

DRAFT CONSTITUTION OF INDIA

A LEGAL ANALYSIS SHOWING HOW THE CONSTITUENT ASSEMBLY
IS SHAPING A UNIFIED CENTRE UNDER THE
GARB OF FEDERALISM

MEMORANDUM SUBMITTED TO THE PRESIDENT OF
THE CONSTITUENT ASSEMBLY

By
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To,

The President of the Constituent Assembly,
NEW DELHI.

Sir,

The Constituent Assembly is soon meeting to adopt the Draft Constitution of India, and the citizen, as such, is taking a quickened interest in the principles and purposes of the Constitution.

Such of the criticism, friendly or otherwise, of the Draft Constitution, which has been evidenced during the past few months in this country, does not touch the fringe of the propositions involved in any technical discussion.

It is to be feared that under the ostensible garb of Federalism the Draft Constitution seeks to install a Unitary type of Government in the country. I have ventured to examine the provisions of the Draft Constitution to demonstrate the peril to Federalism involved in the proposals to set up this authoritarian State. The argument is purely legal, though I have endeavoured to make the legislator and the citizen cling on to the spirit, and not to the letter, of the proposed Constitution.

I shall feel fully recompensed if this critique enables the Constituent Assembly to see through the pitfalls in the Draft Constitution, so that amendments might be made to it before it becomes the law of the land under Parliamentary sanction.

Camp :
Prabhu Dayal Building,
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NEW DELHI.
October 25, 1948.

Yours faithfully,
C. APPA RAO.

INTRODUCTORY

Constitutions of various countries have necessarily been consulted in the course of the drafting of the new Constitution of India by our law makers. But the general framework from which the present Draft Constitution has been hammered out seems to be the Government of India Act of 1935. The contents of both have a close resemblance to each other.

There is a well-grounded criticism that the 1935 Act is not a well-drafted piece of legislation. It is prolific both in intent and purpose, hedged in all around by checks, counter-checks, safeguards and so many other restrictions. The sections are usually long-winded. The main principles are shrouded in the laborious and ultra-careful construction of sentences.

From the point of view of legislative draftsmanship, the words and expressions of an enactment should be concise, subtle, unambiguous, full of meaning, unredundant and defectless. This appears to be a universal principle of almost all kinds of legal drafting. The Hindu codifiers have laid the rule thus :

अल्पाक्षरमसंदिग्धं सरावद्विस्वतीमृखं
अस्तोभमनवद्वच पढेते सुत्रलक्षणाः ॥

This rule is mostly inapplicable to the Government of India Act, which, therefore, should not have been our guide. There is another reason too. That is an act prepared for a dependent country by the then rulers. So, their motives behind are bound to differ naturally from those of ours. Nor have we had a hand in its drafting. The fact that it was drafted by intelligent, constitutional experts like Lord Sankey, and took seven or eight years to become law, after searchlight scrutiny and discussion in Parliament, need not have tempted us into its adaptation. We also rejected it then.

Too many details which are rigidly worked out are out of place in ideal constitutional enactments. If the fundamental laws of our Constitution—whichever type it may be—in the shape of fundamental rights and obligations of our people and the general sanctions behind them which are necessary for their enforcement, together with the general structure of Government, had been succinctly stated, it would have been more than an exemplary Constitution, especially with a well-devised provision for amendment thereof after the prescribed period.

There is yet another objection that the draft does not reflect the age-long Indianism and its genius that we often boast of. It does not even touch the fringes of Gandhian ideology, apart from the question of his name being mentioned as the Father of Free Modern India in the Preamble, as was done in the case of Dr. Sunyet Sen by the Chinese people in the preamble of their Constitution.

A constitution improvised from out of the various Western types does not endure, because it is neither indigenous nor a complete imitation of any single constitution. This conclusion is fortified by the fact that our draft, as it has emerged now, envisages neither an out-and-out Federal, nor a thoroughly Unitary type, of Government. At least, the good and abiding principles of our ancient system of administration should have been kept in mind. The all-comprehensive and four-fold human objective should not have been lost sight of, when India is preparing a mighty constitution worthy of world recognition. It is regrettable there was no attempt in this direction at all.

Law, justice and duty, as the ingredients of *dharma*, signify the three organs of a modern State, viz. the Legislature, the Judiciary and the Executive. A Preamble embodying the spirit of the above ideology would have been a grand and new approach to Indian constitution-making. Is it too late to incorporate a Preamble on the above lines? Is it opposed to the ideal of a socialistic State or a co-operative Commonwealth? No, it is the shortest and surest way to reach our long cherished goal of *Ram Raj*.

The following is a suggested draft amendment to the Preamble :

“We the people of India, having solemnly resolved to constitute India into a Sovereign Republic to make laws, social, economic, political and ethical, for all citizens ;

do justice to all citizens in fear of God but of no man ;
enforce duty of every citizen in accordance with law and justice to the very letter ;

and thereby assure the dignity of the individual, the unity of the nation, the brotherhood of humanity, and the universality of the individual soul, in our Constituent Assembly this.....ofdo hereby adopt an Act, and give to ourselves this Constitution.”

PART I—UNION, ITS TERRITORY AND JURISDICTION

Art. 1. (i) Name :—The word ‘India’ for the separated portion of our country may look appropriate and natural in the English language, but if it is to be translated into Hindi or Urdu, what would be its proper equivalent? If the same word is to be retained, there will be no beauty in it. The expressions ‘Bharat Khand’, ‘Aryasthan’ or even ‘Hindustan’ may reasonably be considered as proper substitutes. India is described as a Union of States; because the description is not improper even for a Federal Constitution, *vide* the Preamble to the British North America Act 1867. But the word ‘Union’ had acquired a bad odour as in the case of Union of South Africa. The word ‘Republic’ may be used in place of ‘Union’. Our sister country China has adopted the same name. So also is the case with Burma. The amendment is also necessary because the word ‘Union’ is particularly used in later chapters as identical with the Federal branch of the State.

(ii) The names of the States in Parts I to III of the First Schedule are merely the names of old provinces, Chief Commissioner’s provinces and Indian States respectively. The old provinces, especially Madras and Bombay, will have to be split up into integral linguistic units, renumbered and renamed. The anglicised names of some of the old provinces may be changed and the corresponding historical names may be restored. Thus, the words ‘Bengal’, ‘Bihar’, ‘Punjab’, ‘Assam’ and ‘Orissa’ may be converted into Vanga, Vidheha, Panchala, Kamarupa and Utkala.

The territories mentioned in part II may as well be constituted into one single State called Hastina or Delhi, and included in Part I itself. The reason for mentioning them in a separate part and for retaining their old identity is not apparent. The distinction is unnecessary.

The States of Part III, Division A, have to be altered and renamed, inasmuch as there have been, since, so many mergers and consolidations of old Princely States. By the time of the actual passing of the Constitution the question of Hyderabad would have become settled, and there is no necessity for any sub-divisions such as ‘A’ and ‘B’.

The kingdom of Nepal is outside the Indian Federation, and therefore seems to have been left out of account. As and when such outside territories are absorbed, they become part and parcel of the Republic automatically, by virtue of clause (c).

Territories mentioned in part IV, i.e. the Andaman and Nicobar Islands, have to be administered separately for some time, and it is right that they should be treated as a separate entity.

Article 2. This article gives power to Parliament to admit new States into the Union. It can also establish new States, on such terms and conditions as it thinks best. What is the underlying idea of this article? Does it mean that Parliament has a right to create new and separate non-Federal States from out of the Union territory? In other words, does this article concede a conditional right of secession to the States which already joined the Union? The *rationale* has to be clarified in better language, especially in view of the following clause. Evidently, this clause must have reference to the States whose integration, as well as admission, is contemplated by it. Even that intention must be clearly and unequivocally stated.

Article 3. This article provides for the formation of new States. Five modes are mentioned in clauses (a) to (e). Clauses (a) to (d) overlap each other. All of them can be clubbed into one, because the formation of a new State from out of the existing States necessarily involves the increase or decrease of area of one State or the other. As a consequence, the boundaries must perforce undergo an alteration. Hence, the clauses may be recast into one, as follows :

Delete clauses (b), (c), (d) and, add the following at the end of clause (a) :—“By increasing or diminishing the area, and thereby altering, in consequence, the boundaries of any State.” Clause (e) may be renamed as clause (b).

The proviso gives power to the Government of India only under certain prescribed conditions. The conditions are not uniform either in respect of the various States, or the changes proposed therefor. For instance, whereas a representation to the President is made obligatory by the majority of the territorial representatives of a State whose territory is to be affected, a mere resolution by the Legislature of the concerned State is found sufficient if its boundaries or name are to be affected. The object is not clear, even if the distinction is sought to be maintained. The boundaries question is intimately connected with the change of territory, and therefore has to be detached from sub-clause (ii) of clause (a) to the proviso. This is also consistent in view of the previous amendment proposed.

A small doubt may arise whether the word ‘Legislature’ mentioned in the two sub-clauses of clause (a) means both the Chambers wherever they exist. The singular includes the plural, and so the above interpretation should be correct. If not, clarification is needed.

Clause (b) lays down a further condition in respect of change of boundaries or name for part III States as distinguished from the other States. The arrangement of the clauses and the qualifying words thereof are a bit confusing. As it is, clauses (a) and (b) of the proviso read as though two conditions are laid down for the Government of India to introduce a bill for any kind of change as contemplated in clauses (a) to (e) of the main article. But the two conditions do not apply to any and every change, because clause (b) of the proviso lays down conditions in respect of change of only boundaries and name of a State, and as such it should be read along with sub-clause (ii).

For separation or exclusion of territory of a State the condition in clause (b) does not apply. It is both necessary and proper to rename the existing clause (a) sub-clause (i) as merely clause (a), to rename sub-clause (ii) as clause (b) sub-clause (i), and the existing clause (b) as sub-clause (ii) of the new clause (b). In view of the suggested changes, the language of the new sub-clauses (i) and (ii) may be recast if necessary. The existing clause (b) distinguishes between the Part III States, i.e., old Indian States, on the one hand, and Parts I and II States, i.e. old provinces on the other. In short, the President, according to this clause, requires previous consent in the case of old Indian States, and merely ascertains the opinion of the Legislature in the case of the old provinces.

In part III there are two divisions of States. No distinction is observed between them, wherever Part III is referred to. Evidently, Division B States are to be called the non-acceding States. It is hoped that there will be no necessity for any sub-division at all in Part III in view of the merger, integration and accession of almost all the States, including even Hyderabad which is to decide its future very soon. If the change in territory is contemplated, which also affects a State in Division B of Part III according to the existing

clause (a) of the proviso, does it mean that no kind of consent, or even ascertainment of views, of the non-acceding State is necessary? Or, does it mean that no such bill affecting the territory or name of a non-acceding State should be introduced at all? But there is no such exception made in the whole of the Article. If by the time of the passing of the Constitution, Division B of Part III has still to be retained, some clear provision which deals with such States may also have to be made.

Article 4. This article is auxiliary to articles 2 and 3. Both the clauses are necessary. Instead of the words "for the purpose of" in clause (ii), the words "within the meaning of" may be substituted, to make it happy reading.

PART II—CITIZENSHIP

Citizenship is a fundamental tie between the subject and the State, as between the members of a family. The rights and obligations of the citizens of a State are mutual and exclusive. Hence, the necessity for a precise definition.

Article 5. This article lays down conditions for citizenship at the date of the commencement of the Constitution. Birth or descent and domicile are made the basis of Indian citizenship. The Chairman's explanatory note on Articles 3 and 6 in the foreword appears to treat all the three elements as alternatives. But, some kind of domicile test, positive or negative, has to be satisfied along with the "birth" or "descent" test under this article.

In order that a person may be a citizen under clause (a), firstly, he or his parents or grand-parents must have been born in the territory of the Indian Union, and, secondly, he must not have made a permanent abode in a foreign State after 1-4-1947. What is a 'permanent abode' is not defined. So the test is ambiguous. Why the first day of April 1947 is chosen as the crucial date is also not clear. It is no where laid down in clause (a) that all persons mentioned therein should have positive domicile rights in Indian territories. Only a negative condition is laid down. Why there should be a special ban for Indians on permanent abode qualification after that date is not known. Instead of the negative condition as it exists, an alternative right based on domicile in India may be laid down positively, so that the intention of the drafters may be fulfilled.

Recast clause (a) thus :—

- (a) "Every person.....in this Constitution or (not and) who has made his permanent abode in India, and lived in it for a continuous period of 12 years before commencement of this-Constitution shall be a citizen etc. etc."

The phrase 'permanent abode' may be defined properly so as to comprehend the large classes of people in the tribal areas of India, who are nevertheless its citizens but whose dwellings are a peculiar feature in the mountain regions.

Clause (b) confers citizenship on another category of persons viz. (i) those born in the India of 1935, and (ii) those born in Burma, Ceylon or Malaya. Why only these three countries? Why not Nepal, Indonesia, Indo-China, South Africa, Mauritius, West Indian countries, Fiji etc., also be included under this clause? Such persons must have also been domiciled in the new India to acquire citizenship. Here neither date nor period is mentioned. The same conditions as are proposed in clause (a) may be laid down for this clause also

These two clauses are subject to a common proviso, viz. that the person who satisfies the conditions in two clauses must not have acquired the citizenship of a foreign State before the commencement of this Constitution. From this it is clear that double citizenship for a person in India is not recognised. This is not so in other countries. In U. S. A. itself there is double citizenship for an American both in the Federation as well as in the State in which he lives. Either he has both or none at all. Since India, better called U. S. I, is analogous in race, language and nationality to the U.S.A., it is better to adopt the double

citizenship clause in our country also. If there is no such regulation, large-scale internal migrations may become a matter of frequent occurrence at any future time, which in turn may breed parochial jealousies and internecine strife. Citizenship-status is generally conferred by Federal and not by provincial law as in Switzerland. The rights and privileges flowing from citizenship may, however, be dealt with by the individual States, as in the U. S. A.

