons/47.
CONSTITUENT ASSEMBLY OF INDIA.

From

Sir B.N.Rau,
Constitutional Adviser,
Constituent Assembly of India.

To

All Members of the Central and Provincial Legislatures.

New Delhi, the 17th March, 1947.

Sir,

In order to facilitate the work of framing a new Constitution before June, 1948, it is considered desirable to issue a questionnaire, bearing on the salient features of the Constitution, to all the members of the various Provincial Legislatures and of the Central Legislature and to invite their individual views thereon.

2. Such a questionnaire is annexed to this letter. The questionnaire is divided into five parts, and in each part are set out a certain number of questions bearing on its subject-matter. Brief explanatory notes have been inserted under each question.

3. The questionnaire, as will be noticed, deals only with the Constitution of the Centre. But most of the questions will apply, mutatis mutandis, to the provincial sphere also. You are therefore requested to give your answers both in regard to the Union Constitution and in regard to the Provincial Constitutions.

4. Your answers may kindly be sent so as to reach this office as early as possible and in any case before April 10, 1947, as the matter is very urgent.

5. It is considered unnecessary to frame any questionnaire regarding Group Constitutions until the Sections have decided to set up such Constitutions.

I have the honour to be,

Sir,

Your most obedient servant,

B.N.Rau

Constitutional Adviser.

CONSTITUENT ASSEMBLY OF INDIA.

QUESTIONNAIRE.

A.

Head of the Indian Union.1. What should be the designation of the Head of the Indian Union?

Note: In this and the following notes reference has been made to the constitutions of various countries. But it must be remembered that the United Kingdom and Ireland are not Federations and even South Africa is not a true Federation.

<u>U.S.A.</u>	}	President.
<u>Switzerland</u>		
<u>Ireland</u>		
<u>Canada</u>		The local Executive Head is the Governor General
<u>Australia</u>		on behalf of His Majesty.
<u>South Africa</u>		The local Executive Head is the Governor General. ⁷

2. How should he be chosen?

Note: The answer will probably turn on whether the Head of the Indian Union is to be a real Head as in the U.S.A. or merely a nominal Head as in Switzerland. If he is to be a real Head, independent of the Legislature, he may have to be elected otherwise than by the Legislature as in the U.S.A. If he is to be a nominal Head, not independent of the Legislature, he may be elected by the Legislature as in Switzerland. The case of Ireland is peculiar, because the President is elected by the direct vote of the people and yet is to a large extent a nominal Head acting on the advice of Ministers responsible to the Legislature.

U.S.A. The President is elected by an electoral college in which each State has as many electors as it has members in the Congress (i.e. the Federal Legislature, including both Houses), the

electors being elected in each State by adult franchise. This mode of election is presumably due to the theory of the American Constitution that the executive power must be completely separated from the legislative power. An absolute majority is required for election of the President. Where no candidate secures an absolute majority, the House of Representatives elects the President from among the highest three, each State having one vote.

Switzerland. The President is elected annually by the Federal Assembly (i.e., the Federal Legislature, including both Houses) from amongst the members of the Federal Council (Executive), who are also elected by the Federal Legislature.

Ireland. The President is elected by the direct vote of the people (secret voting, on the system of proportional representation by means of single transferable vote).⁷

3. What should be his term of office?

Note:

U.S.A. 4 years (elected every leap year).

Switzerland. 1 year (annual election).

Ireland. 7 years.

Canada)
Australia) Customary term of 5 years.⁷
South Africa)

4. Should he be eligible for re-election?

Note:

U.S.A. Eligible for re-election: previous to Franklin Roosevelt convention of not more than two terms. Franklin Roosevelt held office for 4 consecutive terms, the last one interrupted by death.

Switzerland. Re-election of the President who is in office is prohibited by the Constitution. By usage, the office rotates among the members of Federal Council.

Ireland. Eligible for re-election to the office once, but only once.⁷

5. Should the office rotate among the different communities in turn?

If so, how?

Note:

U.S.A. No provision.

Switzerland. By usage, the offices of the President and the Vice-President rotate amongst the members of the Federal Council in which the main communities are represented.

Ireland: No statutory provision; but the first President was a Protestant (Dr. Hyde, elected in 1938); the present President is a Roman Catholic.⁷

6. Assuming that the Indian Union is to have a President as its Head, should there be a Vice-President or Vice-Presidents?

Note:

U.S.A. There is a Vice-President who also presides over the Senate. Method of election is the same as that of the President except that when he fails to secure an absolute majority of the votes of the electors, he is elected by the Senate from among the highest two.

Switzerland. There is one Vice-President elected by the Federal Assembly from amongst the members of the Federal Council.

Ireland. No provision for Vice-President.

U.S.S.R. The Presidium has a President and 16 Vice-Presidents, corresponding to the number of Republics.⁷

7. What should be the term of office of a Vice-President?

Note:

U.S.A. 4 years (election every leap year).

