

57881

Office of the Constitutional Advisory Committee,
Ernakulam,

Dated 16th January 1948

To

The Chief Secretary to Government of Cochin,
Public and Political Department

Sir,

We, the members of the Constitutional Advisory Committee, enclose herewith our Report on the subjects referred to us for advice.

2. The Committee was appointed by Proceedings of Government, dated 23rd September 1946, Order P.11. 45466/21. Four of the seven members, namely, Messrs. P. Govinda Menon, C. R. Iyyunni, Rao Sahib K. Ayyappan and Rao Bahadur T. K. Nayar were elected by the Legislative Council on the 13th August 1946. The other three members, namely, Messrs. M. Sivarama Menon, Rao Bahadur T. S. Narayana Ayyar and P. A. Mohammed Ashroff were nominated by Government. Government were also pleased to nominate Mr. P. Govinda Menon as the Chairman, and Sri. Rama Varmha Tampuran, Reforms Commissioner, as the Official Adviser to the Committee. Mr. I. Madhava Panicker was the Secretary to the Committee.

3. The functions assigned to the Committee were:—

(a) to advise Government in matters connected with any discussion between this Government and the Governments of Madras and Travancore regarding the formation of a Kerala Union;

(b) to advise Government regarding the measures to be adopted with a view to the establishment of responsible government; and

(c) to study matters which will have to be considered in connection with the State's relations with the new Government of India and to make recommendations regarding them.

4. The Committee in all held 32 sittings. There were sub-committees appointed to report on various matters to the full Committee. Such sub-committees sat on 6 occasions. In most of the earlier sittings the Committee were engaged in considering papers received from the Chamber of Princes which were sent to the Committee by Government for their advice.

5. We wish to place on record the very valuable advice tendered to us from time to time by the Official Adviser to the Committee. We also record our appreciation of the services rendered by the Secretary to the Committee.

PART I

6. The first function assigned to the Committee was to advise the Government in matters connected with any discussion between this Government and the Governments of Madras and Travancore regarding the formation of a Kerala Union.

7. The gracious announcement made by His Highness the Maharaja on the 29th July 1946 has created a stir not only in Cochin and other areas of Kerala but throughout India. The popular organisations in Cochin, Travancore and Malabar are reported to have appreciated this message very much. His Highness' speech while inaugurating the Aykya Kerala Conference at Trichur on the 26th of April 1947 has also been received very well throughout India. Several Indian leaders have, in lavish language, praised the sentiments underlying these gracious utterances.

8. We have been asked to advise Government in matters connected with discussions between this Government and other Governments regarding the formation of the Kerala Union. It is well-known that the late Diwan of Travancore did not conceive this message with any degree of appreciation. The attitude of the Travancore Government after the election of the Constituent Assembly and the formation of a new Government has yet to be seen. Before that is known, we are not in a position to tender any advice as to negotiations to take place between this Government and the Travancore Government.

9. The Kerala Province cannot be formed so long as the Malayalam-speaking people of the Province of Madras live in Districts which form only administrative divisions of the Province of Madras. If the Kerala Union has to materialise, we think that the Malayalam-speaking areas of the Province of Madras have to come out as a separate entity from the Province of Madras. We feel that the demand for this must come from the people of those areas. It will be rather delicate on the part of our Government to press either before the Government of India or the Government

of Madras or the Constituent Assembly for the carving out of a separate State of Malayalam-speaking people from the Province of Madras. His Highness' announcements are really offers made to the people of Malabar and other areas of Kerala that Cochin is prepared to join a Kerala Union. We think that this Government cannot do anything further just at present before getting any response to the offer so made. We therefore advise the Government to formally communicate copies of the Message of His Highness on the 26th of April 1947, to the Government of Madras, to the Government of India, to the President of the Constituent Assembly and to the Government of Travancore. Beyond this, we are not in a position to add anything further at present on this subject.

PART II

10. The third function of the Committee as enunciated in the order of appointment is to study matters which will have to be considered in connection with the State's relations with the Union Government of India and to make recommendations regarding them.

