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# CHAPTER-1

## INDIAN CONSTITUTION – HISTORICAL UNDERPINNINGS

### INTRODUCTION

The outstanding feature of the Indian National movement was the values and modern ideals on which the movement was based along with the broad socio-economic and political vision of its leadership. The vision was that of a democratic, Civil libertarian and secular India, based on a self reliant, egalitarian social order and to have an independent foreign policy. Our national movement popularized democratic ideas and institution in India. The Indian national congress was itself organized on the ideals of democracy. Therefore some of the most important decision were taken after heated debates and on the basis of open voting. Our constitution is the ultimate symbol of this. It is the product of research and deliberations of a body of eminent representatives of the people. From the beginning, the nationalist fought for the introduction of a representative government on the basis of popular elections and demanded that election should be based on adult franchise. The evidences can be found from the acts which the British government had passed during the freedom struggle, and particularly from the Government of India Act 1858 and the subsequent history up to the making of the constitution. This is largely the story of political disaffection and agitation alternating with the council reforms.

Hence, a retrospect of the constitutional development is indispensable for a proper understanding of our constitution.

### GOVERNMENT OF INDIA ACT, 1858

#### Main features

- East India Company's rule came to an end

and the Indian administration came under the direct control of the crown.

- In England, the court of Directors and Board of control were abolished. Now the administration would be run by the secretary of state who would be advised by the council of India constituting of 15 members nominated by the crown (7 of them would be selected from the now superseded court of Directors). The secretary of state would be a member of the British cabinet. Sir Charles wood was made the first secretary of state for India.
- The Governor General of India was also made the viceroy of India. The first viceroy of India was Lord Canning. He would now be answerable only to the secretary of state.
- The Act laid down a unitary as well as rigidly centralized administration. There were presidencies ruled by Governors who were appointed by the crown and the provinces ruled by Lt. Governors appointed by Governor General. The presidencies and provinces were the agent of centre. The entire machinery was bureaucratic, totally unconcerned with public opinion.
- The Act also declared the secretary of state for India as a corporate body, who could sue and be sued in England and in India.
- The Queen victoria's proclamation, which was issued on 1 November 1858, declared that the treaty made by the company with respect to their rights and dignity shall be honoured. It also assured the Indian people

to have an equal and impartial protection of the law and freedom of religion and social practices. The proclamation gave a practical shape to the Act of 1858.

## INDIAN COUNCILS ACT OF 1861

### Main features

- The Act increased the number of members in the Governor - General's executive council from 4 to 5. The fifth member was to be a gentleman of legal profession, a Jurist rather than a technical lawyer.
- The Governor-General's executive Council was enlarged into a central legislative council. Six to twelve additional members were to be nominated by the Governor – General. Not less than half of these members were to be non officials. They would hold office for two years. The provision was made for the inclusion of Indians in the legislative Council.

**Powers of central legislative council:** The functions of these members were strictly limited to making legislation. They were forbidden from interfering in the matters of the executive council. They did not possess powers of administration and finance. The effective legislative powers remained with Governor General. His consent was necessary before placing certain issues before the council. Secondly, he could veto any legislation. Thirdly he was empowered to issue ordinance which were not to remain force for more than six months.

- The Act empowered the Governor-General to make rules for the more convenient transaction of business in the council. This power was used by Lord Canning to introduce the portfolio system in the government of India. Canning divided the departments of government between the members of the council. Thus were laid the foundations of Cabinet government of India.
- **Provincial Council:** Legislative councils were also established in the provinces. The number of additional members in the provinces was fixed between four to eight. So this Act was an important Constitutional development and the people of India came to be involved in

the law making process. However, no laws passed by the provincial councils were to be valid until those received the assent of the Governor – General.

- The Act restored the legislative power for the making and amending of laws to the provinces of Madras and Bombay. The legislative councils were established in Bengal, the North western province and the Punjab in 1862, 1886 and 1897 respectively.