Switzerland. 1 year.

Ireland. No Vice-President.⁷

8. What should be the functions of the President?

Note:

U.S.A. The President is the Commander-in-Chief of the Army, Navy and Air Force, receives Ambassadors, etc., and makes treaties subject to the consent of a two-thirds majority of the Senate. He appoints Ambassadors and Consuls, Judges of the Supreme Court and such inferior officers as provided for by law. He recommends measures for the consideration of the Congress. He has an absolute veto over legislation which can only be overcome by a measure being passed by a two-thirds majority of each of the two Houses. He has also, what is called, the "pocket veto", i.e., a measure passed within ten days of the adjournment of the Congress and not assented to by the President is deemed to have lapsed. He may grant reprieves and pardons (except in cases of impeachment) for offences against the State, commute sentences, etc. He is liable to impeachment.

Switzerland. The President has only formal or ceremonial functions, the principal one being that of presiding over the Federal Council. He is in charge of one of the administrative departments.

Ireland. The President, on the nomination of Dail Eireann, appoints the Prime Minister (Taoiseach) or the head of the

Government, who, in turn, recommends the appointment of other members of the Cabinet. He summons and dissolves Dail Eireann on the advice of the Prime Minister and in case the Prime Minister has lost the support of the majority in the Dail, the President may, in his absolute discretion, refuse to dissolve the Dail. The President may at any time after consultation with the Council of State convene a meeting of either or both of the Houses ^{Communicate with them} by message or address - which has received the approval of Government - on any matter of national or public importance or address a message approved by the Government to the nation at any time on any such matter. He is the Supreme Commander of all defence forces and all Commissions are held from him. He has a right of pardon and a power to commute or remit punishment. He is liable to impeachment.⁷

9. What should be the functions of the Vice-President?

Note:

U.S.A. Presides over the Senate; becomes President if President dies during term of office.

Switzerland. Member of the Federal Council, in charge of an administrative department, and presides over the Council in the absence of the President.⁷

10. Should the President be liable to removal? If so, in what manner?

Note:

U.S.A. The President is removable from office only by impeachment. The Lower Chamber initiates proceedings and the Senate sits as a court of trial. The President is removed on the majority vote of the Senate sitting as the court of impeachment.

Switzerland. No specific provision.

Ireland. Removable by impeachment. The President may be impeached

for stated misbehaviour. A proposal to either House to prefer a charge against the President is entertained when moved in writing by at least 30 members of that House and is adopted when, at least, two-thirds of the total members support it. The other House investigates the charges or causes the charges to be investigated. If it sustains the charge by a two-thirds majority of the total members, the President is removed.⁷

11. How is a temporary vacancy in the office of the President to be filled?

Note:

U.S.A. The Vice-President acts as President for the rest of the term.

Switzerland. Apparently the Vice-President acts as President.

Ireland. A Commission consisting of the Chief Justice, the Chairman of Dail and the Chairman of Senate acts for the President.

The Commission may act by any two of their number.⁷

B.

Executive.

12. What should be the nature and type of the Union Executive?

Should it be of the British type (Parliamentary) or the American type (Non-parliamentary) or the Swiss type (mixed) or any other type?

Note: From the point of view of practical administration this is perhaps the most important question in the framing of the new Constitution. There are, as indicated in the questionnaire, three main types of Executives. In the British type, the Executive is responsible to the Legislature and has to resign on loss of confidence of the Legislature. In the American type, the Executive is not

responsible to the Legislature, each derives its authority from the people direct and is not responsible to the other. In the Swiss type, the Executive is elected by the Legislature for a term of 4 years (which is also the life of the Legislature) and no question of resignation during the term arises. In the Irish Free State Constitution of 1922, we find a fourth type: there was a Ministry of the British type plus certain additional Ministers appointed rather on the Swiss plan - that is to say, they were nominated by the Dail on the recommendation of a special committee, they held office for the term of the Dail, and were responsible only to the Dail. The British type is the one with which we are most familiar in India and its features are well-known. The main features of the Swiss type are (1) it gives all sections a chance of being represented in the Executive, the election being by proportional representation (2) it enables the Ministry to concentrate on the real problems of the country for a fixed term of 4 years without being distracted by motions of no-confidence (3) it ensures a substantial degree of responsibility to the Legislature, inasmuch as the Executive is not only elected by the Legislature but is also subject to its directions. The Irish Free State type had a short life and has been abandoned in the new Irish Constitution, which has adopted the British type.

U.K. and the Dominions. By convention the Executive (Cabinet) is responsible to the Legislature and retains office so long as it enjoys the confidence of the Legislature.

U.S.A. The President is the head of the Federal Executive with a Cabinet of 10 heads of departments called Secretaries, appointed by him, subject to the nominal approval of the Senate and

answerable only to him. Executive not responsible to the Legislature.

Non-parliamentary.

