A SOVEREIGN BODY

Assumption of Power

In order to make the transfer of power "smooth" and utilise Mountbatten's services in the transition period the Congress leadership proposed that Mountbatten would continue as the Governor-General of India for some-time. This led to an interesting discussion in the Constituent Assembly.

On 31st July, 1947, the concluding day of the fourth session, while the programme of Independence day was announced by President, Mahavir-Tyagi (U.P., General) objected to the proposal of 'inviting' Mountbatten to take up the Governor-Generalship of India. He said:

"Can you kindly spare this House the part of the programme according to which we are required to invite Lord Mountbatten to be our Governor-General in future; because this House has never discussed that question; nor has the House passed so far, any resolution, nor
agreed to the idea, of Lord Mountbatten being the
Governor-General of India? ....." (1).

He later explained that he was not recording
any objection on behalf of the House to the acceptance
of Lord Mountbatten as the Governor-General of India. "That
thing has already been done ........ What I was suggesting
was that you had better drop the idea of going through
that item of programme in which, you say, on behalf of
this House, Lord Mountbatten was to be invited to accept,
the Governor-Generalship. I think he has already done it
and this formality may better be given up, because this
House has never discussed the issue, and if without the
House having considered this issue, he is invited, this
will be too formal and in my opinion slightly unfair....(2).
Most of the members were, however, reluctant to discuss
the question. Finally, they authorised the President to
chalk out the programme of independence day celebration.
On August 14 at 11 P.M. the Constituent Assembly met and
decided upon the formalities of the transfer of power.

(2) Ibid., p. 1046.
As the clock struck twelve, President and Members stood up and took the pledge of service to India and her people. Then the President proposed "that it should be intimated to the Viceroy that -

"(1) The Constituent Assembly has assumed power for the governance of India, and

(2) The Constituent Assembly of India has endorsed the recommendation that Lord Mountbatten be Governor-General of India from the 15th August, 1947 and that this message be conveyed to Lord Mountbatten by the President and Pandit Nehru" (3).

On August 15, Mountbatten addressed the Constituent Assembly. He first read out a historic royal message:

"On this historic day when India takes her place as a free and independent Dominion in the British Commonwealth of Nations, I send you all my greetings and heartful wishes".

The significance of Mountbatten's own speech lies in his acceptance of the status of a constitutional head:

"From today I am your constitutional Gover General and I would ask you to regard me as one of yourselves, devoted wholly to the furtherance of India's interests. I am honoured that you have endorsed the invitation originally made to me by your leaders to remain as your Governor-General .......... while discussing the Draft of the India Independence Act your leaders selected the 31st March, 1948 as the end of what may be called the Interim period. I propose to ask to be released in April." (4).

**New Status of the Constituent Assembly:**

On 20th August, 1947, Mahavir Tyagi, K. Santhanam and other members raised the question of the status of the Assembly after the transfer of power in respect of its ordinary legislative and constituent functions. Consequently on the same day (20.8.47) President appointed the Committee consisting of Mavalankar, Hussain Iman, P.D. Thandon, Ambadkar, Alladi Krishnaswai Ayyar, Gopalaswami Ayyanger and

B.L. Mitter "to consider the Indian Independence Act, the adaptations of the Government of India Act, 1935, the Rules and standing orders of the Legislative Assembly, the Rules and standing orders in force in the Constituent Assembly etc. and report on the procedural matters" (5).

On 29th August, 1947, Ambedkar submitted the report of the same committee which made five recommendations:— "Its first recommendation is that it is open to the Constituent Assembly to function as Legislature and that it should function as such; (2) that while functioning as Legislature it should adopt the rules of the Legislative Assembly as far as possible with necessary amendments; (3) the necessary amendments should be made under the orders of the President of the Constituent Assembly; (4) the work of the Constituent Assembly as a constitution-making body and as an ordinary legislature should be separated and should be considered in separate session to be held in separate days;

(5) Ibid., p. 34 and p. 59.
(5) the power of prorogation should vest in the President and not in the Governor-General as found in the Adaptation of the Government of India Act "(6).

In the debate that followed, Ambedkar, speaking in reply to a question by Lakshmi Kanta Moitra, assured the House "that we have got the power to change the adaptations, The Government of India Act with its adaptations is not entirely binding on us in the sense that a change is not beyond our purview. If the House, on a reconsideration of the matter, finds that certain adaptations ought to be changed, it would be possible to undertake that provision". He also said that there was a theoretical possibility of conflict between the President of the Constituent Assembly and the Speaker of the Legislature but that could be avoided in practice. He also said that the Constituent Assembly would work in the dual capacity so long as the constitution-making was not complete (7).

(6) Ibid., p. 337.
(7) Ibid., pp. 357-8.
In view of the Report (8), therefore, the House passed a resolution to the effect that the Assembly's functions would be:

(a) to continue and complete the work of Constitution-making which commenced on 9th December, 1946 and

(b) to function as the Dominion Legislature until a legislature under the new constitution came into being.