## INDIAN COUNCIL ACT OF 1892

### Main features

The Act dealt exclusively with the powers, functions and composition of the legislative councils in India.

- **Composition of the central legislative council:** The Act provided that the number of additional members must not be less than ten or more than sixteen. The Act also provided that two-fifth of the total members of the council were to be non-officials. These non-officials were partly nominated and partly elected. The members were to be nominated by Bengal Chamber of commerce and provincial councils. There would be no election but selection by the governor from amongst the recommended candidates by such bodies.
- **Powers of the central legislative council:** The member could now discuss budget and address questions to the executive. However supplementary questions were not allowed. They could not vote on the budget, nor they could move any resolutions or demand a vote on any resolution brought by the government.
- **Provincial council:** With regard to the provincial legislature, the Act enlarged the number of additional members. The non-official members were to be nominated by certain local bodies like municipalities, universities, district boards. There would be no election but selection by the governor from amongst the recommended candidates by such bodies.
- **Powers of provincial council:** The members received the right of interpellation from the executive in the matters of general public

interest. They could now discuss budget and address questions to the executive. Supplementary questions were not allowed.

## THE INDIAN COUNCIL ACT 1909

The Act was also known as Morley-Minto reforms in the name of Morley the secretary of state for India and Lord Minto, the Governor – General of India.

### Main Features

- **Composition of the central legislative council:** The maximum number of additional members was increased to 60. Elected members were to be 27 and among the remaining 33 nominated members not more than 28 were to be officials. Hence the elected non-official members were introduced but official majority was retained. The principle of election to the councils was legally recognised. Communal representation was for the first time introduced in the interests of Muslims. Separate electorate was provided for the Muslims. This had ultimately led to the partition of India in 1947.
- **Powers of central legislative council:** The members were given right to discuss and pass resolutions on the Budget and all matters of public interests except armed forces, foreign affairs and native states. However, the Governor – General had the power to disallow discussion on the budget.
- **Provincial Council:** The number of members in provincial legislative councils of major provinces was raised to 50. Elected non-official members were introduced so that the official majority was gone but many of the no officials were to be nominated by the government.

### Other important provisions of the Act

- An Indian member was appointed for the first time to the Governor-General's executive council. Sir S.P Sinha was the first Indian to be appointed for the post.
- Two Indians were appointed to the Indian council in England.

- The Act provided for the separate representation of presidency corporations, chambers of commerce, universities and Zamindars.
- Elections were introduced but under various constraints. Details of seat allocation and electoral qualifications were left to be decided by local governments. And the government of India was given the power to disallow any candidate from contesting on any grounds. Moreover electorate was to be based on high profile qualifications.

## GOVERNMENT OF INDIA ACT 1919 OR MONTAGUE CHELMSFORD REFORMS

The national political movement in India during the First World War such as the home rule movement led to the declaration. In that declaration Montague, the secretary of state for India assured the introduction of responsible government in India in different stages. As a first measure the government of India Act of 1919 was passed by the parliament of England. This Act is popularly known as Montague Chelmsford Reforms. At that time Chelmsford was the viceroy of India.

### Main Features

- Composition of central legislative council, was made bicameral. The council of state and the legislative Assembly. Non-official majority in the lower house was raised to seventy percent and in the upper house too, the non-official members had a majority. Communal representation was continued.
- Powers of central legislative council, the governor general still had overriding powers by the means of veto, and his consent was needed for the introduction of certain bills. Moreover he could make ordinances which had same power as Acts.
- **Provincial councils:** Here the non-official majority was raised to the seventy percent of the total strength of the house. Here also the electorate were arranged on commercial basis.
- **Powers of provincial councils:** Members could now move resolution on budget and

levy taxes. However a provincial bill could become an act only when it received the consent of the governor general. Furthermore his consent was required to introduced for some bills.