The explanation defines 'domicile' in two clauses. The first clause adopts the Succession Act-test, which is perhaps of restricted operation. The second clause is intended for absorbing displaced persons, otherwise called 'refugees'. An easy condition of domicile is fixed for them in view of their shattered status. Under this clause, not only the *bona fide* refugees, but also the fifth columnists of unfriendly Pakistan, can easily acquire citizenship in India. Should not this be prevented? Should this remain a source of permanent headache to the Indian Union?

Article 6. This gives power to Parliament for the grant of citizenship to a person subsequent to the commencement of the Constitution. In other words, it provides for naturalisation laws for aliens. Any how, a separate law or an amendment of this Constitution may have to be enacted for this new mode of acquisition of citizenship. Why not a substantial provision be incorporated in this article itself, on the lines of the law obtaining in the U.S.A.?

PART III—FUNDAMENTAL RIGHTS

The idea of fundamental rights of man owes its origin to the famous declaration of Rights of Man and of the Citizen drawn up by the National Assembly of France in 1789. The principles of the Social Contract theory of State enunciated by Rousseau were incorporated therein. The birth-right of man to freedom and equality, right of every man to liberty, property, security and resistance to oppression, but subject to similar rights of other individuals, are some of the rules of law written down once for all in the French Constitution. But, the history of the French Constitution tells us that the country was for long in a perpetual state of anarchy and of war both within and without. The grand rights put down on paper were found to be of little or no use to the people in their national calamities. The proof of the pudding is in the eating thereof. Whether the Constitution is written or unwritten, the genius of a people lies in properly working it out, as Sardar Patel declared in one of his speeches in the Consambley.

In almost all the post-war Constitutions of the world, we find that a chapter on 'fundamental rights' is included with elaborate provisions. The American Constitution contained one or two specific articles regarding such rights, but by article 9 of the amended Constitution such of those as are not specifically mentioned therein are preserved in tact. But, such a saving article was perhaps found to be of no practical use, as human relations grew in complexity in the process of time. This urgency was felt in the framing of the Constitutions of Ireland, the Free City of Danzig, of the German Reich, of China and of Japan, to devote a separate chapter for the exhaustive enumeration of the rights of man in his varied activities of life. The number naturally grew by efflux of time in the social, economic and political fields. The fundamental rights of our Constitution appear to be drafted more on the lines of the Irish Constitution. A reference to the draft Bill of Human Rights of the U.N.O. also deserves mention here.

The authors of our Constitution obviously desired to make India more a Prerogative State like France, than a Common Law State like the U.K. or the U.S.A. The meticulous care with which they worked out every detail clearly proves their intention. In a Prerogative State the authority of the Executive asserts itself more than the judicial branch, while in the Common Law State the Judiciary looks upon the State and the subject as equals, in so far as the rule of law is applicable. In fact, in all Common Law States it is the Courts that constitute the supreme authority, either in originating laws or interpreting them without let or hindrance. The effect of a Prerogative system is to make "the administration, the

arbitrary judge of its own conduct". This system was obtaining in France from the 18th century down to the time of Napoleon. The result was that by a constant revolutionary process, the Executive and Judicial functions were made distinct, and courts were subordinated to the Executive by a mere fiat of the law, whenever they tended to invade the Executive field. That kind of constitutional development should be avoided at all costs in India, otherwise history will repeat itself as in France.

The fundamental rights of the people, as well as the directive principles of State policy, are described in about 30 articles in Parts III and IV.

Article 7. Under this article the definition of the State, unless otherwise restricted, includes the machinery of State, right from the Parliament of India down to the *Panchayat* Board of a village. This idea smells as if the State is more Unitary in character, than Federal. The question is whether this decision represents the real will of the people.

Article 8. This is a saving and far-reaching article. It abrogates all laws in force, in so far as they are inconsistent with the provisions of Part III, and declares them null and void. The State further strips itself of all authority to take away or abridge the rights conferred in this part. It also binds the State in the future by declaring that any law made in contravention will become void. The State further clothes itself with a power to set right an 'inequality', 'disparity', 'disadvantage' or 'discrimination'. There is no phase of human relationship under the sun that is not included within the jurisdiction of the State, through the use of the aforesaid vague and indefinite expressions. There is bound to be some kind of 'inequality', 'disparity', 'disadvantage' or 'discrimination' in respect of some individual or other, whatever law may be passed by the State. But the principle of democracy is the "greatest good to the greatest number of people". Then, why this high-sounding declaration? Is it a Magna Carta for perpetual litigation in the Supreme Court? The explanatory note in the foreword in this regard is an expression of self-satisfaction. In short, this article confers revolutionary jurisdiction on the State, to render topsy-turvy every little rule, byelaw, notification, regulation, custom or usage, on the plea that it is vitiated by the arbitrary rule stated above. Have the people of India understood the import of this revolutionary doctrine? What is their mandate for the members of the Constituent Assembly? No such parallel provisions are found in the Irish Constitution, which has been our guide in this matter. There is no harm, therefore, in completely deleting articles 7 and 8. Thus, much harm that is likely to accrue as between subject and subject on the one side, between subject and State on the other, between courts and State on the third, and between the States and the Union *inter se* on the fourth, will be avoided to a very large extent.

RIGHTS OF EQUALITY

Article 9. No kind of discrimination against any citizen on grounds only of religion, race, caste, sex or any of them is allowed on the part of the State. The terms 'race' and 'caste' require precise definition. The word 'only' may be deleted, because its presence may imply that these factors, when coupled with some other disability, may involve discrimination. Non-discrimination on these grounds should read as absolute.

The second para of clause (i) is unnecessary. If the idea is that the first para relates to State obligation and the second para to people's obligation *inter se*, the first para itself may be amended suitably. After the word 'discriminate' add the words "or allow discrimination in public life or society", and the object in para 2 will have been achieved. More words, more interpretations, and more interpretations, more controversies.

Clause (ii) reserves the right to make any special provision in respect of women and children. Is this in favour of non-discrimination or discrimination? The reason behind the rule ought to be made more clear.

Article 10. Equality in opportunity of employment is guaranteed under clause (i) of this article. For public employment, in addition to the aforesaid factor, "place of birth"

also is mentioned under clause (ii). On this ground, employment cannot be refused to any citizen.

The underlying principle of clause (iii) is itself unsound. The clause is unnecessary for more than one reason, has to be omitted. In the first place, the reservation to some classes of people in public employment is itself a discrimination which is disallowed in clauses (i) and (ii). In the second place, it tries to perpetuate a special category of people called the backward classes. Should not this ugly and monstrous categorisation of the Britisher be given the go-by even now? Further, since the State declares that all citizens are to be given equal opportunities, this reservation seems incongruous. It is not even for a specified period. Opportunities for education and examination may be freely given to all, and even more for such classes. Then they get their due automatically in competition with others. Efficiency in administrative services should not dwindle a whit. It should be secured purely by examination and test of merit and competency. The Committee, while thinking it fit to add the word "backward" before the word "classes of citizens" has not chosen to define it in article 303. Nor is it clear that the expressions "scheduled castes" and "scheduled tribes" are synonymous with "backward classes".

Article 11. Untouchability is abolished in this article. It is forbidden and made punishable. No definition of this is given in Article 303. Are we to interpret it in the same way as it is now popularly understood? Is this not unnecessary in view of Article 9? What is the special object intended or achieved by this Article? If still it is thought necessary, this article may be clubbed with Article 9 and properly redrafted.

Article 12. This Article purports to abolish all titles. What exactly is the scope and meaning of a title is not defined. Does an honorary degree amount to a title? What is the harm in giving a suitable title to a person in recognition of a deed of glorious valour, or an act of noble service? Conferment of such a title and not prohibition thereof is a laudable idea for any State to adopt. These apart, do the authors of the Constitution consider that the possession of some title, indigenous or foreign, is subversive of good government, or derogatory to the self-governing status of a free citizen?

Clause (iii), however, makes mention of different receipts and recipients. Certainly, no servant of the State can have truck with a foreign State, except with the permission of the Head under whom he serves. The underlying principle of this rule is that no servant can serve two masters satisfactorily, except perhaps by mutual agreement. So, it is enough if clause (iii) alone is retained, and clauses (i) and (ii) removed.

Article 13. This article is unnecessarily long and redundant. Clauses (ii) to (vi) are provisos to the seven clauses of rights mentioned in clause (i). Practically all of them are based on one fundamental provision, namely that the various rights conferred are subject to the existing law or laws which be made by the State hereafter. So many hair-splitting ideas and details as are mentioned in the article are out of place in the sanctified pages of a formal Constitution.

The article may be recast thus :—

"All the citizens shall have the right (a) to freedom of speech and expression, (b) to peaceful Assembly, (c) to form into associations, (d) to free movement and residence, temporary or permanent, in any part of the territory of India, (e) to acquire, hold and dispose of property, and (f) to practice or carry on any profession, occupation, trade or business.

Provided that nothing mentioned in the above sub-clauses shall affect the operation of any existing law, or prevent the State from making any law, imposing restrictions in the interest of the general public, or any section thereof, on the exercise of any of the rights conferred by the above sub-clauses.

The distinction observed by the Committee in favour of aboriginal tribes in respect of sub-clauses (d), (e) and (f) is unnecessary. The words "in the interests of the general

public or a section thereof" are wide enough to include the aboriginal tribes, as also the special detailed considerations contemplated in clause (vi). Thus, this article, which covers a whole page, may be briefly, yet fully, condensed as shown above.

Article 14. This article prohibits any special law or special punishment for any offence, except as provided by the existing law at the time of the commission of the offence. In other words, vindictiveness and victimization in the enforcement of criminal law is prevented by this. Clauses (ii) and (iii) are provisions whose proper place is either in the Penal Code or the Evidence Act. So, they can be dispensed with in the Constitution Act.

Article 15. This article affords protection of life and liberty of a person in accordance with procedural law. The second part of the article does not bring out the idea clearly. The expressions "equality before the law" and "equal protection of the laws" coalesce with each other. The foot note states that in Section 1 of Article 14 of U. S. A. Constitution both the expressions exist. Either expression brings out the idea clearly enough, namely, every person is entitled to be treated equally in the eye of law with others.

Article 16. This article ensures freedom of trade, commerce and intercourse throughout the territory of India under certain conditions. In a way, this freedom is already conferred by clause (g) of Article 13. So, this may be omitted. Even as it is, it does not name the persons by and between whom the trade etc. is carried on. The Committee purposely omitted the words "by and between the citizens" adopted by the Consimbi, to avoid a supposed elaborate enquiry at the frontiers as to the nationality of the parties. But, does the omission improve matters? Does the article as it stands convey a definite meaning? Can it be understood that each and every kind of person, not merely a citizen of India, is entitled to free trade, commerce and intercourse throughout India? If that were so, aliens can carry on trade with impunity to the detriment of our nationals. So, the omission of the expression "by and between the citizens" by the Committee gives rise to a far greater mischief or danger than is sought to be avoided. If this has to be retained, it can conveniently be included in clause (g) of article 13, unless it be that non-citizen trade also is sought to be protected by this article. In the latter view, it may exist as a separate article.

Article 17. It is well that Free India should put an end to slavery and other kinds of forced labour, and teach a striking lesson to America. Beggary is not forced labour. "Traffic in beggars" is included in the words "traffic in human beings". So the words "and beggar" are unnecessary. Rightly, slave trade is made an offence in the Constitution itself. But compulsory service for public good is excepted in clause (ii). No discrimination in the imposition of that service is allowed. But a new class-ground is mentioned here, in addition to the previously mentioned grounds of race, religion and caste. It is better that uniformity in the grounds of discrimination is maintained. What is meant by "class", again, is not clear, as in the case of race or caste.

Article 18. Child labour is prohibited under this article. It is necessary that it should be provided for in the Constitution? It is more appropriate in factory or other labour legislation, and hence may be omitted from this. Perhaps, the age limit of 14 is low. It may be raised to 16 or even 18, because, by then, a definite stage of education of the child would have been reached.

RIGHTS RELATING TO RELIGION

The new Indian State, which claims to be secular in character, declares its strict neutrality to religion in the following four articles, but subject to certain conditions. It also defines the scope of its interference in religious institutions. Where there are numerous faiths prevailing in a country like India, the Government cannot accept one particular faith and run the administration in its name. Nor will it be in keeping with the spirit of the age. But at the same time the State should signify its obeisance to the will of the Almighty and

exhort the people to the path of spirituality. What the Irish authors could recognise, the Indian authors could not. Article 44 (i) of the Irish Constitution acknowledges that the homage of public worship is due to the Almighty God. It shall hold His name in reverence, and shall respect and honour religion. It is a pity that the able authors of our Constitution have not thought fit to introduce an article similar to the above one. The articles relating to religious neutrality in the constitutions of Ireland, Danzig and the Reich, are better drafted than in our Constitution.

Article 19. This article guarantees freedom of religion to all people, i.e., the right to profess, preach and propagate religion, subject however to public order, morality and health, and to the other provisions mentioned in this part.

What is public morality in any particular instance may be hard to define. In fact, religion is a code of conduct which engenders cultural virtues which are conducive to a happy social and spiritual life. So, in deciding what is public morality, the State may certainly have to encroach in the field of religion and examine its tenets in any particular case. The word "morality" may be substituted by any of the words "good", "interests" or "policy", whichever is considered comprehensive enough. It is but right that freedom of conscience also should be subject to the above conditions.

The explanation to this clause appears to be a special favour to Sikhs. It is doubtful whether constitutional recognition should be given to that custom. It may induce other sects to agitate for similar recognition of some such customs. The explanation is *prima facie* proof of partiality in favour of one sect, which is openly repudiated in the preceding paragraph. The age-long custom of the Sikh wearing the *kirpan* may as well be established in any law court of the country, if ever it becomes a matter of dispute between citizens. So, the explanation may be deleted altogether.