11. It will take a few months before the Constituent Assembly of India frames a Constitution for the Indian Union. As to what the relations of this Government with the Government formed under that Constitution shall be, can be laid down only after the final Constitution emerges out of the Constituent Assembly. His Highness has, however, repeatedly declared his intention that Cochin must be a member of the Indian Union Government. The following passage in the speech of His Highness in inaugurating the Aykya Kerala Convention at Trichur will bear quotation in this connection.

"You would like to know" stated His Highness, "what Cochin's attitude is in this respect. I have no hesitation to declare that Cochin would continue to remain part of the Mother Country. It is joining the Constituent Assembly at once. No word or act of mine shall usher in a day when a Cochinite finds he has lost the right to call himself an Indian".

With this declaration in mind, the Government of Cochin must decide what their relations shall be with the Government of India to be formed under the new Constitution.

12. With the withdrawal of British power from India on the 15th August 1947 and with the formation of a Dominion Government at new Delhi, the question of accession of Indian States to the Dominion Government was raised. Cochin was one of the first States to declare her willingness to accede to the Dominion Government of India. A conference of representatives of Indian

States and the Government of India was held in New Delhi in the last week of July and the first week of August 1947. It was attended by Dewan Bahadur C. P. Karunakara Menon, Diwan of Cochin, as the representative of this State. A draft Instrument of Accession and the draft of a Stand-Still Agreement were drawn up in a Committee of that conference and we had the privilege of being consulted about their terms before they were executed by His Highness the Maharaja. A special meeting of this Committee was held on 9th August 1947 when this Committee considered the draft Instrument of Accession and the Stand-Still Agreement and the recommendation of this Committee regarding those documents have already been sent to Government and the Instrument of Accession and Stand-Still Agreement have since been executed by His Highness.

13. The Committee think that on this subject they have no further advice to tender at present.

14. The Committee wish, however, to point out in this connection that in the matter of the terms of accession to the Interim Dominion Government, the Committee have made their recommendations with regard to the attitude to be assumed by Cochin in the matter of the several subjects on which accession has been proposed. The recommendations of the Committee in this behalf have been approved by His Highness and until occasion arises for reviewing the position consequent on the final nature of the Constitution as framed by the Constituent Assembly those recommendations may hold good.

PART III

15. Probably the most important function of the Committee is to advise the Government regarding the measures to be adopted with a view to the establishment of responsible government in Cochin.

16. On the 14th of August 1947, His Highness sent a message to the Cochin Legislative Council proposing to transfer all departments except Police, Devaswam, Palaces, Jail and State Forces to Ministers under the Government of Cochin Act. In that Message His Highness was further pleased to state that He would be entrusting Police, Jail and State Forces to one of the Ministers though in respect of them no transfer has been made. This message necessitated an amendment to the Government of Cochin Act, XX of 1113, and Act I of 1123 was promulgated by His Highness to amend the said Act XX of 1113. At that time the Committee had proceeded very far with the drafting of a new

Constitution for Cochin and we are glad to state that some of the important amendments introduced to the Government of Cochin Act, XX of 1113, by the said Act I of 1123, have been drawn from the draft of the new Constitution prepared by the Committee.

17. The most important matter which has to engage the attention of Government for the establishment of responsible Government is the enactment of a new Constitution. We are appending to this Report a copy of the draft of the Constitution prepared by us. (See Appendix I). This Constitution has to be promulgated by His Highness before the establishment of full responsible Government.

18. Part II of the draft Constitution lays down the principles regarding the formation of the Executive Authority of the Cochin State. The clauses of this Part of the draft speak for themselves and do not require any elucidation from us. We have drawn freely from the provisions of the Government of India Act, 1935, in drawing up this Part. We have introduced an innovation in clause 4 by laying down that the Council of Ministers shall not exceed five in number. We may state in this connection that such a provision exists in the Australian Constitution and that section 9 of the Government of India Act as it stood prior to its adaptation by the India (Provisional Constitution) Order, 1947, also contained a similar provision limiting the number of ministers. In a small State like Cochin, we think that five is the maximum which may be fixed as the strength of the Cabinet. We have provided in clause 6 for the joint responsibility of ministers. The nature of the Executive contemplated by us is on the model of the Executive in Great Britain, which is the type of Government universally advocated in India today. Ever since the year 1113, we have been getting accustomed to and progressing towards a Government of this type.