Switzerland. The Federal Council consists of 7 members elected by the Legislature (by proportional representation) once in 4 years. They are eligible for re-election. Not more than one is elected from the same canton. A mixture of Parliamentary and Non-Parliamentary.

Ireland. Ireland has put into statutory form what in U.K. is based on convention. The government consists of 7 to 15 members appointed by the President. One of them acts as Prime Minister, and another as Deputy Prime Minister. Responsible to Dail Eireann, though the Ministers may be chosen from both the Houses, at most two from the Senate. Parliamentary.⁷

13. If Parliamentary, should there be any special provision to secure a stable Executive?

Note: The following observations in the Simon-Attlee Report are worth notice. Although they relate to the provincial sphere they are of general application:

"We think that under the conditions which have developed in the Indian provinces, Ministers are too much at the mercy of hostile combinations against them for good work to be done. Ministers need to feel that they are assured of a reasonable period within which their policy may mature and its results may be judged; at present some of them are so much occupied in maintaining their position by securing the temporary support of this or that group of critics or malcontents that it must be very difficult to carry on the main work of ministerial government at all."

Ireland. In the Irish Constitution of 1922 an attempt was made to

secure stable administration by providing for Ministers, outside the Cabinet, who retained office even after the Cabinet had resigned. This experiment was carried out in the first two Dails, but apparently was found unworkable. See note under question No. 12 above.

China. In case there is disagreement on any matter between the Legislature on the one hand and the Cabinet supported by the President on the other, the Legislature can make its views prevail over those of the Executive only by passing a measure or proposition by a two-thirds majority of members present.⁷

14. What should be the composition of the Executive? What should be the maximum, if any, of the number of Ministers?

Note:

U.K. No statutory maximum. The number at present in the Cabinet is 20 members including the Prime Minister.

Canada. No statutory maximum; the number at present is 20 members including the Prime Minister.

Australia. There is a statutory maximum of seven until Parliament otherwise provides. The number at present is 19 members including the Prime Minister. Ministers cannot remain in office more than 3 months without being members of one of the Houses of the Legislature.

South Africa. There is a statutory maximum of eleven. Ministers cannot remain in office more than 3 months without being members of one of the Houses of the Legislature.

U.S.A. President with 10 heads of Departments called Secretaries who are answerable only to him. None of these can be a member of either House of the Legislature.

Switzerland. The Federal Council consists of 7 members elected by the

-10-

two Houses of the Legislature at a joint sitting. None of them can be a member of either House, but all may sit and speak without voting.

Ireland. Consists of 7 - 15 Ministers, selected from among the members of both the Houses, not more than two being selected from the Upper House. All continue to be members of the House from which they were selected.⁷

15. Should provision be made to secure representation of different communities on the Executive? If so, how?

Note:

U.S.A. No provision.

Switzerland. Not more than one member of the Federal Council can be chosen from the same Canton.

Canada. No statutory provision. In considering the claims of various candidates for Ministerial office the Premier has to take into account race, religion and geographical factors. Where the total number was 23, 3 were usually assigned to French Canada and 3 to Ontario; at least 1 was assigned to each of the Provinces of Nova Scotia, New Brunswick, Manitoba, Saskatchewan, Alberta and British Columbia, and a politician of Irish extraction usually represented the English speaking Roman Catholic church.⁷

16. How should joint responsibility or co-ordination be secured?

Note:

U.K. and the Dominions. By convention all the Ministers jointly responsible to the Legislature. They are chosen by the Prime Minister. The Government must be one which can work together and can secure the support of the lower House. The first mark of the Cabinet is united and indivisible responsibility.

U.S.A.

No responsibility to the Legislature. Co-ordination secured, because all the Secretaries hold office during the pleasure of the President and are answerable to him.

Switzerland.

Federal Council is bound by the decisions of the Federal Legislature. The Council arrives at a decision by majority vote. When Council is not unanimous on any matter, it is open to Ministers to speak against each other in the Legislature and this sometimes happens; but when once the Legislature decides the matter, all Ministers loyally carry out the decision. The Legislature may therefore be regarded as the co-ordinating factor in the last resort.

Ireland.

The Cabinet is collectively responsible to the Dail Eireann and holds office during its command of majority in the Dail. The statutory provisions follow the British convention.⁷

17. How should the members of the Executive be chosen?/Note:U.K. and the Dominions.

The choice of the Prime Minister is made by the King, or the Governor-General, as the case may be, and the nature of the choice depends upon the state of parties in the lower House. The Prime Minister chooses his colleagues in the Cabinet.

U.S.A.

President (elected by an electoral college) selects his Secretaries subject to the normal approval of the Senate.

Switzerland.

The members of the Federal Council chosen by the Federal Legislature at a joint sitting.

Ireland.

The President appoints the Prime Minister on the recommendation of Dail and other Ministers on the recommendation of Prime Minister.⁷

18. What provisions should be made for the removal of the Executive?

Note:

U.K. and the Dominions. The Cabinet holds office so long as it has the confidence of the lower House. It can be removed by a vote of no-confidence by the lower House.