Clause (ii) preserves in tact any existing law, and does not preclude the State from making any law which regulates or restricts the economic, financial, political or other secular activities associated with religious practice. The words "or other secular activities" again may raise much controversy. Naturally, they have to be interpreted *ejusdem generis*. There is no harm in omitting the expression altogether, because the preceding three adjectives give exhaustive jurisdiction for interference by the State. The State can under this clause also make laws for social welfare and reform, and for throwing open public temples to any class or section of Hindus. Hindu customs and practices are so intertwined with religious, moral, physical and secular injunctions that it is difficult to separate one from the other. The State can by this power make effective inroads into existing Hindu religion, and bring about the unique and sublime Vedic faith in line, say, with Christianity as it obtains today in the western world. Religion is nothing but a way of life. That religion, whose dogmas and rules are not observed in practical life, becomes worthy of lip service, and in course of time turns into a cloak for high fraud and humbug. How far social welfare and reform can be accomplished by legislation is a matter of doubtful conviction. The urge for a happy, united social life must come from within, and not from without. So, it is better that the State should interfere with as little of social life of the citizens as possible.

Article 20. This article allows establishment of religious institutions, owning and acquisition of property and management and administration thereof by religious bodies. The question is whether the right conferred by this article is absolute, or is qualified by clause (ii) of Article 19. In the name of financial regulation or restriction, the State may interfere with the autonomy of management or administration of property given under this article. The intention has to be made definite.

Article 21. In this article money spent for the promotion or maintenance of any religion is exempt from all taxes. This may in course of time prove to be a big check on State finance. To avoid taxes, people may convert their properties into religious or charitable endowments, and make themselves and their heirs as perpetual trustees thereof. It is better that the State should be equipped with an ultimate weapon in the larger interests

of the people. The article is not happily worded. The words "on property or income" may be introduced between the words "taxes" and "the proceeds".

Article 22. Under clause (i) of this article, a purely Government educational institution does not provide religious instruction. This is necessitated in proof of its strict neutrality to all religions. If the people of a State profess only one religion, there would have been no necessity for such a clause as this. Where there are many, State funds must be equally spent for all religions, or not at all. Then, there will be no grievance for anybody. Since the religions of India are legion, the drafters chose the second alternative as the better.

But the State permits religious instruction in other educational institutions, according to certain rules and regulations. The distinctions observed in the three clauses are peculiar and cumbersome. Either there should be a total taboo of religious instruction in all our educational institutions, or permission should be given in all institutions for all religions. Otherwise, there would be more controversy than harmony. The latter alternative will certainly lead to various impracticable and unwholesome regulations. Since the State is determined to be secular in outlook, it is safe that it disallows religion in all public schools. In this view the whole article has to be redrafted thus :

"No religious instruction shall be provided in an educational institution, whether maintained out of or aided by State funds, administered or recognised by State."

CULTURAL AND EDUCATIONAL RIGHTS

Article 23. Any minority having one language, script and culture shall have the right to conserve the same under clause (i) of this article. In other words, linguist groups can form distinct units among themselves, But how that right to conserve is exercised, or what is meant by that conservation is not made plain.

In State educational institutions no person shall be discriminated against, on the ground that he belongs to a minority based on religion, community or language under clause (ii). Are there not other grounds of distinction such as caste, creed or race? Then, it is better to make a positive rule that all persons shall have access to State educational institutions.

The third clause provides for the establishment of the educational institutions by the above-mentioned minorities and the State should not discriminate against any in granting aid. Is it the idea that in these private-owned institutions the bar of minority may be enforced legitimately.

The definition of the word "minority" is not given, but the test is laid down in clause (i). Instead of the word "culture", "literature" may be substituted. Another doubt that arises is whether the language "minority" referred to in clauses (ii) and (iii) is the same as the minority contemplated by clause (i). If so, the words "or script or culture" (literature) may be added after the word "language". In that case, clause iii (a) comes within the purview of clause (i), because the right to establish and administer educational institutions by a language-minority is one of the modes of conserving its culture etc. It can be omitted or tacked on to clause (i).

RIGHT TO PROPERTY

Article 24. The institution of private property is preserved by this article. The State can however acquire it under certain conditions. The first clause enunciates the general rule. Clause (ii) lays down that no property of any kind shall be possessed or acquired for public purposes except on payment or determination of compensation. The expression "public purpose" must be taken to include State emergency also. But as to what exactly is the connotation of "public purpose", and what are its nature and limits, are not made clear. We

have to presume that the law which precedes possession or acquisition provides for such determination, legislative, executive or otherwise, is still a matter for speculation. Perhaps, the Government will resort to whatever expedient is found useful under the circumstances. This should not be. All confiscatory laws, even in case of emergencies, must be passed with some kind of previous consent of the sovereign people. Else, representative democracy becomes meaningless.

The scope and meaning of the proviso to clause (ii) mentioned in clause (iii) are not clear. What is the kind of any existing law that is sought to be excepted? It must be one relating to State possession and State acquisition of property, and must also be one providing conditions other than those mentioned herein, that is, any existing law which provides for State possession or acquisition without compensation is kept in tact by the first proviso. This is a great anomaly which cannot be countenanced. There should be uniformity of principle in the enforcement of all confiscatory and commanding laws. If there are any such laws existing, they should be abrogated by means of this proviso, and not preserved.

The second proviso has no connection with the main principle in clause (ii). As it is, it means that any tax laws, any public health law or any danger-prevention law, which may hereafter be passed by the State will not be affected by the provisions of clause (ii). Could any body contend that these laws should be passed only on payment of sufficient compensation? The doubt has arisen because the expression used in clause (ii) is "public purposes". The principle in making laws in para (b) of clause (iii) is also similar to this. So a conflict is imagined and this para is put in. This is to some extent understandable. The complication would have been avoided if the expression "public purposes" in clause (ii) has been substituted by a more appropriate one. It is also necessary. The expression "for any emergent public or social good" may be substituted. The adjective "emergent" is necessary too, because the extraordinary and rare act of confiscation or commandeering by State arises only in the case of an emergency.

Article 41 of the Irish Constitution recognises certain fundamental family rights and duties. Articles 110 to 115 in the Danzig Constitution provide for certain privileges in the economic field. Articles 152 to 157 of the Chinese Constitution provide for certain measures based on social security. These are not at all touched in our Constitution. Such of those rights and privileges as are not already covered by the existing articles in the subjects referred to above, may be adopted from out of the above-mentioned provisions of other constitutions. The Belgian Constitution guarantees freedom of the Press also.

RIGHT TO CONSTITUTIONAL REMEDIES

Generally, there can be no right without a remedy, and all remediless rights are as good as non-existing. If the Constitution upholds certain fundamental rights, it is meet that it should provide for corresponding remedies also.

Article 25. The Supreme Court of the State is invested with jurisdiction to adjudicate upon questions of fundamental rights through appropriate proceedings. Parliament may empower any other Court also for that purpose.

Clause (iv) may be omitted in view of article 26. Where does the question of suspension arise for constitutionally-granted rights? The authority and power of the Supreme Court are commented upon in detail later. Suffice it to say here that the effect of power reserved by Parliament under clauses (i) and (iii) is to make the Supreme Court not the supreme adjudicator of rights between all parties including States, but to make it a subordinate branch of Parliament. Where, then, is the independence of the Judiciary so grandiloquently proclaimed by constitutional pundits?

Article 26. An exception is made in this article in the case of the guaranteeing of fundamental rights to the members of Armed Forces, charged with the maintenance of public order. They may be restricted or abrogated as circumstances require. The object is

maintenance of discipline and proper discharge of duties by those ranks. In other words, to ensure public order these fundamental rights are to be given the go-by for the time being.

This article arouses the suspicion of the Armed Forces unnecessarily, and is sure to defeat the intended object. It is better that such power is exercised by the Supreme Court in the interests of both the public and the State, as and when necessity arises. So, this article may safely be omitted. Moreover, it is not made clear whether the exception holds good when the Armed Forces are involved in the defence of the country, or whether that contingency is deliberately ruled out.

Article 27. This article confers jurisdiction on Parliament to make legislation in respect of rights and remedies conferred under this part. Provincial and Princely States are precluded from making these laws. Parliament shall give effect to these laws soon after the commencement of the Constitution by further consequential legislation. Until the passing of such legislation, the existing laws will remain in force by virtue of this proviso.

Most of the fundamental rights guaranteed in this part can as well be dealt with by individual States. Why should they be deprived of the power to legislate when they are autonomous Federal Units? This proviso, again, savours of an assertion of authority by the Federal Government over the constituent States.

PART IV.—DIRECTIVE PRINCIPLES OF STATE POLICY

In the introductory remarks it was observed that the Draft Constitution is defective, in the sense that it contains many non-constitutional provisions which are more within the sphere of ordinary Municipal Law. It is defective in another sense, that it contains certain directive principles of State policy as are mentioned in this part, but which are not, however, enforceable by citizens in law courts. They are expressions of a pious hope on the part of the State. They are recommendatory in character and therefore ultra-constitutional, and vain. The need for such mention in a strict constitutional enactment is a doubtful proposition, except for the hope that they will be treated as conventions of the Constitution and developed as such. None of the modern constitutions, except the Irish Constitution, contain a list of such directive principles. Many of the articles in this part are actually a reproduction of the provisions of article 45 of the Irish Constitution. The ideals of the Constitution are already mentioned in the Preamble. Articles 28 to 40 are only an amplification of those ideals, as far as the codifiers could foresee. There is absolutely no harm in removing those provisions, because neither the State is strictly bound by them, nor the people have a right to enforce them. The maxim of goat-neck-teats truly applies to all these articles.

No doubt, Article 29 lays it down as a duty of the State to observe these principles as fundamental to the governance of the country, and to apply them in making laws. Supposing it does not. Where is the remedy? In fact, what else does a State exist for if not to achieve the ends so elaborately defined in the various articles? In a way, these articles lay the seeds for the gradual growth of a socialist regime for India, on the basis of a Co-operative Commonwealth, which is the golden dream of Pandit Jawaharlal Nehru. Articles 30 and 31 direct the securing of social justice, especially for the working class, by equitable distribution of wealth and its resources. These are recognised as fundamental rights in the Chinese and other constitutions, capable of being enforced in law. Provision for unemployment, old age, sickness, disablement, security of humane work-conditions and maternity relief have become the natural concern of every modern democratic State. A very large body of labour, health, insurance and commercial laws is growing day by day to meet the surging socialist trends of the modern age. Articles 32 to 38 embody the general principles of the above-mentioned laws, which have to be passed by separate legislation as the need arises. Article 39 directs the preservation and protection of monuments etc. In fact, there is a special Act called the Ancient Monuments Preservation Act in force, governing the subject at present. In the face of that legislation, why a directive principle to the same effect has been included in this category passes one's comprehension. It should have been recognised as a specific right of the citizen, legally enforceable in a court of law, by specific

remedies. This right of the people to preserve their monuments, and places or objects of historic interest, is so fundamental that it should have been included in Part III itself.

Article 40 lays down the principles of international amity and world peace and human security, on the lines of the Atlantic Charter. What is the use of incorporating such an unilateral declaration in the written constitutional law of a country? Is there any special sanctity for those principles by virtue of their being mentioned in writing and kept on the Statute Book?

If it is the anxiety of the authors that these general principles should find a place in the solemn document of the Constitution, it is proper that they are included in the Preamble, in as simple and effective a language as possible. That would really be the Magna Carta of our Constitution. In any case, these principles can never occupy the place of articles of a Constitution, which is purely a law dealing with the structure and functions of the State.

PART V—THE UNION

CHAPTER I. THE EXECUTIVE AND COUNCIL OF MINISTERS

This is the age of democratic republics. Monarchies are anathema today, though in countries like England, Greece and Holland a hereditary monarchical system is still maintained. Even these few monarchies that exist are wholly democratic in character, and the King or Queen is only a constitutional figurehead.

Even where there is no king, it is widely recognised as a fundamental axiom of constitutional law that there should be a person styled "President" as the titular head of a State. The Government runs in his name. He is the protector of the Constitution and the law of the country. The President is supposed to be the concentrated essence of all political authority derived from the people, and to him, again, all the different institutions of the Government are linked. Even this headship of the State in the person of a single individual was not recognised by the Swiss Constitution. But the Federal Council, which partakes of the characteristics of both the parliamentary and non-parliamentary Executive, is the real Executive consisting of seven elected Ministers. Their responsibility is joint and equal in all matters. Even they have to choose a person as Chairman for a year, for the performance and discharge of certain functions which several people cannot do. Thus, in the absence of a Crown, a popular representative as the political head of a State appears to be a normal feature in all modern democratic constitutions. The so-called Presidential head is not a prototype of the old Monarch, who exercised the treble functions of law-giving, judgement and executive action. He discharges only a portion, or rather portions, of that sum-total of authority in a modern State. His powers, of course, vary from state to state. As the head of a Cabinet form of Government, his power is nominal. As the head of a non-parliamentary, or fixed, Executive, his authority is supreme.

Who, then, and what, constitutes the Executive of a particular state, is a question to be decided on the facts of each case. In the U.K. the Cabinet with the Prime Minister as its head constitutes the main Executive. It is removable by a vote of Parliament. The British Crown is only a symbol of sovereignty for them, and they do every thing in his name and under his seal. In the U.S.A. the President is all powerful. He too has a Cabinet of his own, but it is merely an advisory body for him. The Congress cannot touch him until the expiry of his normal term of office. So the test is not whether the Executive is elected or non-elected, to determine its flexibility or otherwise, but whether the Executive is removable by the Legislature or not is the real question to be answered.