19. Part III of the draft Constitution deals with Legislature. The Government of Cochin Act, XX of 1113, has provided for one Chamber alone for the Legislature. Government appointed a Franchise Committee in 1946. That Committee recommended among other things, the introduction of adult franchise. In their Proceedings dated 1st February 1947, Order L. 4. 35668/20, Government have accepted the recommendations of the Franchise Committee regarding adult franchise, and adult meaning a person of the age of 21 years. The Franchise Committee, however, in paragraph 12 of their Report has remarked as follows:—

“A Legislature elected on the basis of adult franchise will be very different in its composition from a Legislature which is chosen on a restricted franchise. With the introduction of adult franchise representation in the

Legislature will become increasingly popular in character. In almost all countries where adult franchise is in vogue, the Legislature has been established on a bicameral basis. The existence of a second Chamber has been 'a security against abuse of power and impetuosity on the part of the popular Chamber'. At a time when the franchise is very largely extended to people, the majority of whom are illiterate, it is, we think, essential to create a body which would be representative of experience and expert knowledge to act as a stabilising element in the Constitution. The history of different Constitutions shows that 'the consideration of legislation by one House is inadequate and a second Chamber has been proved to be the best revisory instrument.' It would be apposite here to quote the views of two eminent authorities.—

'With a perfect Lower House it is certain that an Upper House would be scarcely of any value. If we had an ideal House of Commons perfectly representing the nation, always moderate, abounding in men of leisure, never omitting the slow and steady forms necessary for good consideration, it is certain that we should not need a higher Chamber. The work would be so well done that we should not want anyone to look over or revise it. But though beside an ideal House of Commons, the Lords would be unnecessary, beside the actual House, a revising and leisured Legislature is extremely useful.' (Bagehot)

'A majority in a single Assembly when it has assumed a permanent character when composed of the same persons habitually acting together and always assured of victory in their own House easily become despotic and over-weening if released from the necessity of considering whether its acts will be concurred in by another constituted authority.' (Mill)

In recommending the grant of adult franchise we wish to make it clear that it should be accompanied by the provision of adequate constitutional safeguards like the creation of a second Chamber for the purpose of checking hasty or ill-conceived legislation by a House elected on the basis of adult franchise. It is better that the responsibility for acting as a brake on the Lower House should normally be exercised by a constitutional body like a Second Chamber. The restraining influence of the Upper House will reduce to a minimum the occasions on which His Highness the Maharaja might feel Himself called upon to interfere by exercising the power of veto. The Upper House will be much smaller in size, chosen on a distinct and high franchise and with limited functions. Its composition and powers are matters for detailed consideration by the Constitutional Advisory Committee. But it is the considered opinion of (the majority of) this Committee that if adult franchise is granted, there must be provision for constitutional safeguards of the manner indicated above. Mr. P. Govinda Menon is inclined to take the view that the question of constitutional safeguards is a matter more appropriate for consideration by the Constitutional Advisory Committee and that this Committee need only suggest the desirability of the consideration of this question by that Committee. Rao Sahib K. Ayyappan does not agree that there is need for any such safeguards".

Government did not pass final orders on this part of the recommendation of the Franchise Committee. They thought it necessary to have the advice of the Constitutional Advisory Committee on this matter.

52801

20. The question therefore whether a Second Chamber ought to be established with the grant of adult franchise and the establishment of full responsible government was anxiously considered and the Committee, by a majority, for the reasons elaborately stated in the Report of the Franchise Committee, decided that there ought to be a Second Chamber. A minority of the Committee consisting of the Chairman, Messrs. K. Ayyappan and C. R. Iyyunni thought that in a small State like Cochin with a monarchical system of Government, there is no need or scope for a Second Chamber.