U.S.A. President may be removed by impeachment; Secretaries are removable by the President.

Switzerland. No specific provision.

Ireland. The Prime Minister and Ministers hold office so long as they have the support of the majority in the lower House.

Individual Ministers can be removed from office on the advice of the Prime Minister.]

19. What should be the nature of relations between the Head of the Union and the Executive?

Note:

U.K. The King is merely a formal Head. In all political matters he acts on the advice of the Cabinet. He has certain prerogative powers, namely, (1) the right to dissolve Parliament (2) the right to refuse a dissolution of Parliament and (3) the right to select Prime Minister. These rights are circumscribed by many considerations and are very often of theoretical interest only. There are also certain personal prerogatives which he exercises on his own responsibility.

Dominions. The Cabinet is the de facto Executive. In all political matters the Governor-General acts only on the advice of the Cabinet. He does not preside over the business meetings of the Cabinet, which are summoned in the name of the Prime Minister. The Governor-General acts

merely as the constitutional head of the Government advised by the Ministers.

U.S.A. The President is the Head of the Union, as well as the Chief Executive.

Switzerland. The President is the Head of the Union and also a Minister in charge of an administrative department like other Ministers. No special powers, except those of a formal or ceremonial character, vested in him.

Ireland. The President is the titular Head and all laws are promulgated in his name. The President acts with the consent of the Prime Minister and his cabinet except when the Cabinet loses the confidence of the Dail. In that case the President may in his discretion, dissolve the Dail and call for fresh elections. The President is also advised by the Council of State which has the Prime Minister and Deputy Prime Minister among its members.⁷

C.

Legislature.

20. Should the Union Legislature have a Single Chamber or two Chambers?

Note: Second Chambers are set up for various reasons: e.g., to represent special interests or classes as in Ireland; as a check on hasty and ill-conceived legislation of the lower House as in France; to provide equal representation to the different Constituent Units of a federation as in U.S.A. It may provide for a continuous term of office, only a portion of the members retiring at regular interval as in U.S.A., and the old French Constitution. This secures the representation of past as well as current opinion and helps in

maintaining continuity in public policy.

There is also a growing opposition to the Second Chamber for various reasons, viz., (1) it may tend to be reactionary, over-conservative and check urgently-needed but radical reforms, (2) it may be instrumental in delaying legislation, (3) it tends to be undemocratic since it is very difficult to constitute a truly democratic Second Chamber on a different basis from the lower Chamber, (4) it is expensive to the country, and politically-backward countries also lack able statesmen to man a Second Chamber properly.

U.K and the Dominions. All bicameral (Two Chambers).

U.K. House of Lords, (Upper House).
House of Commons, (Lower House).

Canada. Senate, (Upper House).
House of Commons, (Lower House).

Australia. Senate, (Upper House).
House of Representatives, (Lower House).

South Africa. Senate, (Upper House).
House of Assembly, (Lower House).

U.S.A. Bicameral : Senate, (Upper House) and
House of Representatives, (Lower House).

Switzerland. Bicameral : Council of States, (Upper House) and National Council
~~Federal Assembly~~, (Lower House).

Ireland. Bicameral : Seanad Eireann, (Upper House) and
Dail Eireann, (Lower House)

21. If bicameral, how should the two Houses be constituted?

Note:

U.K. The British House of Lords is of the traditional type.
Most of the members are hereditary peers. In addition to these 16 are elected by the Scottish peers, for the duration of each Parliament. There are also some who are members of the House

by virtue of office: the Archbishops and Bishops, and the Law Lords.

House of Commons: Entirely elected.

Canada. Senate (Upper House): Senators nominated for life. There are 24 Senators from each of four territorial divisions: Ontario, Quebec, the Maritime Provinces (including Prince Edward Island), and the Western Provinces.

House of Commons (Lower House): Entirely elected, Quebec returning 65 members and other Provinces in proportion to population relatively to Quebec.

Australia. Senate (Upper House): Entirely elected directly through territorial constituencies. 6 Senators from each State, until Parliament otherwise provides.

House of Representatives (Lower House): Entirely elected; total number of members is as nearly as possible double the number of Senators and is distributed among the States according to population, with a minimum of 5 for any State.

South Africa. Senate (Upper House): Partly elected - each Province electing 8 - and partly nominated (8) by the Governor General in Council.

House of Assembly (Lower House): Entirely elected, the quota for each Province depending upon the number of its European adult Union Nationals.

U.S.A.. Senate (Upper House): Constituted on the basis of direct election, each State forming a constituency and electing 2 Senators.

House of Representatives (Lower House): Entirely elected. Under the Constitution, the total number of representatives must not exceed one for every 30,000 of the population but each State shall have

at least one representative. The actual average representation at present is only one for every 300,000.