### **Other Important Provisions of the Act**

- Dyarchy was introduced in the provinces. Provincial subjects were divided into reserved subjects such as land revenue, irrigation police and forests and transferred subjects such as land, self government, public health, agriculture etc. The reserved subjects were to be administered by the governor and his executive council. The transferred subjects by the governor and his ministers.
- In the centre state relations the subjects of administration was divided into central subjects and provincial subjects. Even the sources of revenue were divided into central and provincial. The provinces could now run their administration based on the revenue they generated. Thus the budgets for provinces also came into place, but this was not federalism because the centre could still legislate on any provincial subject.
- The salaries of the secretary of state for India and his assistants were now to be paid out of the British revenues. So far, they were paid out of the Indian revenues. A high commissioner for India at London was appointed.

### **Defects of the 1919 Act**

- Administration still remained rigidly centralized. The governor general's consent was needed for introduction and passage of bills. He also decided, whether a subject belonged to centre or state. Moreover centre could still legislate on any subject.
- Under the system of Diarchy the governor had all financial powers. The governor was not bound by the advice of council of ministers even on transferred subjects. The ministers were not collectively responsible to the council but individually responsible to the governor. And the key administrative department including finance were kept into the reserved subjects.

- The act provided for a narrow franchise. Property qualifications restricted it to 12.5% of the muslims, Sikhs were given communal electorate as well while the depressed classes were given nominated seats in legislatures at all level.

## **SIMON COMMISSION**

One of the provision of the government of India Act 1919 mandated to the creation of a commission after ten years to review the working of the Act. That was to be in 1929. However the british government virtually recognized the failure of the reforms of 1919 by appointing the simon commission in November 1927, two years before such a commission was due.

### **Recommendation of the report**

- The report suggested the replacement of diarchy with full responsible government in the provinces with the provision of some emergency powers in the hands of the governors.
- The report did not suggest any change in the central government. It only recommended autonomy for the provinces as far as practicable the report also talk about federation at the centre comprising both British India and the Indian states.

The simon commission report was considered by a round table conference consisting of the delegates of the British government and of British India as well as of the rulers of the Indian states. A white papers was prepared on the results of this conference and was examined by the British parliament and than it was declared as the government of India Act 1935.

Before describing the main features of the 1935 Act, let us briefly discuss about the Nehru report and the Communal Awards.

### **Nehru Report**

In 1928 a committee under the chairmanship of Motilal Nehru was constituted to determine the principles of a Constitution for India.

### **Recommendation of the Report**

- The report demanded dominion status on the lines of Australia and Canada.

- Nineteen Fundamental Rights were suggested.
- The report suggested that the Indian parliament should consist of the senate elected for seven years, containing two hundred members elected by the provincial councils and the house of representative with five hundred members elected for five years through adult franchise. The Governor-General was to act on the advice of the executive council which was to be collectively responsible to the parliament.
- The report rejected the principle of separate electorates. Seats would be reserved for religious minorities only in centre and in provinces in proportion to their population.
- The provincial councils were to be elected on the basis of adult franchise.

## COMMUNAL AWARDS 1932

The Award was issued by Mr. Ramsay Mac Donald, the British prime Minister. It Awarded to each minority a specific number of seats in legislatures to be elected on the basis of communal electorate. The Award also declared Dalits to be a minority Community and extended the communal electorates to them.

## GOVERNMENT OF INDIA ACT OF 1935

### Main features

- Provision for the establishment of an all India federation at the centre, consisting of the provinces of British India and the princely states. The federation would come into existence only if more than 50% of the princely states acceded it. However it did not come into existence since the princely states refused to give their consent for the union.
- Division of power into three lists: Federal, Provincial and Concurrent.
- There were also emergency provision.
- Governors were now derived their powers from the crown and not from the Governor-General.
- Introduction of Dyarchy at the Centre. The

Governor General and his Councilors administered the Reserved subjects. The council of ministers were responsible for the Transferred subjects but even here, the Governor –General could act in contrary to the advice tendered by the council of minister if it affected his special responsibilities.