The French Executive is a peculiar creation. The position of the French President is pitiable even under the Constitution of the Fourth Republic today. It is said that the old kings reigned and governed, the constitutional king only reigned, the U. S. A. President only governed but not reigned. Curiously enough, the French President neither reigned, nor governed. Unfortunately, that is the position even today in France. Vincent Auriol is

torn asunder, amid the ever-warring and unsteady parties among the French people, and every now and then he has to go a-begging for the formation of a Ministry. The President, who is elected to be the head of the Executive, does possess no real power. The Cabinet with its Prime Minister actually wields all the Executive authority. A great French writer has said that the President is the "prisoner" of the Ministry and of Parliament. He is no more than a constitutional king, but for a fixed period. There are also certain inherent differences in the Cabinet systems of Britain and France. The Cabinet system of the Britain is sound, stable and based on a well-organised party grouping. So it is very rarely that constitutional deadlocks or crises occur in Britain. In France, however, the party-grouping is promiscuous and momentary, and so no single Cabinet is guaranteed a safe lease of life even throughout any given normal period.

The Executives of the other States and Dominions share, in varying degrees, the form and powers of the two fundamental types mentioned above.

What, then, is the nature of the Indian Executive contemplated by the framers of the Draft Constitution? Obviously, they seem to have envisaged that any day two heads are better than one, and so they created both a President and a Prime Minister with certain powers for each. *Prima facie*, therefore, the Indian Executive resembles that of the French Republic, which in theory is supposed to be a *via media* and a happy blend between the American and the British systems, but which in actual practice is an ignoble failure from start to finish, as is evidenced in France. How we are going to prove ourselves better than the French people remains to be seen. On a closer examination of the provisions contained in this Part, the President of the Indian Union has also some of the powers of the American President, and the Prime Minister of India has the status of a British Prime Minister to a certain degree.

It is very strange that in case of a conflict between the President and the Prime Minister no method is suggested for a way out. Perhaps, each can manoeuvre and try to get rid of the other. The President can be impeached by the Legislature, and removed under certain conditions. But the Council of Ministers, including the Prime Minister, is appointed by him, and they hold office during his pleasure. Thus, by implication, the President can, if he chooses, remove the Council of Ministers. But the President is a person who commands the majority of the Legislature (like the Prime Minister), but not of the people, and the Council of Ministers is his own creation. There is also no restriction that the Prime Minister should be one who must necessarily command the confidence of the majority party in the Legislature. In this view, the President is more powerful than the Prime Minister. The collective responsibility of the Council of Ministers is to the House of the People. Further, the word "Cabinet", which is of great constitutional import, is not used. Instead, the expression "Council of Ministers" is used. The political authority is said to vest in a Cabinet, while the administrative authority vests in the Council. As a Cabinet they are responsible to the Legislature, and as a Council they act under the directions of the President. Though the word "Cabinet" is not used, the idea behind clause (iii) of Article 62 signifies it. So, the Indian body of Ministers is both a Council of Ministers and a Cabinet, discharging a two-fold responsibility as in France. It is difficult to pronounce from the mere provisions of the Constitution whether the Indian Executive is flexible or rigid, or, fluid, embodying both the features. Its success or otherwise is a matter for experiment.

Article 42. Clause (i) of this article declares that the Executive power of the Union is vested in the President. He is bound to exercise it according to the Constitution and the law. The resemblance here is closer to the American type, than to the French. Clause (ii) also makes the Indian President more akin to the American than the French President. Clause (iii), however, seems to detract from the principle of the above two clauses. The Indian Parliament can by law confer the executive functions on authorities other than the President, and the President has no control over the Executive functions of the Government of any existing State, or other authority.

This proviso is added, perhaps, to establish the supremacy of the Legislature over the Executive, and also to preserve the Federal character of the State. Para (b) is enough to achieve that end. Para (a) is unnecessary and incongruous. Nothing but rivalry would be generated by such irregular divisions of Executive authority. Without defining the powers of the President, how it is prudent to reserve a general check on his authority is a matter for close study. The nature of the other authority or authorities mentioned in paras (a) and (b) requires elucidation.

Articles 43 & 44. The Indian President will not be elected by the people direct. Nor is it by party conventions as in the U.S.A. Nor will he be elected by a simple majority of the joint ballot of both the Chambers of the legislature as in France. An electoral college is created for Presidential election, and the mode of election as well as the determination of votes for each elector are something akin to the American system. The idea in introducing plural voting is not patent. What is the special reason in not copying wholesale either the American or the French method, and what is the special advantage by this mathematically improvised system? Perhaps, to set in motion the huge electoral machinery for a separate election of the President by the people was considered expensive and irksome. Added to this, the method of proportional representation through a single transferable vote and secret ballot is enjoined in clause (iii). The scope for manipulation and manoeuvring is great in this new system. There is no guarantee through this method that the country's most popular figure would always be elected. Anybody has the chance of being elected, if he is able to secure some preferential votes by intelligent canvassing. In fact, this special system of voting ensures the representation of various minorities and special interests in the elections to a public body. But how far it is constitutional commonsense to adopt it for the election of the President of a State, experience alone must teach us.

Articles 45 & 57. Under article 45 the period and termination of Presidentship are provided for. Only removal and resignation are mentioned as grounds here. Other grounds, such as death, disability etc, are provided for in article 57. It is better that both the articles are consolidated into one. At least article 57 should appear immediately after article 45, because of affinity.

Only one ground for the removal of the President by impeachment in the manner specially provided for is given in para (b) of the proviso. The French President is removable for high treason. The American President, under article 4 of the original Constitution, is removable from office "on impeachment for and conviction of treason, bribery or other high crimes and misdemeanours".

The term "violation of the Constitution" is vague. Is it a breach of the enforcement of the strict letter, or the spirit of the Constitution underlying it, that is required for removal? It is essential that some explanation should be indicated. The expression "for acting prejudicially to State interests" may also be added after the words "violation of the Constitution", to give some more definiteness to the ground. It is necessary that the other grounds mentioned in article 4 of the American Constitution should also be included in this article.

Article 46. Instead of the words "once, but only once", the words "only for a second time" may conveniently be substituted. But why should the Indian President be given a second chance too for re-election? There is some principle in the "one or many chances" theory. What is the special *raison d'être* in giving only two chances? There is no such restriction in the great Republics of the West.

Article 47. One of the qualifications for election as President is citizenship of India. Any person who satisfies the conditions of articles 5 and 6 is entitled for candidature. There should be some further limitation. In America only a natural born citizen is entitled to stand, and he should have been a U. S. A. resident for 14 years. At least a 12-year residential qualification may also be fixed for the Indian Presidentship election.

Under clause (ii), a paid Government servant is precluded from standing. The explanation excludes popular Ministers of Provinces or States from the category of Government servants. The question whether Provincial or State Governors can stand as in the U.S.A. is left in doubt for the present, because the drafters are not able to decide which of the two modes of election for Governorship they suggested would be acceptable to the Consembly. The explanation may have to be amended in the event of the Governor being a popular Governor under the final Constitution.

Article 48 & 49. These are in order. The official residence may be named RAJA BHAVANAM or RAJ MAHAL.

Article 50. In this, the procedure for impeachment is prescribed. Thirty is fixed as number of complainant members of either House. It is better that a greater minimum, say 50, may be fixed for the House of the People, whose membership is 500. Of course, two-thirds or more of the House must any way support the complaint resolution. Also no period of notice for the charge is fixed.

In clauses (iii) and (iv) only an investigation, and that too *in camera* by the other House or its members, is prescribed for. There is no open debate or deliberation in Parliament. An investigation and a resolution would decide the fate of a President. Where is the scope given for all the members of Parliament to participate in the momentous trial of the Head of the State? At the time of the passing of the resolution, the members have to merely say yes or no to it, without having an opportunity to pronounce upon it. As it is, the mode of investigation is left to the House to decide. But if the word "investigation" rules out a free and open debate in Parliament, either in closed or open session, it is some thing undignified and surreptitious. The guilty President must face the Parliament and defend himself in open trial. The charges of a democratic body of people must also be open and courageously substantiated. There is always a touch of suspicion and doubt in secrecy. That must be avoided in a ceremonious, historical, trial of State.

So, both the complaint resolution and trial resolution may be required to be substantiated by the two respective Chambers in the presence of full membership, either in secret or in open session. I would advocate an open debate, so that it might be a warning for others in future.

This method would ensure both fairness and freedom for all parties in the procedure adopted. The first stage would amount to a preliminary investigation, and the second stage an actual trial. The high accused will have two opportunities to acquit himself. Under the draft, the President has no chance of representing his case at the time of the passing of the complaint resolution, which, according to the author, should be the investigation stage. To throw out a frivolous charge *in limine*, however, the moving House may enquire or cause it to be enquired *prima facie*, by such means as it thinks fit, say, by the Chief Justice of the Supreme Court, or by House legal committee.

The whole article may be redrafted in the light of the above observations. It should be divided into 3 clauses relating to proposal, preference and pronouncement of the charge. The proposal should be by a prescribed number of members in writing, but subject to a preliminary enquiry by a House committee or the Chief Justice of the Supreme Court. The President shall not know about the *prima facie* enquiry. Whether a preference of the charge is advised or not, an investigation will follow in the complainant House with a kind of legal opinion before it. Then a trial and pronouncement by the other House will have to ensue. This would be complete justice. The article may be recast thus :—

- (i) When a President is to be impeached for violation of the constitution (etc.) the proposal for the charge shall be moved after notice in writing by not less than 30 members of the Council of State or by not less than 50 members of the House of the People. Such proposal shall be caused to be enquired into by a legal Committee of the moving House appointed for the purpose, or by the Chief Justice of the Supreme Court, with a direction to submit its or his opinion whether a *prima facie* case has been made out or not.

- (ii) The complainants shall, if they choose, prefer the charge by a resolution before the House which shall investigate openly in full House, by discussion either in closed or public session as the House may think fit, in the presence of the President or his representative. The charge shall be supported and preferred by not less than two-thirds of the total membership of the House.
- (iii) When a charge has been so preferred by either House of Parliament, the other House shall try the charge openly in full House, by full-dress debate among the members, either in closed or public session of the House, in the presence of the President or his representative. The President or his representative may address the House after impeachment on each item of the charge is finished. He may, after all the items are over, address the House finally in answer to the entire charge. The House shall then pronounce by not less than two-thirds of the total membership that the charge in the resolution has been sustained.
- (iv) Such pronouncement as is mentioned in clause (ii) shall have the effect of removing the President from his office, as from the date on which the resolution is so passed.

Article 51. The principle of this article, though appears to be salutary, may at times create practical difficulties. The expression "shall be completed before the expiration of the term" is ambiguous. As in clause (ii) the election may be fixed to be completed not later than six months, in any case, from the date of the occurrence of the vacancy. The clause may be amended accordingly.

Articles 52 & 53. These two may be clubbed together by adding the word "who" at the end of the word "India" in article 52, and by deleting the words "the Vice-President" in the beginning of article 53.

Article 54. The words "during and in respect of the period" in clause (iii) may be omitted as redundant.

Article 55. Most of the provisions relating to the election of the Vice-President resemble those of the Presidential election. The objections stated above apply *mutatis mutandis* here also.

Article 56. A special method and procedure for the removal of the Vice-President is provided for in clause (b) of the proviso. "Incapacity" perhaps is used in the sense of "incompetency". If not, both may be mentioned as grounds. It is but right that a simpler method of election as well as removal is proposed in the case of a Vice-President. Where there is no period of notice fixed for the complaint against a President, there is no reason why 14 days' notice should be fixed to move a resolution against a Vice-President.

Article 58. This article provides for inquiry and decision in a dispute arising out of, or in connection with, the election of a President or Vice-President. It gives jurisdiction to both the Supreme Court, as well as Parliament. But the method of moving the Supreme Court is not prescribed.

Clause (ii) may be numbered as clause (i), and clause (i) as clause (ii), which may be amended thus: add, "in accordance with any law passed or motion made by Parliament" between the words "shall" and "be".

This provision is an instance where the respective powers of the Legislature and the Judiciary may be tried to be asserted. As it is, under the Draft, Parliament seems to have been given the upper hand. But the independence of the Judiciary of an ideal State must always be real and unfettered.

Article 59. This again is an instance where the President is given overriding powers. This power is unnecessary, and so may be removed in the interests of solidarity between the President and the Supreme Court. The power of the President will have to be exercised only on grounds of mercy, which is the relic of an ancient and powerful monarchical system.

If the power has to be preserved, it may be restricted to very rare cases of high treason, contumacy or the like, irrespective of the nature of the punishment awarded by a court.

Article 60. This article defines the extent of the jurisdiction and executive power of the Union. It is proper that a reference to articles 216 and 217 is made in clause (a) of this article. Clause (b) keeps intact, by the law of devolution, all the rights, authority and jurisdiction, hitherto exercisable by the Government of India by virtue of any treaty or agreement.

The proviso primarily vests the executive power in respect of the concurrent-list subjects in the State concerned, except in so far as is otherwise provided in the Constitution, or in any law made by Parliament. There is no use of this provision, unless a similar provision is made in respect of the legislative power of the State over the concurrent subjects. No such preference is given to the State in Article 217. It is an anomaly that the legislative and executive powers in respect of concurrent-list subjects are not co-extensive or co-ordinate. It may lead to conflicts between the States and the Union. So, instead of this *prima facie* executive power being given to the State, irrespective of the exercise of the power of legislation, it may be stated that the Union shall have executive authority in respect of those matters in the concurrent-list that it legislates upon, and the State in respect of those on which it legislates.

In fact the division of legislative power into three parts is itself unsound. More will be said about it when I deal with articles 216 and 217. This is one of the bad features of the 1935 Act. Common sense in the field of authority often leads to controversy and separatist tendencies. In order that the ideal of a Co-operative Commonwealth should be effectively worked out, it is necessary to understand and follow the eternal principles of unity in diversity, and *vice versa*. Then only there would be universal harmony and happiness.