Switzerland. Council of States (Upper House): Each of the Cantonal or half-Cantonal Units is free to determine the mode of election of its representatives. Direct election in 21 Units and election by Cantonal Legislatures in the other 4. Each Canton elects 2 Senators and each half-Canton one.

National Council (Lower House) : Constituted on the basis of direct election. Entirely elected. One member for every 22,000 of the population.

Ireland. Seanad Eireann (Upper House): Out of a total of 60 members, 11 are nominated by the Taoiseach (Prime Minister) and the rest elected through electoral colleges to represent specified functional interests.

Dail Eireann (Lower House): Entirely elected on the basis of direct election. Not less than one member for every 30,000 of the population nor more than one member for every 20,000.⁷

22. What provisions should be made for the adequate representation of different communities and interests?

Note:

U.K. Universities are given special representation.

South Africa. 4 elected and 4 nominated to represent native interests in the Upper House, 3 seats allotted in the Lower House for natives of Cape Colony.

U.S.A. No provision.

Switzerland. No specific provision . The system of proportional representation helps to secure the adequate representation

of different communities.

Ireland. Provision made for the representation of functional interests such as "agricultural and allied interests and fisheries", "Labour", "Industry and Commerce" in the Upper House; system of proportional representation for the Lower House.⁷

23. What should be (a) composition, (b) franchise, (c) electorate, (d) constituencies, (e) methods of election and (f) allocation of seats in respect of the Union Legislature?

(a) Composition:

✓ Note:

U.S.A. House of Representatives : 435 members at present; under the Constitution the total number must not exceed one for every 30,000 of the population, but each State shall have at least one representative. The actual average representation at present is only one for every 300,000.

Senate : 96 members (2 from each of the 48 States).

Switzerland. National Council (Lower House): Varies according to population (1 member for every 22,000 of the population); present strength - 194 members.

Council of States (Upper House): 44 members (2 members each from 19 full Cantons, 1 each from the remaining 6 half-Cantons).

Ireland. Dail Eireann (Lower House) : Varies according to population (not less than one member for every 30,000 of the population nor more than one member for every 20,000); present strength - 138.

Seanad Eireann (Upper House): 60 members.⁷

(b) Franchise:

✓ Note:

U.S.A. For both the Houses, the franchise is the same as for the

State Legislature if unicameral, or for the Lower House of the State Legislature if bicameral. Disqualifications on the ground of race, colour or sex forbidden. Universal adult franchise in practice, subject to certain minimum literacy qualification.

Switzerland. Universal adult male franchise for the Lower House. Cantons and half-Cantons free to fix the franchise qualifications for the Upper House.

Ireland. Adult franchise for the Lower House, and indirect election for the Upper House.⁷

(c) Electorates:

Note: No separate or special electorates in U.S.A. and Switzerland. For Ireland see "Methods of Election".⁷

(d) Constituencies:

Note: Single Member constituencies in U.S.A. Multi-member constituencies for the Lower House in Switzerland and Ireland where election is by the method of proportional representation.⁷

(e) Methods of Election:

Note:

U.S.A. Single-member constituencies for both the Houses, the person getting the largest number of votes being declared elected.

Switzerland. Proportional representation for the Lower House. Each of or half-Cantons the Cantons/free to determine the mode of election for the Upper House. Direct election in 21 Cantonal or half-Cantonal units and election by the Legislatures of the units in the other 4.

Ireland. Proportional representation for the Lower House. For the Upper House election is indirect. Nominations to elected

seats are made by recognised functional associations, members of the Lower House, the Prime Minister, and persons who have held the office of the Prime Minister or the President. Election is by an electoral college composed of the members of the Dail Eireann and 7 persons elected by each one of the Councils of the Counties or County boroughs. Voting is by the method of proportional representation by means of single transferable vote.⁷

(f) Allocation of seats:

✓ Note:

U.S.A.

Lower House: 435 seats distributed on the basis of population, not exceeding one per 30,000 inhabitants, but with a minimum representation of one for each State.

Upper House: 96 seats, two Senators per State.

Switzerland.

Lower House: One member for every 22,000 inhabitants, but at least one member for each Canton or half-Canton.

Ireland.

Lower House: Allocation of seats as between constituencies on the basis of population.

Upper House: Of the 60 members, 11 are nominated by the Prime Minister, 6 are elected by the Universities, and the remaining 43 are elected from five panels of candidates constituted on a vocational basis.⁷

24. What should be the term of the Union Legislature?

✓ Note:

U.K.

Upper House: largely hereditary.

Lower House : 5 years, unless sooner dissolved.

Canada.

Upper House : Senators are nominated for life.

Lower House : 5 years.

Australia. Upper House : Continuous, half retiring every three years, term of membership being six years.

Lower House : 3 years.

South Africa. Upper House : Normal term 10 years.

Lower House : 5 years.

U.S.A. Lower House : Two years.