21. The composition and nature of the two Chambers of the Legislature do not find a place in the text of the draft Constitution. They are usually included in Schedules attached to the Constitution. The Committee has already made recommendations to Government regarding the strength, composition, etc., of the two Chambers and the qualifications, etc., of voters to elect the members to the two Chambers. To recapitulate briefly, our recommendation sent to Government has been that the Lower House to be known as the Legislative Assembly should consist of 60 elected members, five of whom will be from Special Constituencies, namely, Landholders, Commerce and Industry, 2 Women Constituencies and one Constituency for Labour. The remaining 55 are to be elected from territorial constituencies by adults of the age of 21 years and above. The constituencies shall all be general constituencies where members of all communities will have the right of franchise, provision however being made for the reservation of seats to certain communities.

22. It was brought to our notice that even after giving reservation to several communities, some minorities may still go unrepresented in the Legislative Assembly. We could devise no machinery by which such representatives may get elected to the Legislative Assembly. We have, therefore, recommended that Government may be given power to nominate five members to the Assembly in order to give representation to such minorities as have not been able to get representation by election. This will raise the strength of the Assembly to 65. The Committee do not think that a sprinkling of five nominated members in a House of 65, will alter the democratic character of the House, especially when, as is proposed, the nomination is by a popular Government. In coming to this conclusion, we have been influenced by the Report of the Advisory Committee of the Indian Constituent Assembly on the subject of Minority Rights. Referring to one of the minorities, the Committee said—

"There shall be no reservation of seats for them but the President of the Union and the Governors of Provinces shall have power to nominate their representatives in the Centre and the Provinces respectively, if they fail to get adequate representation in the Legislatures as a result of the General Election."

23. As stated in paragraph 20 above, the Committee, by a majority, came to the decision that there ought to be a Second Chamber of the Legislature. The majority who voted for a Second Chamber was not unaware of the opinion among certain sections of the people in the country against a Second Chamber, nor was the minority unaware of the considerations advanced by the majority of the Franchise Committee. The Committee by a majority having decided in favour of a Second Chamber, the question of the composition of the Upper House, the relative strength of the two Chambers and their relative powers had to be considered. It was after such consideration that the Committee unanimously recommended that the strength of the Upper House shall be 30, with a membership of 65 for the Lower House.

24. In a system where there is responsible Government, larger powers ought to be vested in the Lower House than in the Upper House. A perusal of the clauses of the chapter on 'Legislature' will show that this has been fairly well achieved. The following provisions require special mention. Clause 6 provides that the Ministers shall be responsible to the Legislative Assembly meaning thereby that they cannot be removed by a vote of the Upper House. This, as is well-known, is the case in Great Britain. Special provisions have been made regarding the passage of financial bills in clause 29 and it has further been provided in clause 31 that the Annual Financial Statement shall be submitted to the vote of the Lower House alone, the Upper House having only the power to discuss the Statement. By these provisions it is hoped that the fully democratic character of the Constitution will be preserved while at the same time providing for ample checks by the Upper House in the matter of Legislation.

25. We have already reported that right of franchise shall be given only to Cochinites either born or naturalised in Cochin in accordance with the provisions of the Cochin Nationality and Naturalisation Act until reciprocal arrangements are made with other Governments in this behalf.

26. The representation in the Upper House has been recommended by the Committee on a functional basis in accordance with the recommendation made in this behalf with regard to the Second Chamber in Provinces, if any, by the Indian Constituent Assembly

The Committee have already communicated to Government the nature of the functional representation and qualifications for franchise. A copy of the report sent to Government is added as Appendix II. While in the elections to the Legislative Assembly the distributive system of voting has been recommended by the Committee, proportional representation by means of the single transferable vote has been recommended for adoption in the elections to the Upper House. It is considered that an Upper House constituted on the basis of the recommendations of the Committee will give proper representation to all interests and that it will ensure a mature consideration particularly of all legislative measures which affect the community in general.

27. The Chapter on 'Judicature' is almost a reproduction of the existing Chapter in the present Government of Cochin Act. We have, however, made a few small changes. The advisory Jurisdiction conferred on the High Court under section 41 (3) has been taken away. Reference may in this connection be made to the observations of Sir Alladi Krishnaswami Ayyar in the speech made by him at the time of the inauguration of our High Court. The provision in question has been borrowed from section 213 of the Government of India Act, 1935. In view of the complex functions which the Governor-General had to discharge under that Act, such a provision might have been useful in the Government of India Act. In a unitary State, such a provision seems to us to be unnecessary: That must be the reason why in the Government of India Act 1935, in the Chapter of Provincial High Courts a section corresponding to section 213 which appears in the Chapter on Federal Court does not find a place. This Jurisdiction has not been so far invoked in this State and the Committee considers this provision to be unnecessary.