Clause (ii) is put in to continue for some time the exercise of the existing executive power of a State over matters in respect of which Parliament has power to make laws. This gives, again, a different kind of jurisdiction to the State. Thus, the State has three kinds of executive power: (i) in respect of its own list-subjects, (ii) *prima facie* in respect of concurrent-list subjects, and (iii) over Parliament subjects existing at present. In respect of the latter two, the provincial unit of the Federation acts more or less like the agent of the Central Government, which, then, assumes the character of a Unitary State.

COUNCIL OF MINISTERS

General remarks about the Council and the Cabinet of Ministers are stated in the introductory para to this part. From the provisions of articles 61 and 62 it looks as if the body of Ministers, though styled a Council, are also-bound to act like a Cabinet.

Article 61. The Council of Ministers "to aid and advise the President", is a phrase borrowed from the terminology of the British constitution. If there is a conflict, who is to succumb becomes the question. Since the Ministers hold office during the pleasure of the President, the latter may dismiss them whenever he feels like doing it. This idea of "holding office during pleasure" is also borrowed from the British Constitution, but there the Cabinet, though formed by the King, is drawn from Parliament, is responsible to it, and will be there only as long as it commands its confidence, and no longer.

Article 62. The President is to appoint the Prime Minister. Can he choose any person for the job? Clause (i), as it reads, allows him the widest choice. The President can have any man of his liking as Prime Minister, though the latter must seek franchise within six months of the assumption of office. The King in the U.K., as a rule, calls upon the leader of the largest majority party and asks him to form his Cabinet. But, under our Constitution, the President simply appoints the Council of Ministers. No doubt, as an

elected Head of the State, he may not ordinarily depart from the accepted precedents of democratic Government, but there would be nothing constitutionally wrong if the President departs from the rule, because the article does not fetter his discretion either way. Yet, it is an essential requisite of a democratic Government that the Prime Minister, who is likely to command the majority in the Parliament, alone should be appointed by the President. The Constitution does not provide for instructions in this matter. Clause (i) may therefore be amended accordingly.

In clause (ii) it is said that the Ministers hold office during the pleasure of the President. This must mean that they should resign only when they have lost the confidence of Parliament. The clause may be amended in a suitable way.

In clause (iii), the joint-responsibility theory of the Cabinet system is adopted. Consequently, the Council of Ministers stands or falls as a body, in so far as the Legislature is concerned, but not in relation to the President. Collective responsibility is confined to the House of the People, and not to the Council of States, on the analogy of the British Cabinet, where the Cabinet is responsible to the House of Commons, but not to the House of Lords.

So, whether the Council of Ministers goes with the President, as in the U. S. A., whether the Cabinet and Parliament are supreme over the titular head as in the U. K., as was evident when the Cabinet did not resign when Edward VIII abdicated the Throne; or whether the Council is merely a toy tossing hither and thither as in the French system, is not easy to surmise. A close analysis would show that the Indian Executive and the Council of Ministers seem to imbibe the qualities of all the three types mentioned above. Experience alone must tell as to how this ingenious system works.

Article 63. There will be appointed by the President an Attorney-General for India, under this article. The question is whether a constitutional provision is necessary for his appointment. It is purely an executive post; and the President can, in the exercise of his executive authority, appoint him by a Presidential decree. In this view, the article may be omitted.

Article 65. In this article, clauses (a) and (b) establish a kind of co-ordination between the President and Council of Ministers. But clause (c) paves the way for gradual and frequent interference in the day-to-day administrative, as well as legislative, functions. This clause gives access to individual Ministers to go and complain to the President over the head of the Prime Minister. The President, in turn, may assume a patronising attitude and give directions to the Prime Minister. This is a most unhealthy, nay, even injurious, provision and may prove subversive of the principle of joint Cabinet responsibility. There would be much scope for estrangement (through this clause) between the Prime Minister and the President. The question whether a decision has or has not been considered by the Council becomes a controversial issue. As a rule, the Prime Minister alone should be the mouth-piece of the Council of Ministers. Even if individual Ministers were to have access to the President, their business should not be to carry tales against the Prime Minister, and create cliques through the instrumentality of the President. This clause does more mischief than good, and is a blow to the growth of collective responsibility among the Council of Ministers. It may be deleted.

CHAPTER II—PARLIAMENT

Article 66. The House of the People may be called a House of Representatives, so that the abbreviations "Councillor" and "Representative" may be usefully used in common parlance.

Article 67. It is better if the strength of the Council of State is increased to 300, having regard to the total population and the number of units forming the Federation. After all the States are integrated and fitted into the Federal scheme, there will not be more than 30 unit-states in India, and each will have 10 representatives on the average. The

population also is about 30 crores. The nominated membership may be increased to 20. Forty per cent of the remainder of representatives, after deducting the nominated membership, would go to the so-called Princely India, as is provided for in the Draft. If the membership is increased to 300, a lesser percentage, say 33 $\frac{1}{3}$, may be fixed for it.

The nomination principle is acceptable, though it is not in accordance with full Federal constitutionalism. The categories of special knowledge and practical experience are exhaustive enough, but distinguished men of the Armed Forces do not come under any category. So, the expression "social services" may be changed into "distinguished service". This functional representation by nomination has its relic in the Constitution of the Italian Second Chamber, which was completely a nominated body. Technical men, and men of knowledge, are not generally popular figures, and in order they may serve the State nomination is the only method. Nomination should no doubt be by the President, but in consultation with, or on the recommendation of, the Prime Minister.

The membership of the House of the People may be increased to 600. The division, grouping and formation into territorial constituencies is the most important arrangement in the set-up of a new People's Government. So also is the allotment of representatives to constituencies. The principle of equal and proportionate representation is kept in mind throughout. The rule fixing the lower and the upper limits of population for determining the number of representatives is not clear. A general rule that there should be one representative for every 5 lakhs, or part thereof, may be laid down.

Qualifications of representatives are not mentioned in this article, but disqualifications are mentioned in article 83. An age limit and a citizenship and residence qualification may be fixed.

Article 80. The second para of clause (ii) is fantastic. It is not clear how any contingency, as is contemplated therein, will arise. Do the framers suspect trespassers into Parliament, and imagine that they participate in the proceedings without being noticed? Under clause (iii) a common quorum is fixed. Should it not be different for the two Houses?

Article 82. It is not clear whether under clause (iii) a member has to satisfy two conditions to forfeit his membership, i. e. (i) absence for 6 days and (ii) absence from all meetings. Suppose a member commits a breach of one of the conditions alone, is it the idea that he would not lose his membership?

Article 83. All the disqualifications mentioned in the sub-clauses are exclusive and should be separated by "or", "or" at the end. The word "and" at the end of sub-clause (d) may be omitted. There is no article prescribing the qualifications of members of Parliament, at least for the Council of State. Representative democracy demands that the member selected should be free to devote himself to public service, i. e., he must be a professional politician.

In Canada, for instance, a nominated Senator must be at least 30 years of age, resident of the province for which he is selected, and possess a property qualification. In the Irish Free State, men of the age of 35, who have brought honour to the nation or who possess special qualifications or attainments, are chosen as representatives, because the Constitution enjoins accordingly. No such provisions are laid down for the Indian Second Chamber. Is it not desirable to do so? If it is not held to be in consonance with modern democratic conception, it is still necessary to introduce a clause either in article 67, or in this article, that every voter is entitled to stand for election as a candidate, subject to the disqualifications mentioned above.

Article 84. How can a member know that he is not qualified for candidature when there are no qualifications laid down at all? So, this alternative rule regarding disqualification necessitates a specific mention of the qualifications of a member.

In fact, articles 73 to 84, both inclusive, come strictly within the realm of parliamentary procedure. They need not find a place in the Constitution document. In spite of these careful provisions, a large body of laws relating to parliamentary procedure and practice is bound to grow. So, these provisions also may form part of that body which may be in the form of rules, or acts, or conventional laws. There is no void, or defect, even if they are deleted.

Article 91. It is a convention in the English constitution that a Bill passed by both the Houses of Parliament should be automatically signed by the King. The question does not arise as to what should be done if he refuses to sign. It was suggested by some constitutional experts that an Act of Parliament should be passed requesting the King to sign in case of any such refusal. This contingency is not actually entertained.

But, under the Presidential system, the President has greater powers. He may consent, or he may reject and send back a Bill for reconsideration for the reasons mentioned. In the U. S. A. a Bill becomes law, or an Act, if it is passed by the Congress and signed by the President. If the latter either takes no action within a stated period, or sends the Bill back for reconsideration and it is passed by special majority, thereupon it becomes law as a matter of course, irrespective of the President's intervention.

In France, the President and the Senate, have greater control over the Chamber of Deputies. The President can, if he wishes, check the excesses of the Chamber by returning bills for reconsideration, or by adjourning it during a period of too great excitement. The President and the Senate can dissolve the Chamber and appeal to the constituencies on any particular issue. Laterly, the influence of the Senate waned, and the Chamber became all-powerful.

Now, this article contains an innocuous provision regarding the assent of the Indian President. If within six weeks of the receipt of a Bill he sends it back for reconsideration, it is simply stated in the article that the Houses shall reconsider the Bill. This is an incomplete and ineffective provision. No method, by which the returned Bill becomes law, is mentioned. In the U. S. A. it shall have to be passed by a special two-thirds majority. Moreover, the period given to the American President is 10 days for assent. For the Indian President 20, or at least 30 days, will be more than enough. The article may be amended, adding the condition that the returned Bill will become law finally after being passed by a two-thirds majority in each house.

Articles 92 to 96. Articles 92 to 97 lay down the procedure in financial matters. It may at once be said that all these provisions, with incidental changes in phraseology, are taken bodily from sections 33 to 37 of the Government of India Act, 1935. So also are the provisions relating to "procedure generally" contained in articles 98 to 101.

The principle kept in view in enacting these financial provisions was that the Governor-General should have the predominating voice over the Legislature. Now, all those powers are vested in the President. Both in the American and French systems these functions are discharged by special Standing Committees of the Legislature. This is in complete consonance with popular democratic rules. The reason for the departure in our Constitution is not known. The tendency may be for the President to become autocratic, on account of these extraordinary powers. For instance, the schedule of authentication of the budget estimates by the President shall not be open to discussion, or vote, in Parliament, according to clause (ii) of article 94. What is the special sanctity of that authentication? Further, every demand for a grant shall be made only on the recommendation of the President. Why should this be so? These small but deleterious powers may as well be cut off.

Article 97. Matters specified in items (a) to (f) of clause (i) of article 90 are said to require recommendation of the President before introduction. What about item (g) which deals with incidental items? Is it the idea that bills relating to these incidental matters do

not require the recommendation of the President? Why not, when item (g) also comes within the definition of a Money Bill? Whether legislation is incidental or primary, one has the same effect as the other.

The last sentence of this article is redundant, and may be removed, because the same provision is contained in clause (i) of article 89.

According to this proviso, an amendment making provision for reduction or abolition of any tax does not require the recommendation of the President. The intention perhaps is that a reduction or abolition of tax is always considered a popular measure, and therefore the President need not recommend. It is not so. Sometimes, reduction or abolition of a tax is as detrimental to Society as imposition or regulation thereof. So, equal vigilance has to be exercised on all such Bills and amendments. Why should the proviso be restricted only to amending Bills of a particular type? Hence, this proviso may be deleted.

Class (ii) is similar in scope, almost exact in language, as clause (ii) of article 90, except for the addition of the word "amendment". What applies to the Bill must equally apply to its amendment. So the definition of the word Bill should be taken to include "amendment" also. Hence this clause should be deleted. Or, to clarify matters, the words "or an amendment thereof" may be added in clause (ii) of article 90.

If all annual expenditure from the revenues of India requires recommendation of the President; it is reasonable that a Bill involving such expenditure if passed into law should also require the recommendation of the President. If the recommendation principle is given up in the earlier provisions, this clause also becomes unnecessary.

Articles 98 to 101. The provisions contained in articles 98 to 101 are similar to those of sections 38 to 41 of the Government of India Act. Under these articles, the rule-making power is given to the President, the Chairman and the Speaker as the case may be.

Article 99. The question whether Parliamentary business should be conducted in Hindi, English or Hindustani has become a controversial issue. In the first place, English appears to have been given a permanent status in Parliament. When the future of the English language is going to be short-lived. i. e., 5 years or so, in the educational system of our country, why should it be made a permanent medium for conducting our Parliamentary business?

Then, whether Hindi or Hindustani should be the spoken language is the next question. Although the Consenbly decided, and the Drafting Committee adopted, Hindi as the *Lingua Franca* of India, India's Prime Minister Pandit Jawaharlal Nehru put forth a powerful plea for Hindustani (following the footsteps of Mahatma Gandhi) in his speech at Madras on 25th July, 1948. It was since resented by some members of the Consenbly. A keen controversy regarding this is bound to rage at the time of discussion of the Draft Constitution in the Consenbly. The language of Tulsi Das and Kabir Das, whatever name may be given to it, is the language best suited to be the spoken language of All-India. Except for the fact that Hindustani was advocated by Mahatma Gandhi, on the ground that it is a combination of simple Sanskrit and simple Urdu, and therefore an ideal tongue for us, there is no other merit about it. The script also should be Devanagri and not Urdu. I urge that Hindi, in Devanagati script, should be the national language of India. The groundless apprehensions of the Muslims and other minorities need not be taken serious notice of. Sanskrit is the mother of almost all languages of the world. Its predominance in Hindi need not bother any body. The alphabet also is familiar to a vast majority of the people. Others can easily learn it.

CHAPTER III—LEGISLATIVE POWERS OF PRESIDENT

The provisions of article 102 are similar to the ordinance-making power of the Governor-General under sections 42 to 44 of the Govetment of India Act. Articles 39 and

43 of the Chinese Constitution also make a similar provision. The French Constitution also contains such ordinance-making powers for the President. The American President, too, can pass such measures as he thinks expedient on extraordinary occasions. In no other modern Constitution such emergent powers are conferred on the head of a State. Though the power of the President is restricted to a period when the Legislature is not in session, still it is a far-reaching provision with which the President is armed. If there is any such grave emergency, he can as well summon an urgent session of the House of the People. Even if he were to promulgate an ordinance immediately, it must be either in consultation with, or on the advice of, the Prime Minister. Such a direction must also be contained in the article.