Upper House : Continuous, one-third retiring every two years, term of membership being six years.

Switzerland. Lower House : 4 years.

Upper House : Each Canton or half Canton free to fix the term of office of its representatives. Varies from 1 to 4 years.

Ireland. Lower House : 7 years, unless sooner dissolved.

A shorter period may be fixed by law.

Upper House : Same as for Lower House. 7

25. If bicameral, what should be the relative powers of the two Houses?

What provision should be made to resolve deadlocks?

Note:

U.K. Until 1911 the powers of the House of Lords were largely co-extensive with those of the House of Commons. This led to occasional conflicts between the two Houses and finally the powers of the Upper House were curtailed by the enactment of the Parliament Act of 1911. At present, all money bills, so certified by the Speaker of the House of Commons, if not passed by the House of Lords without amendment, become law without their concurrence on the Royal assent being signified. Public bills, other than money bills or a bill extending the maximum duration of Parliament, if passed by the House of Commons in three successive sessions, whether of the same

Parliament or not, and rejected each time, or not passed by the House of Lords, may become law without their concurrence, on the Royal assent being signified, provided that two years have elapsed between the second reading in the first session of the House of Commons and the third reading in the third session. All bills coming under this Act should reach the House of Lords at least one month before the end of the session.

Canada. The powers of the Canadian Senate are, in law, equal to those of the lower House, excepting that money bills must originate in the House of Commons, and convention requires that they may be rejected but not amended. There are no adequate means to adjust differences between the two Houses: all that the framers of the Constitution have done for this purpose is to provide for the appointment of additional members to the Senate, but since the total strength of the House cannot exceed 104, the maximum number that can be nominated at any time to resolve differences is 8.

Australia. The Senate has equal powers with the House of Representatives in respect of proposed laws except that money bills must originate only in the lower House and cannot be amended by the Senate. The Senate may, however, at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting by message, the omission or amendment of any items or provisions therein. But if there is a deadlock between the two Houses, the Senate can force the dissolution of both the Houses even in regard to money bills. But such dissolution shall not take place within 6 months before the date of the expiry of the House of Representatives by effluxion of time. If the deadlock continues even

after the reconstituted Houses meet, it is resolved by a joint sitting of the two Houses. A majority of the total number of the members of the Senate and the House of Representatives is required for the measure to be passed into law.

South Africa. The South African Senate has only limited powers and is essentially a "House of review". Money bills must originate in the House of Assembly only. The Senate may not amend any bill which imposes taxation or appropriates revenue or monies for the services of the government, nor can it amend any bill so as to increase any proposed charges or burdens on the people. If there is a difference of opinion between the two Houses, the constitution provides for a joint sitting, at which a majority of the members present - and not, as in Australia, a majority of the total number of members - is required for the bill to be passed into law. In the case of a money bill, the joint session is convened during the same session; in the case of other bills, during the second session of the Legislature.

U.S.A. The Upper House has all the powers of the Lower House and a few more. Its consent is required for the appointment of Ambassadors, Judges and other high officials and it has the sole power to try all impeachments. Its consent by a two-thirds majority is required for the conclusion of all treaties. A Joint Conference Committee tries to iron out differences, but no provision is made in the Constitution for resolving deadlocks.

Switzerland. The two Houses have co-ordinate powers. In cases of difference of opinion, the respective Committees of the two Houses try to arrive at a compromise, but no provision is made in the Constitution for resolving deadlocks.

Ireland. The Upper House has a suspensory veto for a period of only 90 days in respect of bills other than money bills or urgent bills. If it has the support of one-third of the members of the Lower House, it can ask the President for a referendum to ascertain the will of the people and the President, in consultation with the Council of State, may grant the request. This procedure does not apply to bills proposing to amend the Constitution.⁷

D.

D.

Judiciary.

26. Should there be a separate chain of courts to administer Union Laws?

Note: In U.S.A., there is a separate chain of Federal Courts, but not in Canada, Australia or Switzerland.

U.S.A. Under the constitution the judicial power of the United States is vested in a Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. There are, at present, two sets of inferior federal courts, namely, the Federal District Courts and the Circuit Courts of Appeal. The country is divided into 83 districts, each State constituting at least one district. From the Federal Courts of these districts there is an appeal to Circuit Courts, which are ten in number. There are also two special courts, namely, the Court of Claims and the Court of Customs Appeals. In certain cases, however, the State courts may be, and are, permitted, in the exercise of the jurisdiction vested in them by the Constitution or laws of their respective States, to deal with causes which are within the federal judicial power. But their jurisdiction in such cases may be qualified by the right of the defendant to have the cause removed before

trial into a Federal Court, or after trial the case may be taken by appeal to the Federal Supreme Court.