28. In the existing section 48 (1), it has been provided that where, for reasons adequate in the opinion of the Chief Justice, a Judge is unable to be a member of the Bench and for that reason a Bench of three Judges cannot be formed, a Division Court of two Judges may dispose of the case. The Committee was unanimously of the opinion that this provision deprives the litigant public of the very valuable right of having their cause heard by three Judges of the Highest Court of the land. We thought it not proper that they should be so deprived of such a valuable right. We, therefore, omitted that particular provision. This means that cases which ought, under law, be heard by a Bench of three Judges ought to be necessarily heard by a Bench of three Judges.

29. In the clauses prescribing the qualification for appointment as a Judge of the High Court, we have provided that a person to be so qualified must have for at least five years held a judicial office in the Cochin State not inferior to that of a District and Sessions Judge. Under the present Act, it is enough if he had held such office for three years and that not necessarily as a District and Sessions Judge. We are of opinion that the high office of a Judge of the High Court requires that he must have at least five years' experience as a District and Sessions Judge.

30. The question of investing the High Court with power to issue prerogative writs arose for consideration. The more important writs are Habeas Corpus and Mandamus. Power to issue writs in the nature of Habeas Corpus has been embodied in the Code of Criminal Procedure (as amended). In the Dominion of India, the High Courts do not possess the power to issue writs of Mandamus as such; but only the substituted remedy as provided for in Chapter VIII-A of the Indian Specific Relief Act. We recommend that the Cochin Specific Relief Act may be suitably amended so as to give this power to our High Court.

PART IV

31. It is necessary to invest the Parliament of the people with the power of amending the Constitution. Unless this is done, dissatisfaction, if any, against the provisions of the Constitution may find expression through extra-constitutional channels. At the same time, it is necessary that any established Constitution must be given a trial for a fair period of time. It is these conflicting considerations which persuaded the Committee to suggest a clause like clause 74. This clause gives constituent powers to the Legislature itself; but such powers can be exercised only after a period of ten years. There is a similar provision in the draft of the Constitution prepared by the Constitution Committee of the Indian Constituent Assembly. The provision that in exercising constituent powers, more than a simple majority vote is necessary, is usual with all written Constitutions.

32. There is a school of thought that this Constitution itself must be submitted to the next Legislature for ratification or variation, the Legislature becoming a Constituent Assembly for this purpose. There are others, however, who think that it is enough that a Constitution on the lines given in Appendix I be promulgated by His Highness as a Proclamation in view of the fact that all the members of this Committee are members of the Legislature,

57801

representative of all parties therein and consists of a majority of elected members. The Committee, however, by a majority (Messrs. M. Sivarama Menon and Rao Bahadur T. S. Narayana Ayyar dissenting and Rao Bahadur T. K. Nayar being absent) think that the provisions of the Constitution ought to be referred to the next Legislature which will consider them sitting as a Constituent Assembly. The Committee is unanimously of the view that responsible Government in Cochin should be under the aegis of His Highness the Maharaja.

PART V

33. The Committee have already reported to Government suggesting two variations in the Electoral Rules. One recommendation is that certain election Offences like personation may be made cognisable offences. With the enlargement of the franchise such offences are likely to increase and prompt action by the Police against those who commit such offences is bound to have a wholesome effect.

34. Another suggestion the Committee has made is about the Tribunal which ought to be invested with the jurisdiction to try election petitions. The Committee think that such petitions may be made triable by the District Judge having jurisdiction in the constituency concerned with a right of appeal both on questions of fact and law to a Bench of three Judges of the High Court.

We have the honour to remain,

Sir,

Your most obedient servants,

P. Govinda Menon

Chairman

2. C. R. Iyyunny
3. K. Ayyappan
4. T. K. Nayar
5. M. Sivarama Menon
6. T. S. Narayana Ayyar
7. P. A. Mohamed Ashroff