CHAPTER IV—FEDERAL JUDICATURE

Generally, in all Common Law States which have developed the rule of law, the Judiciary is independent of the Executive. But in the Prerogative States, a certain branch of the law called the Administrative Law is controlled by the Executive.

Though the powers of a Government are divided into three categories, yet "the separation of powers does not mean the equal balance of powers", according to Prof. Laski. These three Departments act and react upon each other. One tries to control the other. In most constitutional States the Judiciary, though appointed by the Executive, is not removeable frequently, according to the vagaries of political parties. This independence of the Judiciary guarantees the rights of the governed, as it were, in a double way.

The tendency of Judges in all Prerogative States is not to transgress the Administrative Law, but simply to interpret it, whereas in the Common Law States the Judges do make law on the basis of precedents. But this power of the judges is always subject to the law-making power of the Legislature. Even the Legislature is not supreme in Federal States, because it is the Constitution that guides and controls the three organs of State. Thus, the Judiciary is of co-ordinate authority as the Legislature, as in the U. S. A. However, it is not always easy to answer the question whether judges or politicians are the better custodians of democratic ideals.

Under our Draft Constitution, the Judiciary appears to be somewhat dependent on the authority of the Executive and the Legislature, as in a Prerogative State. Once, the Chief Justice of India, Sir Hiralal Kania, on the occasion of the opening ceremony of the Orissa High Court, observed thus: "The actions of the Judiciary were always under the critical and vigilant eye of the people. It was, therefore, improper to put the Judiciary under the Executive." "Disregard of Law, or overlooking the decision of the Judiciary, either by the Executive authorities, or the people," he went on to say, "was bound to endanger the existence of Society as such." He defined the correct position of the Judiciary in relation to the Executive and people, and said that a correct appreciation of that position was necessary in order to avoid conflict. "While on the one hand", he added, "it was the duty of the Judiciary to uphold the actions of the Executive, to the extent strictly permitted by law, because the will of the people has enabled the Legislature to pass the law, it was equally the function of the Judiciary to prevent any excess beyond the limit prescribed by law, as the Executive was given special powers to be used only under special circumstances, and within special limits." How far this principle is kept in mind by the authors of our Constitution one cannot definitely say now.

The appointment of judges by the President, solely or in consultation with the Senate, or other legislative body, as the case may be, is the most feasible method, instead of election, as it obtains in Switzerland and some of the individual States of the U.S.A.

In France, however, the candidates for the Bench of Judges are selected by competitive examination under the direction of the Minister of Justice. Even under the present set-up of the Indian Government, the Law Minister's advice is taken by the Chief Justice in

recommending a name for judgeship. But the Judges cannot be removed by the Legislature or the Executive, but only by the final Court of Appeal (Court of Cassation) acting through a Committee of Judges.

Article 109 : This article defines the original jurisdiction of the Supreme Court over disputes between the Federal and the Provincial States *inter se*. But the proviso makes exception in regard to two kinds of dispute. The proviso can be omitted in its entirety, firstly because that most of the States are now to be incorporated into the machinery of the Indian Union, and, secondly, because any attempt to oust the jurisdiction of the Supreme Court by a contract to the contrary in any treaty or agreement etc. between two States, is opposed to sound constitutional jurisprudence.

Article 121 : In so far as the rule-making power of the Supreme Court is concerned, both civil and criminal procedure will have to be prescribed first. In item (b) clause (1), a provision as to the time-limit of arguments by an advocate is also made after the manner of American practice. Shri Alladi Krishna Swami Iyer's argument against such limitation is irrefutable, and the clause will have to be omitted.

In short, all the provisions contained in this part, as well as the rules of procedure and practice, may well form part of an Act of Parliament. It is enough if the Constitution provides for the establishment of a Supreme Court of Appeal for the country, which works in co-ordination with the Legislature and the Executive. In this view, all these provisions, except one article, may be deleted and incorporated in a suitable enactment called the Federal Judicature Act, with the present High Court Act amalgamated into it.

PART VI — STATES IN PART I OF THE FIRST SCHEDULE

CHAPTER II — THE EXECUTIVE

THE GOVERNOR

The provincial heads called Lt. Governors in Canada are appointed by the Governor-General and hold office during his pleasure. They cannot be removed, except for causes assigned and by a special procedure. In South Africa the provincial head is called the Administrator, and is appointed by the Governor-General-in-Council. The procedure for appointment and removal is similar to that in Canada. This method is not adopted by the authors of our Constitution. They first decided upon direct election by the voters, but the Committee apprehended friction between an elective Governor and a Prime Minister responsible to the Legislature, and therefore suggested the Governor's appointment by the President, from out of a panel of four candidates to be elected by the members of the Legislature of the State concerned.

If the guiding principle of our Constitution is the Federal one, naturally the Provincial Governors should have to be directly elected by the voters. The reason behind the rule is that the Provincial unit is as much independent and autonomous as the Federal unit, and it is but proper that both should have elective heads. If, on the other hand, the Unitary principles were to prevail, the method of appointment by the Union President seems to be an appropriate course. Apart from this, if the people directly elect their Governor, they will realise the responsibility of their choice in course of time, which is fundamental for the growth of healthy democracy. In the system of "appointment" there is scope for much official patronage, and consequent jobbery. The clamour for a strong unified Centre, slowly emerging from interested quarters, can only be for the period of transition, and since the Federal principle is the most salutary basis of our Constitution, it is in consonance with modern democratic rule that the Governors of Provinces should be elected by direct vote as in the U. S. A., and in China, which drew up its Constitution only in 1946 (vide Article 113 sub-clause ii).

Article 141 : This article gives extraordinary powers to the Provincial Governors in the matter of granting pardon etc. As it is, the power seems to be unfettered, because no

conditions are laid down. It extends to all offences against law, over which the Legislature of the State has got jurisdiction. This, in course of time, leads to encroachment into the powers of the Judiciary, and, so, may be omitted. The Provincial head, like the Federal one, should, as far as possible, try to protect and maintain the Constitution, and not to usurp the normal functions of the three main organs of State.

COUNCIL OF MINISTERS

The Provincial Governor will be aided and advised generally by a Council of Ministers in the exercise of his Executive functions, except in two instances: (i) in the appointment and (ii) in the dismissal of Ministers. In these two cases he is said to exercise his functions in his discretion. The validity of acts done by the Governor in his discretion cannot be questioned. His other acts also cannot in any way be challenged. But so far as his discretion regarding appointment is concerned, he is bound to follow the instructions given in the Fourth Schedule.

Article 144. Under clause (i) the Governor shall appoint his Ministers. The appointment will normally be in accordance with the instructions in the Fourth Schedule. Even if the Governor departs from them, nobody can question him under the powers of clause (iv). Then, what is the purpose of the instructions? So, the second half of clause (iv), beginning with the words "but the validity of anything done etc." till the end, may be deleted, in order that the instructions may have some value.

The Governor's Ministers shall hold office during his pleasure. The dismissal of Ministers is a power to be exercised by the Governor in his discretion. No grounds are mentioned as to when a Council of Ministers, or some of them, may be dismissed. Nor does the Fourth Schedule contain any instructions regarding dismissals. The net result of the provision in regard to dismissal is that the Governor can ask his Council of Ministers to quit at his whim and fancy, setting out of course, some petty, ostensible reason. There should necessarily be a specific reason governing the dismissal of Ministers also. It is dangerous to leave it to the sheer discretion of the Governor, without any guiding rule whatsoever.

Articles 143 to 147: These are parallel to articles 61 to 75, with this difference that the former relate to the Provincial Council of Ministers etc., and latter to the Federal Council of Ministers etc. Unfortunately, the collective-responsibility clause expressly stated in respect of the Union Ministry is omitted in articles 143 and 144.

Article 147: The objections raised to clause (c) of Article 65 do also apply to clause (c) of article 147. Clause (a) and (d) are necessary to establish contact between the Governor and the council of Ministers.

CHAPTER III — THE STATE LEGISLATURES

Article 143: It is not decided in this Article as to which of the States should have two houses. The decision is perhaps left to the Comsebly, to be arrived at after discussion with the individual States concerned. Second Chambers in Provinces are not to be found in most of the countries of Europe. They do not exactly serve the purpose of the Council of States of the Union Parliament. The bicameral system need not be considered as a desideratum in the Provincial sphere of government. Second Chambers were created in certain Provinces by the British Government more for their own ends, by allotting seats in the Legislature for certain special interests and for "reserved" representation. Till now, they have been a drag on the speedy and efficient working of the Lower House. They have made the least contribution to sound democratic idealism. The view expressed by Sir Henry Maine that "a well-constituted Second Chamber is not an infallibility, but an additional security" cannot now be applied to the Provincial Second Chambers with any degree of confidence. It is the vicious system of franchise, which brought into existence these Second Chambers, that has been responsible for the stagnant growth of democracy

under the British rule. Now that a uniform system of franchise is to be put into operation, there would be no variety of representative voting, and any voter can choose any candidate he pleases, irrespective of the fact that he represents this or that special interest. The existence of these useless Second Chambers results in the waste of much valuable time of the Legislators. Nothing is lost if they are abolished *in toto* in all the States. The Legislative Assembly itself will hereafter be representative fully of all kinds of interests, according to the wishes of adult voters. If at all there is to be nominated membership, it must surely be to the Legislative Assembly.

Article 150 : This article is unnecessary if the above views are accepted. But the method of nomination mentioned in clause (iii) may be preserved. The constitution of the Legislative Council, wherever it is to exist, is itself unnatural, because the representatives are to be selected by a curious process. The strength of the Provincial Upper Chambers is generally one-fourth (or less) of the Lower one. One half of that strength will be chosen from four panels of specially-qualified candidates, prepared specially for the purpose. But it is not stated who should choose those representatives. One-third of the strength will be elected by the members of the Legislative Assembly by the system of P.R. Is it from among the general public? It is left vague as to wherefrom the candidates under clause (b) have to be drawn. The remaining one-sixth strength shall be nominated by the Governor. He may bring in his own candidates. As the article reads, it cannot be taken to mean that the four panels prepared under clause (ii) would form the source from which the members for a Legislative Council will be elected by the different modes mentioned in clause (a), (b) and (c). The article is unintelligible and will have to be redrafted clearly in case of retention. The meaning of clause (v) is also not obvious. It may be that the panels prepared under clause (iii) will be construed as valid electoral rolls for purposes of a by-election.

Article 151 : The life of the Legislative Assembly may have been conveniently raised from 4 to 5 years, but the reasons adduced by the Committee are singular in outlook. They offer no valid excuse whatsoever to raise the period by one year, if only on the ground that they will have too short a time to do effective work in the line of planned administration.

Clause (ii) confers permanent longevity also on these moribund Second Chambers, with provision to inject fresh blood every 3 years. What is the special object achieved by keeping them alive in perpetuity without dissolution?

Article 155 : The Governor's address at the commencement of every session would, in the very nature of things, be a nice formality. It is further laid down that if any matters are referred to by him in his address, precedence shall be given to them in the transaction of legislative business. With what particular motive this provision is introduced is not easy to understand. The Committee, in the footnote, have not chosen to give us in detail the nature of the usefulness of this provision.

Article 156 : This gives the right of audience and speech to the Advocate-General and the provincial Ministers in the Legislature of the State, or any committee thereof. But they are not entitled to vote. In the first place, a similar provision is not made in respect of the Federal Ministers and the Attorney-General. In the second place, the Advocate-General of a Province is given bigger status than the Attorney-General in India, in that the former can take part in the proceedings of the Legislature. Again, while it appears from this article that the Provincial Ministers have no right to vote, no such provision is made at all in regard to the status of the Federal Ministers. If both the Federal Union and the Provincial States are deemed to be equal in constitutional status, it is not understandable why this invidious distinction is maintained.

Articles 157 to 187 : The provisions of these articles are similar to those made in respect to the Union Legislature in Articles 73 to 102. The remarks made with reference to the latter do, *mutatis mutandis*, apply to provision relating to the State Legislatures. In

it may be said that the State Legislatures are treated as on a par with the Union Legislature, in view of the exact parallel provisions drafted for both. This factor is to some extent reminiscent of the Federal form of our constitution.

CHAPTER V.—PROVISIONS IN CASES OF GRAVE EMERGENCY

Article 183 : This article is an exact reproduction of Section 93 of the Government of India Act. The power entrusted to the British Indian Governors under that section was condemned outright by all freedom-loving people in India. It is, to say the least, strange, how the authors of the Draft Constitution of Independent India have reconciled themselves to incorporate a most reactionary and anti-democratic provision in it. The Governor must first be satisfied that a grave emergency threatens the "peace and tranquility" of the State and that it is not possible to carry on the Government of the State, in accordance with the provisions of the Constitution. It may be argued that in the case of a breakdown of the constitutional machinery, the head of the State must be equipped with sufficient authority to carry on the government, as otherwise anarchy would prevail. True it is that the Governor must be clothed with certain extraordinary powers to tide over a crisis, but that cannot be a pretext to make him an autocrat, with arbitrary powers to suspend and revive the Constitution at his discretion. Such discretionary power, without the exact definition of the expressions "grave emergency" and "peace and tranquility", is another name for the dictatorship. But the Governor cannot, under the exercise of this power, suspend the operation of the provisions of the Constitution relating to the High Court. In no popular constitution of the world do we find a provision similar to the one made in this article. One cannot see why our constitutional experts went out of their way and thought fit to perpetuate the spirit of Section 93 of the Government of India Act. In their anxiety to produce a thorough and exhaustive Constitution, applicable in the case of every conceivable contingency, they perhaps thought the Government of India Act 1935 was the best of the lot, ready at hand to resort to. But they little realise the slavish mentality which is actuating them from underneath, in relying upon that imperialistically-interwoven document, as our constitutional Bible. If the "peace and tranquility" of a State are so endangered and a so-called "grave emergency" occurs, then the people decide the state of the State for themselves. No Constitution and no Governor can save the situation single-handed. It is poor imagination to think that when the whole State has gone to dogs, the Governor alone would sit tight in his seat and try to save the ship of State from being wrecked. What can he do when he has neither oars, nor rudder? Even the High Court machinery is inadequate to cope with such a catastrophic situation. The entire article may be deleted without any the least compunction.