Australia. The judicial power of the Commonwealth is vested in a Federal Supreme Court, called the High Court of Australia, and "in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction." The Parliament is also empowered to make laws investing any court of a State with federal jurisdiction. Thus, the constitution has left to the discretion of the Parliament the determination of the degree to which the agency of the State courts is to be utilised for the administration of federal laws. Under the Judiciary Act of 1903, as amended from time to time, the several courts of the States are vested with federal jurisdiction in matters not within the exclusive jurisdiction of the High Court, and there is a right of appeal from these courts to the High Court.

Canada. Under the constitution the Canadian Parliament is empowered to establish a General Court of Appeal for Canada and other courts for the better administration of the laws of Canada. In the exercise of these powers, the Canadian Parliament has set up a Supreme Court of Appeal and an Exchequer Court. In other respects, the administration of justice, including the constitution, maintenance and organisation of civil and criminal courts and civil procedure is a Provincial subject while criminal law and procedure are assigned to the Federation. It may be noted that the Constitution vests the Governor-General with power to appoint the Judges of the superior, district, and county courts of each province, subject to certain exceptions.⁷

E.Amendments to the Constitution.

27. What provisions should be made regarding amendments to the Constitution?

Note:

U.K. The British Constitution can be altered by an Act of Parliament.

Canada. The constitution of the Dominion of Canada can only be amended by the Parliament of Great Britain. The Constitution Act itself does not contain any provision regarding such amendments and the Statute of Westminster clearly lays down that it should not be deemed to apply to the repeal, amendment or alteration of the "British North America Acts", 1867 to 1930, or any order, rule or regulation made thereunder. As a matter of form, changes in the constitution have been carried out on addresses from the two Houses of the Dominion Parliament; but this would be difficult if the measure were opposed by one or more of the provincial legislatures. It may be noted that the last of the amendments to the constitution, passed in 1907, was based on the assent of all the provinces: British Columbia demanded better terms but finally agreed to the passing of the measure.

Australia. A proposal to amend the constitution must be passed by an absolute majority in each of the two Houses, and, not less than 2 nor more than 6 months after its passage through both Houses, must be submitted in each State to the electors of the House of Representatives (Lower House). But if an amendment proposed by an absolute majority of one House is not agreed to

by the other House, and if after an interval of three months, the amendment is again proposed by the first-mentioned House and again not agreed to by the other House, the Governor-General may submit the proposed amendment to the electors in each State. The proposed amendment cannot become law unless it is approved by a majority of electors voting and by a majority of the States. No amendment (1) diminishing the proportionate representation of any State in either House of Parliament (2) diminishing the minimum number of representatives of a State in the House of Representatives (3) increasing, diminishing, or otherwise altering the limits of a State and (4) affecting the provisions of the constitution in relation to the foregoing matters, may be carried unless the majority of the electors voting in the State interested approve of the proposed law.

Union of South Africa. Except in regard to certain "entrenched" provisions the Union Parliament may by law repeal or alter any of the provisions of the Constitution Act. As regards the excepted provisions, viz., Section 35 (protection of the Cape native franchise), Section 137 (equality of English, Dutch and Afrikaans languages), Section 152 (amendment of the Constitution Act) proposals to amend them should be passed at a Joint Session of both Houses of Parliament, and at the third reading receive the assent of not less than 2/3rds of the total number of members of both Houses.

U.S.A. In the Constitution of the United States, two methods of originating amendments are provided, and there are also two methods of enacting amendments, when so originated.

In the first place, Congress itself may, by a two-thirds majority in each House, draft and propose amendments; in the second place the legislatures of two-thirds of the several States may apply to Congress to call a convention for the purpose of proposing amendments. When amendments are proposed by Congress, or by a constitutional convention, they have to be submitted to the States, and ratified in three-fourths of the States, either by the State legislatures or by State conventions specially elected in each State for the purpose.

Switzerland. There are several methods by which revisions of the Constitution may be originated and ratified. A total revision of the Constitution may be brought about in three ways: (1) The National Council and the Council of States may agree to an amendment, as in the case of an ordinary federal law. The Constitution, as drawn up by the two Houses, must then be submitted to the popular vote, and if it is approved by a majority of the people and by a majority of the Cantons, it becomes law. (2) If one House votes for a total revision and the other refuses its assent, the question is then submitted to the electors in each Canton or half Canton, "Do you wish the Constitution to be revised - Yes or No?" If the majority of electors vote "Yes" in support of a revision, the two Houses are then dissolved, and a new Federal Assembly is elected charged with the work of revising and drafting a new Constitution. When this has been prepared, it is submitted to the popular vote, and if it is approved by a majority of the people and by a majority of the Cantons it becomes law. (3) If 50,000 citizens sign a petition in favour of a total revision of the Constitution, it is the duty of the Executive to submit the question to the electors,

"Do you wish the Constitution to be revised--Yes or No?" If a majority of the electors decide in favour of revision, the Federal Legislature has to carry out the popular wish, and revise the Constitution for submission to the people. If on such submission it is approved by the required double majority it becomes law.