The business of the Assembly as a constitution-making body should be clearly distinguished from its normal business as the Dominion Legislature, and different days or separate sittings on the same day should be set apart for the two kinds of business. Suitable provision should be made in the Rules of the Constituent Assembly for the election of an officer to be designated the Speaker to preside over the deliberations of the Assembly, when functioning as the Dominion Legislature.

(8) Ibid., pp. 359-60.
The power of summoning the Assembly for functioning as the Dominion Legislature and proroguing it should vest in the President. Ministers of the Dominion Government, who were not members of the Constituent Assembly, should have the right to attend and participate in its work of constitution-making though until they became members of the Constituent Assembly, they should not have the right to vote.

"Necessary modifications, adaptations and additions should be made by the President of the Constituent Assembly to the Rules and standing orders of the Indian Legislative Assembly to bring them into accord with the relevant provisions of the Government of India Act adopted under the Indian Independence Act, 1947....."

Membership Enhanced

During the sixth session of the Constituent Assembly representation from West Bengal and East Punjab was enhanced. On January 27, 1948 Ananthasayanan Ayenger proposed that, as West Bengal's representation had been fixed by the June 3 statement at 19(15 General & 4 Muslim)
on the basis of a border that afterward was changed by the Boundary Commission, she became entitled to representation of 21 members (16 General and 5 Muslim). The House therefore ordered the election of 2 more members (1 General and 1 Muslim) from West Bengal. Inspite of its competence to do so the House did not drop the principle of communal elections (9).

On the same day Giani Gurumukh Singh proposed that, as East Punjab's representation to the Constituent Assembly had been fixed by the June 3 declaration at 6 General, 4 Muslim and 2 Sikh seats on the basis of a boundary that afterward was revised by the Boundary Commission and as the population composition of East Punjab was changed due to the two-way migrations of people, she became entitled to a representation of 8 General and 4 Sikh members (10).

President added on this point that the case of East Punjab came before the Steering Committee which

(9) Constituent Assembly Debates, Vol. VI., p.3.
(10) Ibid., p. 5.
appointed a Committee to examine the question. The sub-committee suggested this increase of the General and Sikh representation though it did not suggest the reduction of the Muslim representation as the four existing Muslim members of the Constituent Assembly from Punjab had long been keeping absent (11). The House passed this resolution too. Thus representation from the Indian mainland to the Constituent Assembly rose to a strength of 235. All new-comers save one Sikh, belonged to Congress. The four Muslim seats from E. Punjab were never filled up.

Jennings on the Status of the Assembly

Some interesting legal controversies have been raised by Jennings (11) in respect of the status of the Constituent Assembly. The Assembly started functioning from August, 15, 1947 on what he calls two 'traditional interpretations' of the Indian Independence Act:

(11) Ibid., p.9.
(1) The Constituent Assembly was in reality functioning in two parts - the constituent, for 'making provisions as to the Constitution' and the legislative, as per the Government of India Act as adopted for India, as a Dominion Legislative. "In other words, a distinction was drawn out, not as section 8 specified, between the 'constituent powers' and 'legislative powers' but between the constituent body and the legislative body".

(2) The Constituent part was a Sovereign body. "So far as is known, nobody explained whether this Sovereignty was obtained because it was exercising the powers of the legislature of the Dominion under Section 6 or it derived its powers independently from Section 8". India, thus, proceeded on the assumption that the Governor-General's assent was necessary for the acts of the Dominion Legislature and not of the Constituent Assembly. Sovereignty of the Constituent Assembly, he sarcastically notes, "was an act of faith and indeed hope, with the Congress" which had the deep-seated tradition of "Albion perfide" (12).

"Politically, no doubt" Jennings concludes, "it was admitted that the special task of the Constituent Assembly was to frame a constitution, but the Act did not say so. For the purpose of making provision as to the constitution, the Constituent Assembly had the powers of the legislature of the Dominion. It might not frame a constitution at all. Had the Government of India Act been suitably amended either by Lord Mountbatten under section 9 or by the Constituent Assembly in the exercise of its powers under section 6, the Assembly might have been dissolved and the Government of India Act as adopted, have become the permanent Constitution of the Dominion ....... The greatest difficulty was, however, in finding out where the 'Sovereignty' of the Constituent Assembly came from. If it was because, it was, for the line being endowed with the powers of the legislature of the Dominion, the rest of the argument did not seem to follow" (13).

It may be noted that, of the two dichotomies pointed out by Jennings though the first may genuinely appear to be a Lawyer's puzzle, it can only be

(13) Ibid., p. 33.
understood in reference to the second. It may also be carrying the argument a little too far to assert that "the Constituent Assembly might not frame a constitution at all". As a matter of fact the Independence Act did not set up a Dominion Legislature apart from the body that was functioning as the Constituent Assembly since the introduction of the Cabinet Mission Scheme. When Henderson, the Under-Secretary for India, replied in the British Parliament to the debate on the second reading of the Indian Independence Bill, he categorically stressed this perspective:

"It has been necessary to provide for legislatures for both India and Pakistan. These legislatures, besides having legislative powers, must also have constituent powers. They must also have a dual purpose of performing the ordinary functioning of a parliament and of making Constitutions" (14).