CHAPTER VI — SCHEDULED AND TRIBAL AREAS

Articles 189 & 190: These two articles provide for the special administration of the scheduled and tribal areas. These tribes are found scattered over the length and breadth of India, coming within the ambit of every one nine individual States. The Fifth and Sixth Schedules specifically provide with the details of administration of these areas and their people. It is necessary, no doubt, that for some time a separate administration should be provided for them, but it cannot be a permanent feature in our democratic Constitution. Steps must be taken to liquidate soon the backwardness of these classes of people. Unless a time limit is fixed, before which the said areas and their people are required to come within the operation of the ordinary mechanism of the Constitution and its laws, there will be no sharp incentive for the administrators of these areas to work for speedy uplift of innocent, Nature's children, living in naked poverty and squalor.

CHAPTER VII — THE HIGH COURTS IN THE STATES

Articles 191 to 209 : These articles relate to the constitution of the High Courts in the States. The provisions are the same as those which obtain at present under the High

Courts Act and other connected legislation, except for one or two changes. These provisions also may be deleted.

Under article 193, the age limit for the retirement of the High Court Judges is fixed to be between 60 and 55. The minimum and maximum limits are given, and each State will have to fix its own age limit by a law of its own Legislature. This is a quixotic provision. Since the margin is only 5 years, more than one State will necessarily have to adopt the same age for retirement, and there are no pressing reasons, climatic or otherwise, which compel the adoption of such a rule, except to give a small power to be exercised by the Legislature over the Judiciary. It is better, therefore, to make it a uniform rule, applicable throughout the Indian Union, by fixing the age limit at 65.

Article 196 imposes an undesirable restriction. It passes one's comprehension as to why a person who sat on the High Court Bench for some time, should not be allowed to appear before any Court or authority within the territory of India. There would have been some meaning, in one sense, if he was precluded from appearing in the Court in which he sat as a Judge. This sweeping constitutional prohibition is undemocratic. I am not in favour of even a partial prohibition. So, the whole article may be deleted.

Article 200 contains a new provision which enables retired Judges to come occasionally to the help of the Chief Justice of a High Court, and to dispose of cases. But the circumstances under which the Chief Justice may call upon a retired Judge of his Court to sit and act as a Judge are not set forth. The article merely says that the Chief Justice may request him "at any time". The power conferred is too arbitrary. It is better some limits or conditions are mentioned, for example, as when there is heavy accumulation of arrears of cases, when there is a special or technical point of law involved in a case, or for some such other reason. No time limit for such acting is fixed in the article. For ought we know, this also is left to the sweet will of the Chief Justice. Such arbitrary power, as is given to the Chief Justice under this article, not only leads to a kind of nepotism under the existing state of affairs in the country, but also reflects badly upon the competency of the existing members of the concerned High Court bench. Since more harm than good is likely to flow from such a provision, it may as well be deleted. Further, no question of remuneration or salary for the period of sitting is touched upon in this article.

PART VII—STATES IN PARTS II AND III OF FIRST SCHEDULE

Articles 212 to 214: These articles relate to the Chief Commissioner's provinces and such princely States as have acceded to the Indian Union by the time of the Drafting Committee's report. If Part II territories have to be administered still as separate units, there is no other way except the one proposed hereunder. But the view is expressed earlier that these territories may be amalgamated and included in Part I itself. In view of the subsequent mergers and consolidation of almost all the princely States, Part III of the First Schedule will have to be completely recast, and with it article 212 clause (ii) also will have to undergo a change. Under the Draft, a princely State, or a union of such States, which has acceded to the Indian Union shall be administered as if it were a territory included in Part II. Such a kind of administration as is now going on in the Chief Commissioner's provinces cannot at all be applied to the large Unions of princely States which have since joined the Indian Union. It is hoped that the Drafting Committee itself must have been at work by now to absorb all the old Indian States into the new constitutional set up, without further complication or trouble.

PART VIII—TERRITORIES OF PART IV OF FIRST SCHEDULE

Article 215: The President is empowered under this article to administer the Andaman and Nicobar Islands and such other territories as are not mentioned in Part IV, but which come within the jurisdiction of the Indian Union from time to time, through a Chief Commissioner. Steps will have to be taken to bring them in line with the self-governing States as early as possible.

PART IX—RELATIONS BETWEEN THE UNION AND THE STATES

The fundamental principle underlying the field of legislative action in accordance with a Federal constitution is that the Federal Union and the State Units are of co-extensive authority, and that the State Legislature is in no way subordinate to the Federal Legislature, in so far as its own exclusive legislative field is concerned. In other words, there is no delegation of powers by the Federal authority to the State authority, and both are supreme and *sui juris* within their respective fields. Nevertheless, certain extra territorial powers are found conferred on Federal legislatures in most modern constitutions, but only under extraordinary circumstances. This principle is recognised in our Draft Constitution also.

Then, as regards the scheme of distribution of legislative power between the Federal and the Provincial legislatures, however soundly and equitably the subjects are listed, conflicts are bound to arise in the actual exercise of authority from time to time. The remedy for such conflicts can only be had through the Supreme Court of the land.

The actual method of allocation of legislative power adopted by the framers of the Draft Constitution is peculiar. It is practically unheard of in any of the federal constitutions of the other parts of the world. It is, of course, an exact copy of the sections and schedules contained in the Government of India Act, 1935, which, in this respect, is subject to the strong criticism stated earlier. The fact that there is no exact precedent for this kind of partition of legislative power in other federal constitutions cannot be a comforting factor for us, because the more complicated the division the greater is the trouble in the exercise of power. The division of power in the Draft Constitution has a near resemblance to the division under the Canadian Constitution, but even this is not complete.

Two principles are usually followed in the matter of legislative distribution by other federal constitutions. One is to specifically enumerate the Provincial or State List, and to leave the residual powers to the Federal Legislature. The other principle is the exact converse of the above. The Canadian constitution is an example for the first principle. The Australian and the American Constitutions are the instances of the adoption of the second principle. Even though the British North America Act grants residual powers to the Dominion Legislature, it is not satisfied with a bare mention of that statement. Indeed, section 91 lists 29 subjects as coming within the exclusive jurisdiction of Dominion Parliament. This is said to be by way of greater certainty for the exercise of residual powers. Thus, there are actually two lists of subjects in the Canadian Constitution, (i) the provincial and (ii) Parliament lists, though the Canadian Parliament is deemed to possess the residuum of legislative power. There are however two subjects, immigration and agriculture, over which both the Provincial and the Dominion Legislatures have got concurrent jurisdiction. In cases of conflict of legislation on concurrent subjects, a rule is made that the Dominion law should prevail over the provincial law.

Here, the Government of India Act chalked out a new path, by exhibiting three long lists of subjects in the Seventh Schedule, i. e. the federal, the provincial, and the concurrent. The same enumeration is brought in tact into the Draft Constitution, with a slight change of "Federal list", being termed the "Union list". The pity is that the joint field of operation for the State and the Union legislatures is wide enough to give rise to frequent disputes. The concurrent list contains as many as 37 subjects. If we just examine the background motive which, in the opinion of Sir Samuel Heare, necessitated the three-fold division of subjects in the Seventh Schedule of the Government of India Act, 1935, we find that it was a device invented to balance the ever-conflicting Hindu and Muslim opinion, Sir Samuel Hoare, who is considered to be the father of the 1935 Constitution, himself admits, during the course of his evidence to the Joint Select Committee that this division is unnatural, unprecedented and unnecessarily complicated. He frankly deposed that the Muslim interests strongly advocated for the residual powers being vested in the Provinces, while the Hindu protagonists hotly

contested for the same being vested in the Federal Centre. Having failed in various attempts to reconcile the opposing view-points and making them agree to a two-fold division of subjects, he went on to say, he was forced to hit upon this plan to satisfy both the parties outwardly. There being no other go, the Indian representatives had to bow their heads unwillingly. That is not all. Sir Samuel Hoare also expressed his view clearly that this division, being unsound, gives rise to frequent conflicts between the Federal Union and the Provinces. These are his actual words: "We find that we have really exhausted the ordinary activities of government in the three other fields. I agree with my honorable friend that it means complications. I believe that it also means the possibility of increased litigation." Yet, he thought it was inevitable then!

Now, after the partition of India, with the Muslim League having been eliminated, it is surprising how the authors of the Draft Constitution chose to retain that pernicious device specially improvised in the Government of India Act with an ulterior purpose. There is no other reason suggested for this unwholesome method of legislative distribution, either then or now. What is the necessity now to hold on to this unconstitutional expedient in Independent India? Have the members of the Drafting Committee at least bestowed a little thought over this aspect of the question? Whole generations may have to suffer from this blind folly of a few individuals. Even now it is not too late to reshuffle the three lists and make them into two. It is much better if one exhaustive list is prepared, either for the Provinces, or for the Centre, with all the other subjects declared to come under the residuary list. Before doing so, our legislators will have to come to a decision with regard to the vesting of residuary power, whether it is to be in the Provinces or in the Centre. If the Seventh Schedule is amended on the lines indicated above, some of the articles in this chapter will have to undergo necessary alterations. The method of classification of the subjects in the three lists is without any rhyme or reason. Many of them impinge upon each other from the point of view of their meaning and language. The subjects are put down without any technical or even alphabetical arrangement.

Article 216: This article defines the territorial jurisdictions of Parliament and the State Legislatures. Parliamentary laws apply to the whole or any part of India, while State laws are confined to the particular State for which they are intended, as per clause (i).

The meaning of clause (ii) is a little obscure. A law passed by Parliament must *ipso facto* apply to the whole territory of India, unless it is limited to a part thereof. Where, then, does the question of extra-territorial operation come in? Is there any territory, in the first place, within the political boundaries of India which is outside the jurisdiction of Parliament? If there is any such in existence, then the question of extra-territorial jurisdiction comes in. Are we to understand then, by extra-territorial operation, an operation of Parliamentary law over a subject comprised in the State list? Anyhow, clarification of the clause is essential.

Article 217: This article, though cumbrous and confusing in its construction, in effect confers powers of legislation on Parliament and the States over the Union-list and State-list subjects. Clause (ii) gives concurrent jurisdiction to Parliament and States over list (iii) subjects.

Clause (iv) again is not happily worded. Does the clause "any part of the territory of India, not included for the time being in Part I or Part III of the First Schedule" mean, territory covered by Parts II and IV, or the territory of the non-acceding Indian States as at the time of the drafting, or both? The subject matter, in respect of which Parliament has power to make law, may be any subject matter, though enumerated in the State list. This is another special power given to Parliament to legislate. This is not considered an encroachment by Parliament into State jurisdiction by the authors of the Constitution. A clarification must be made with regard to the extra-territorial jurisdiction of Parliament under this clause. It is

this two-fold jurisdiction, territory-wise and matter-wise, not clearly delimited, that causes much confusion.

Article 218 : This article is redundant in view of article 217. Entry 52 of the Union list is the subject matter of this article. Article 217, together with entry 52, means the same thing as article 217. Hence, it may be deleted.

Article 219 : This article gives power to Parliament to establish additional Supreme Courts for the special purpose of administering Parliament laws, or existing laws relating to Union list subjects. There should be only one Supreme Court for the Union. Power to establish additional Courts, for the better administration of law, means the undermining of the authority of the Supreme Court by Parliament. This is yet another instance of the Legislature trying to get the better of the Judiciary through overriding powers provided for in the Constitution itself.

Article 220 : This article may be omitted, inasmuch as its effect is already achieved by virtue of article 217, coupled with entry 2 of the States list. Clause (ii) may be clubbed with article 217, and added as clause (v).

Articles 221 and 222 : These articles are also unnecessary, inasmuch as the subject is covered by article 217, coupled with entries 1, 2, 4 and 5 of the concurrent list, and also by the corresponding entries of the other lists.

Article 223 : Under this article residuary power is vested in Parliament. In accordance with the Federal principle it should vest in the States and not in the Federal Union. This is another instance where the Unitary principle in our Constitution gets the better of the Federal one.

Article 224 : This article will have to be completely recast, in view of the recent mergers, union and accessions of Indian States.

Article 225 : With regard to Part III States, it is enough if this article alone is retained. But it is essential that the agreements under the Instruments of Accession, entered into by the various States, should in course of time be drastically changed so as to enable those States to come into line with the Provinces. The Princely States should not remain for long as anachronisms in Independent India.

Article 226 : This article gives overriding power to Parliament to legislate upon State subjects, if it is so declared by two-thirds of the members of the Council of States. It is curious why the Council of States alone should decide on the expediency of legislation under this article. In fact, this reservation of power to legislate on State subjects is yet another example where the Federal Union tries to entrench on State authority, and to establish a Unitary type of government in due course.

Article 227 : This article can more appropriately be included under Part XI. It is not clear why under clause (ii) the Emergency legislation should be in force till six months after the cessation of the operation of the Proclamation.

Article 228 : The object of this Article will be achieved if the words "and not the Legislature of a State" are added after the word "Parliament" in both article 226 and clause (i) of article 227.

But the general issue raised in respect of articles 226 to 228 still remains there. Why should Parliament intervene and legislate over State subjects, under the plea that there is an expediency of national interest or a Proclamation of Emergency? In both the cases, the Parliament and the States can effectively discharge their legitimate legislative functions in their respective spheres of action. In this view, all the three articles may be deleted.