There are two methods by which a partial revision or a partial amendment of the Swiss Constitution may be brought about. An amendment may be proposed by the two Federal Houses, as in the ordinary process of legislation. It must then be submitted to and accepted by a majority of the people and by a majority of the Cantons. A demand for the adoption of a new article, or the alteration of an old one, may be made in writing by 50,000 Swiss citizens in the same way as a demand for a total revision. If the Federal Legislature agrees with the demand of the petitioners it proceeds to formulate the required amendment and prepare it for submission to the people. If on the other hand it disagrees with the demand the question is submitted to the people, "Are you in favour of a revision of the Constitution--Yes or No?" If a majority of the people decide in favour of a revision it becomes the duty of the Federal Legislature, acting as a Drafting Committee, to prepare the required amendment for submission to the people. It is then submitted to the popular vote, and if it receives the support of the required statutory majority of people and of Cantons, it becomes law. The final referendum is obligatory in every proposal to amend the Constitution.

In reckoning a majority of the Constituent Units, the vote of a half Canton is counted as half a vote.

Ireland. Every proposal for amending the constitution must be initiated in the Lower House as a bill, and after it is passed by both the Houses of the Legislature, submitted to the people for their decision. The bill is held to have been approved by the people if the majority of the votes cast is in favour of its enactment, and it becomes law after it is signed and promulgated by the President in due form.⁷

By No. 433-Cong.
d 27.3.47.

-37-



(62)
8, Council House,
New Delhi,
26th March 1947.

Serial no. 6

My dear Rau,

The members of the European Group in the Indian Legislative Assembly, together with other members of that Assembly, have had forwarded to them from you a questionnaire with regard to the framing of the Constitution and they have been asked to answer the questions therein.

We in this Group, like all concerned with business and industry in India, are particularly interested in the establishment of a stable and balanced constitution and the temptation to reply to your questionnaire is therefore very great. On careful consideration however, we have come to the conclusion that this is a matter in which we ought not to intervene. Not only would such interference be illogical in view of the fact that we deliberately renounced membership of the Constituent Assembly, but it might also be regarded as contrary to the principle that the constitution of India must be framed by Indians. We have, therefore, decided not to reply to the questionnaire and the members of the Group have asked me to write to you to explain that the non-submission of replies does not indicate any lack of keen interest in the deliberations of the Constituent Assembly, or any diminution of our desire to see a stable and orderly Government established in a free India.

Yours sincerely,

P.J. Griffiths
(P.J. Griffiths)
LEADER.

Received from
CA. on 26.3.47.

Sir B.N. Rau,
Constitutional Advisor,
Constituent Assembly of India,
NEW DELHI.

Serial no.7

(63)

- 38 -

M. MAHOMED ISMAIL, M.L.A.

President: The Madras Presidency Muslim League

Leader: The Madras Muslim League Legislature Party

M.R.K
174142

16, THAMBU CHETTY STREET

G. T., Madras, 26th March 1947

To

The Secretary,
The Constituent Assembly,
N E W D E L H I .

Sir,

The members of the Madras Muslim League Legislature Party, 36 in number (in both the Houses) have received copies of questionnaire issued by the Constituent Assembly on constitutional questions. In reply, I am, on behalf of all the above said members of my above party, to state that we do not recognise the present so-called Constituent Assembly as having the legal or moral status or sanction and representative character essential for such a body. This position has been explained by the resolution of the meeting of the Working Committee of the All India Muslim League held at Karachi. We are not therefore sending any replies to the questionnaire.

This does not imply that we have in reality no suggestion or reply to make in connection with the framing of the constitutions to be framed for this sub-continent of India. As a matter of fact, we have got important and fundamental views, suggestions and opinions to express on the subject and we shall place them before a proper Constituent Assembly or Assemblies that may be set up hereafter with proper sanction and authority.

Yours faithfully,

M. Md. Ismail



(69)

253

253/XVIII

NO.

CENTRAL PROVINCES AND BERAR LEGISLATIVE ASSEMBLY

From

Honourable Mr. Ghanshyam Singh Gupta, B.Sc., LL.B.,
Speaker, Central Provinces and Berar
Legislative Assembly,
NAGPUR.

To

Sir B.N.RAU,
Constitutional Advisor,
Constituent Assembly of India,
NEW DELHI.

Dated Nagpur, the 4th April 1947.

Sir,

With reference to your letter No. CA/18/Cons/47, dated the 17th March 1947 addressed to all the members of the Central and Provincial Legislatures, I have the honour to send herewith my replies to your Questionnaire.

I have taken the liberty to add certain introductory remarks conveying my views on some basic problems. The views expressed therein form the background of my answers to the questionnaire.

I have the honour to be,
Sir,
Your most obedient servant,

G.S. Gupta
Speaker,
Central Provinces and Berar
Legislative Assembly.

✓
P.Y. No. 520/47-CAB
10.4.47.
M/s.
See
10/4
Mr. Deshikachan.