In any case the division of the Constituent and legislative functions of the Assembly created a

(14) The Statesman, July 12, 1947, emphasis added.
somewhat confusing situation. The Congress intention, from the very beginning, was, understandably, to frame a sovereign constitution. After August 15, 1947, the Assembly could possibly proclaim India as a sovereign democracy and then proceed to make a constitution. But it chose to "assume power for the governance of India", without defining the nature of the act, and endorsed "the recommendation", without mentioning the recommending authority, of Mountbatten's continued Governor-Generalship. In practice the governance of India, till January 26, 1950, was very much in the dominion pattern and constitution-making a sovereign act.

The 'governance' of India remained under Mountbatten, who chose to be a 'constitutional Governor-General', till June 20, 1948 when the first Indian Governor-General, Raja Gopalachari, replaced him. In 1949 the Government of India Act, 1935 was amended four times and the jurisdiction of the Privy Council was abolished by the Constituent Assembly, with authentication by its President and not by the Governor-General. On October 17, 1949 Alladi K. Ayyar,
during a debate on the Preamble told the Constituent Assembly:—

"I may also point out we were particularly anxious that the Constitution which we are making or passing must not be traceable to section 7 or 8 of the Independence Act. We took the view that there is no necessity of Governor-General's assent being required for the new constitution" (15). K.C.Wheave finds in this tendency a desire for "Constitutional autarchy" or "autochthony" (16). Referring to India particularly, he writes,

"In the first place it would be urged that if the Constituent Assembly had passed the Constitution and the Governor-General had assented to it, then undoubtedly the constitution would have had the force of law, and would have derived this force of law from the powers conferred by the Indian Independence Act of 1947. This certainly did not happen. Though the

 Constituent Assembly itself passed the Constitution, the Governor-General did not assent to it. He was not asked to assent to it. On the view of the members of the Constituent Assembly, his assent was not required to complete the enacting process "(17).

Evidently, the British Government had no objection to India making herself a republic, as is shown by the decision of the Commonwealth Prime Ministers' Conference of 1949. But His Majesty’s Government certainly expected India to maintain what may be called the form of Commonwealth legality. This Commonwealth legality was first threatened by Ireland in 1922, when the Third Dail Eireann (a part of the members of the British Parliament) sat at Dublin to frame the Irish Constitution (see the Appendix) which derived its authority from 'God' and 'the people'. His Majesty's Government was able to save the Commonwealth legality by recognising the Dail Eireann as merely a part of Parliament at Westminster

(17) Ibid., p. 96.
and passing the Constitution of the Irish Free State Act that conferred Dominion Status (informally, though, for the concept had not yet fully developed) on the Irish Free State. The Irish, however, finally disposed of the Commonwealth legality in 1937, when they framed a new constitution through the Dail and ratified it through a referendum. The Irish left the Commonwealth in 1948, but the "break" in their constitutional history had taken place in 1937 (18). This break indeed took place in India too, but not in August, 1947, nor in June, 1948, when Mountbatten left India, but on January 26, 1950, when India was proclaimed a Sovereign Democratic Republic and the Constitution of India was fully enforced. The break, however, had started in early 1949 when the President of the Constituent Assembly authenticated the first Constituent Assembly Act. The following 5 authentications, continued the process. A big leap forward was the authentication of the constitution on November 26, 1949 (19). The final act of the

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(18) Ibid., p. 94.
drama was played on January 26, 1950, when the Governor-General gave the following proclamation in the Durbar Hall of the Government House at 10.30 A.M.

"Whereas the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic, adopted, enacted and gave to themselves on the twenty-sixth day of November, 1949, in their Constituent Assembly, the Constitution of India;

"And whereas it has been declared by the said Constitution that India, that is, Bharat, shall be a Union of States comprising within the Union the territories which were hitherto the Governors' Provinces, the Indian States and the Chief Commissioners' Provinces;

"And whereas this, the twenty-sixth day of January, 1950 has been fixed for the commencement of the said Constitution;

"Now, therefore, it is hereby proclaimed that on and from this, the twenty-sixth day of January, 1950,
India, that is, Bharat, shall be a sovereign Democratic Republic, and the Union and its component units, the States shall exercise all powers and functions of Government and administration in accordance with the provisions of the said Constitution" (20).

The formal assent of the Governor-General to the Constitution Act, was indeed, not taken, but the Governor-General not only acquised in the new Constitution, but also was instrumental in enforcing the Constitution of 1950. The essence of the 'break', therefore, is not that the Governor-General's assent was not taken, but that the new constitution, which superseded the constitution of 1935 - an act of the British Parliament - was not submitted for ratification to the same body. But certainly, the Indian Independence Act did not require that.