Article 229 : This article, again, confers jurisdiction on Parliament by the consent of the State concerned. It is an instance of the creation of parliamentary authority by

surrender of power by the State. The Unitary principle again is given the emphasis. The State, if it is wanted to be truly democratic in character, should protest against this kind of sly and insidious encroachment by the Central authority. The whole article may be omitted.

Article 230: Clause (i) of this article provides a solution in cases of inconsistency between the Federal and State laws. It rightly declares that the Parliamentary laws should prevail and that the State laws, to the extent of repugnancy, be void. Clause (ii) and the proviso are absolutely unnecessary. Clause (ii) *prima facie* deals with State powers over concurrent subjects. It says that initially State legislation shall prevail, but only till the Parliamentary law is enacted. In the case of conflicting laws, the Parliament and the State should not be made to run a race for priority effect. Clause (i) determines, once for all, as to which of the two conflicting laws shall prevail.

CHAPTER II—ADMINISTRATIVE RELATIONS

Article 223: This article deals with the respective executive powers of the Union and the States. It does not divide the power by metes and bounds, as it were, but creates merely a "division in status", thereby giving scope to frequent squabbles as between co-owners.

Article 234: The meaning of this article is not quite intelligible. Why should it be presumed that the State exercises its executive power in a manner prejudicial to the power of the Union? Having presumed an imaginary and improbable contingency, the Union arms itself with the additional power of giving directions to the State as if it is superior in status. Parliament is fully competent to exercise Executive power over its laws, and it will have its own machinery for the purpose. This appears to be an over-cautionary safeguard preserved for the Union. The authors of the Draft Constitution seem to be more in favour of a Unitary type of government for India. But why should they fight shy of it? It is not constitutional propriety that they should try to introduce the Unitary principle by circumlocutory methods. It is not a question of personal bias or inclination. What is the most beneficial type of government for a country like India is the question to be tackled. The people's will must be respected. A plebiscite on the issue of the form of government of India would not be a flippant idea. Clause (ii) and the proviso are out of place in this article and may be omitted.

Article 235: This article deals with the entrustment of certain functions by the President to the State governments or their officers. It also contemplates the conferring of powers and imposition of duties upon State's officers and authorities by Parliamentary laws. It is a sort of delegation of Union Executive power to the States, like the senior partner of a firm asking the junior partner to do some work on his behalf. What are the Federal services for? Why should the Federation attempt to boss over the States wherever opportunity arises? This is not conducive to true democracy. Moreover, what is meant by entrustment of functions, conferring of powers and imposing of duties is not stated clearly. This wide reservation of power by Parliament may ultimately convert the various State governments into so many subordinate branches of the Government of the Union. Clause (iii) provides for the allocation of expenditure for the agency business done by the State.

Article 236: This article gives Legislative, Executive and Judicial power to the Union over Part III States of Schedule I, and also over those not mentioned in the Schedule. In view of the settlement arrived at with all the Princely States, clause (i) will have to be recast, and clause (ii) will have to be omitted because, by the time of the passing of the Constitution, there will be no territory in India which is not included in the one or the other of the four parts of Schedule I. Clauses (iii) and (iv) may be clubbed with clause (i) in redrafting.

Article 237: This article recognises the authority of Part I States to enter into agreement with Part III States in respect of State or concurrent subjects. On an agreement

having been entered into, the Part I States shall have the three-fold power over the Part III States in respect of the particular subject-matter. (*Vide* article 225 parallel provision *in re* Parliament)

Article 238: This article provides for some procedural matters. This need not be a constitutional provision. The same can be incorporated in the Evidence Act, which is applicable to the whole of India.

Articles 239 to 242: These articles deal with particular matters which can better form part of the civil laws of the country. What is the necessity for the special provision regarding water-supplies? When there are so many allied subjects, is this the only item which becomes the subject-matter of controversy? This extraordinary power given to the President would certainly undermine the Independence of the Judiciary. The general tenor of the Constitution seems to be to make the Legislature and the President supreme over both the Executive and the Judiciary through subterfuges. The reason for introducing these provisions relating to water-supplies alone is not made out. There is no harm in deleting all the four articles.

Article 243: This article enunciates the principle of non-discrimination in trade or commerce. This can very well be included in Part II as a fundamental economic right. It can easily be clubbed with article 16.

Article 244: Clause (i) of this article confers rights on a State to levy excise or customs duties on imported articles. This can be added as a proviso to article 16, after being clubbed with article 243. Clause (b) may be converted into a separate article, but it is more proper that this also should be added as a proviso to article 16. Since the temporary and transitional provisions have no place in a permanent constitution, the proviso can even be deleted.

Article 245: It provides for machinery to carry out the objects of articles 243 and 244. Since they have to be transferred to Part III, a general provision applicable to all the articles of Part II may be devised. I think that such machinery is unnecessary because of the existence of the Supreme Court, which is the best custodian of all the rights of all the parties. So this article may be omitted.

Articles 246: This article suggests the establishment of a Council to enquire into inter-statal disputes. The President appoints and instructs it. After all, its business is to make recommendations to the President. This is another case where the President, through a parallel institution called the Inter-State Council, wants to by pass the Supreme Court, and assert his superiority. This kind of usurpation of judicial authority cannot be tolerated by any democratic citizen. The President can as well get the enquiry done through the Supreme Court, or the Chief Justice himself, in the exercise of his authority under article 119. So this article may be deleted.

PART X—PROPERTY, CONTRACTS AND SUITS

Federal finance is a tough subject. The allocation of public revenues between the component parts of the State in an equitable manner always confronts us as a thorny problem. A sound financial structure for the Federation of any country must have, as its bedrock principle, a compromising spirit. The Centre and the Units must work with mutual co-operation and goodwill. Differences are bound to arise, but the genius of civilised democracy lies in adjusting the conflicting claims through a policy of give and take, by submitting to some common and agreed formula of arbitration. It is commonly said that there is no public finance without a government, and that there is no government without public finance. The stability of a government is in accordance with its financial status. The Government of India under the British rule could not claim to boast of a sound financial system. The White Finance Ministers always shaped their policy in India in such a way that they did ultimately

ensure the benefit of their mother country. They, however, took care to see that the institution of the Government of India itself ran efficiently, without financial breakdown, by providing for the day-to-day administration with ample funds.

At the time of framing of the Government of India Act, 1935, the British authors had necessarily to bear in mind the implications of a Federal constitution in drafting the financial provisions. They tried to strike a balance between the Federal Centre and the Units, as far as they could. The existence of the old Indian States in India presented a problem to those constitutional experts. It was not faced in any other country. It must be said to the credit of the authors of the 1935 Constitution that they ultimately evolved a fairly workable financial machinery for the Federation, as well as the Unit States. This is the only bright feature, if one may say so. The authors of our Draft Constitution had no difficulty in copying *verbatim* those carefully-drafted provisions regarding finance, property, contracts and suits of the Government of India. Put in a nutshell, the scheme of Indian financial administration covered the classification under three heads: (i) Imperial; (ii) Provincial; and (iii) Divided (a plan prepared by Lord Lytton), with a further improvement thereon in the Montagu-Chelmsford Reforms. The 1919 Constitution swept away with the common sources of revenue to be divided among the Centre and the Provinces, and even conferred borrowing powers on the Provinces. This liberty given to the Provinces later on mobilised itself into an agitation for contributions to the Provinces from the Centre, which led to the Meston Award subsequently. It is this system that forms the basis of the new financial provisions. The Committee has deliberately avoided to embody the recommendations of the expert Financial Committee in this Draft. The reason given by them is the present unsettled conditions of the country. In the new set-up, certain old sources of revenue, like salt, opium and liquors, have been lost both to the Centre and the Provinces. New sources had to be tapped. The Centre proposes to augment its purse by imposing new kinds of taxes, called Succession and Estate Duties, and also the Corporation Tax. The Provinces discovered a fruitful source of revenue in the sales Tax. Apart from this the borrowing and credit position of India, the balance of trade that is being maintained, the development of internal economy, the present industrial conditions in the country and the various other post-Independence problems have to be carefully studied before a new financial policy is adumbrated for the Union of India. The authors of the Draft Constitution must have certainly all these factors in mind; and it is provided in article 260 for the appointment of a Financial Commission at the end of every five years from the commencement of the Constitution. So, for five years to come and until normal conditions set in, the old system of financial administration will continue. And nobody need cavil at this proposal. But in the meantime the forward and revolutionary pieces of reform carried out by various Provinces must perforce disturb the existing smooth financial relationship between them and the Centre. So, unless there is an agreement between the Provinces and the Centre, even with regard to Legislative reform, conflicts are bound to crop up when it comes to a question of financial help. The latest example is a conflict which is likely to accentuate between the Centre and the Province of Madras. The Centre recommended the dropping, for the present, of the Zamindari Abolition Bill and the Prohibition Extension Scheme, on the ground of want of finances. The Premier of the Province insists upon going ahead with the two reforms, irrespective of the financial consequences, without heeding to the advice of the Union Government. This will soon be an interesting constitutional problem for study.

PART XI—EMERGENCY PROVISIONS

This Part legalises the invasion of Provincial jurisdiction by the Federal Legislature under certain extraordinary conditions, i.e., when the security of India is threatened by war or domestic violence. It is beyond dispute that in the event of a national emergency such a power should vest in the Federal Legislature. The Canadian and the Australian Constitutions do not contain any express provisions in that regard, but they were so interpreted from time to time that the Central Legislature was held to possess inherent jurisdiction, to

assume authority for legislation for the whole country in times of national peril. But from the point of view of Constitutional Law, the doubt is still raised whether even in the case of "domestic violence" the Union Legislature, and not the State Legislature, should be invested with authority. Further, the discretionary powers of declaring that a "grave emergency" exists or is impending vests in the President. This certainly is an interference with the autonomy of the States by the Union Centre. But, since the period of Proclamation of Emergency is fixed to be six months, it cannot be said that this provision is a total violation of the Federal spirit of our Constitution. The American Constitution (original) recognises a broad power in article (i) section 8, clause 18, on the same principle. But it is not so specific. "The United States Government (Congress) shall have power to make all laws which shall be necessary and proper etc., and all other powers vested by this Constitution in the Government of the United States" etc. Under article 278, the Governor of a State in Part I of Schedule I can also declare an emergency in his State, but the reason is different. It must be on the ground of failure of Constitutional machinery. He must report it to the President, who will then take up the Administration of the State. This is something similar to Section 93 of the Government of India Act 1935. One can understand the existence of a State of War for a country. But it is difficult to gauge the intensity of domestic violence, or the impossibility of carrying on the provisions of the Constitution, and correctly declare an Emergency, for any single individual however highly he might be placed. This is yet another instance which slowly tries to set at naught the Federal principle.

Articles 279 & 280 : The suspension of the exercise of fundamental rights also during the continuance of Proclamation of Emergency sounds like a dictatorial power reserved for the President and the Governors.

PART XII — SERVICES UNDER THE UNION AND THE STATES

Detailed provisions *in re* public services have no place in a solemn constitutional document. They can be made the subject matter of separate legislation, and so can be delated from the Draft. The Committee also rightly held the same view.

PART XIV - SPECIAL PROVISIONS RELATING TO MINORITIES

In the face of the vociferous claim that the Indian Union is a secular State, this Part of the Draft relating to special provisions for certain religious minorities is, to say the least, ludicrous.

For a period of ten years these safeguards cannot be touched. Afterwards, they will continue if the Constitution is amended to that effect, or else they automatically cease. One cannot visualise any legal justification for such privileges to these religious minorities. Is there any guarantee that after ten years this separatist tendency, on the ground of religious prejudice, will disappear? On the contrary, it may get hardened, and result in a solid revolt at the end of the prescribed period. There is absolutely no ground for preserving these dangerous and irritating safeguards any longer in Independent India. Gratuitous sympathy, or traditional sentiment should not ignore the basic principle of a democratic Constitution. The Moslems, the Scheduled Tribes, the Anglo-Indians and the Indian Christians should feel like Indians first and Indians last, if they are really patriotic. They should feel these extra advantageous provisions as a slur upon their true patriotic sentiment and must themselves agitate for their removal. In the usual course of administration they may be given greater opportunities to come on a par with the rest of the community in all spheres of activity. But that does not justify a constitutional guarantee, even though for a period. The period of ten years is too long. If at all, five years is more

PART XVI — AMENDMENT OF THE CONSTITUTION

Every Constitution should contain provision for amendment. But a Constitution by its very nature, cannot be interfered with every now and then. Though the authors of the Constitution usually think that they have provided for all humanly imaginable contingencies, but still doubts and difficulties do arise in the course of its working, because human ingenuity and human needs are subtle and limitless. So, in the light of experience it is but proper that the Constitution should be amended so as to subserve the needs of society. In order to gain sufficient experience, a minimum period for the working of the Constitution should be allowed before one thinks of amendment. Article 304 of the Draft Constitution does not provide for any such period. The procedure laid down for the amendment is not also sound. In the matter of passing amendments, a distinction is observed in regard of the nature of amendment proposed. But in no case is the amendment sought to be placed for the approval of the electorate, which is the ultimate sovereign power of the land under any democratic system. This leads us on to a reference to provisions relating to Referendum, Recall and Initiative. Whenever a fundamental democratic right is involved for decision, one or other of the three aforesaid modes is resorted to, and the Constitution should provide for the necessary machinery. Our drafters have completely forgotten these provisions, and they cannot be blamed if they thought it sufficient to intelligently copy the provisions of the Government of India Act, 1935. Article 306 may be omitted from Part XVII, because it is of temporary operation. It cannot be called a constitutional provision in a true sense.

It is fervently hoped that the Consenbly will persuade themselves to think deeply as democratic citizens, and try to set right the Contitution in the light of the cursory criticisms offered above. This will be a sacred duty to discharge in the name of the thirty odd crores of people of Bharata Khanda.