- Abolition of Dyarchy and the introduction of provincial Autonomy in the provinces. The Governor was made the head of the provincial executive but he was expected to run the administration on the advice of the council of Ministers. But this was balanced by giving wide powers to the governors on summoning legislature, giving assent to bills, administering tribal regions, safeguarding minority rights etc.
- Provincial Legislatures of Bengal, Madras, Bombay, United Provinces, Bihar and Assam were made bicameral.
- Extension of the principle of separate electorates to Sikhs, Europeans, Indian Christians and Anglo Indians.
- There was to be a transfer of financial control from London to Delhi in response to the long standing demand of the Government of India for fiscal autonomy.
- Establishment of a Federal Court at Delhi with a Chief Justice and 6 Judges. A Reserve Bank was also established.
- So, the three main features of the Act were provisions for
  - (i) An all- India Federation.
  - (ii) Responsible government with safeguards.
  - (iii) Separate representation of communal and other groups.

It is important to be mentioned here that Dominion status which was promised by the simon commission in 1929, was not conferred by the Government of India Act 1935.

However, in accordance with the provisions of the Government of India Act of 1935 elections to the provincial Legislatures were held in February 1937.

In that elections the congress had virtually swept the polls, the party formed its ministries in seven provinces. But the congress ministries resigned in 1939 when the British Government made India a party to the war without consulting its people. However when the IIInd World War turned against the Britishers and they realized the importance of Indian help. To reconcile, an offer was announced in August 1940.

### **Government of India Act – An Analysis**

Government of India Act, 1935 mark a point of no return in the history of constitutional development in India. The Constitution of India with or without some modification adopted some important provisions from this 1935 Act,

- As it provides the establishment of All India federation including all provinces at that time under the paramountcy of the British Crown, Our Constitution of India provides the same mechanism under the President of India.
- The Act derived the powers between the Centre and units in terms of 3 lists-federal provincial, and the Concurrent List as we adopted the same manner as Union , State and Concurrent List.
- This act introduced Responsible Government, which is same in our Constitution also. The Concept of Dyarchy, the type of Government, which was established in the provinces by the Act of 1935, it remains same in the constitution of India, Provinces were made autonomous in their respective subject. Out states are autonomous too now by the authority under constitution.
- It provides a Federal Court at Delhi. Now the Supreme Court of India is established under Constitution which has the same power and functions as of Federal Court.
- The establishment of RBI under this Act, it remains same in Independent India to control regarding monetary policy and currency creation.
- It introduced bicameralism which yet to be continued in many of the state.

- The Concept of Union Public Service Commission and State service commission also derived from this law.

Thus, while the 1935 act had some federal features, federalism in true spirit was established later-on, only with the passing of constitution.

### **CRIPPS MISSION**

In March 1942, the British Government had sent Sir Stafford Cripps, a member of the cabinet, with a draft declaration which were to be adopted at the end of the war, provided that the two main Indian political parties could come to an agreement to accept them.

#### ***The provisions of the Proposals includes:***

- An elected Constituent assembly comprising solely of Indians would be set up after the war to frame the Indian Constitution. Moreover the members of the constituent assembly would be drawn from provincial legislatures and will have proportional representation. Steps will also be taken for the participation of native states in the constitution making process.
- British Government will accept any constitution prepared by the constituent assembly subject to the fulfillment of the condition that each province will have the right to accept or reject the draft constitution . Moreover if a province want to enter into a separate arrangement with the British Government, they can do so in its sovereign right.
- The constitution should give India Dominion status-equal partnership of the British common wealth of nations.
- In between during war time, the Governor General's executive council will be completely Indianized except the war department. Moreover the Governor General will continue to have a veto power.

The Cripps proposal was rejected by the Indian political parties.

### **WAVELL PLAN – 1945**

Lord Wavell had succeeded Lord Linli thgow as Governor- General in October 1943. He made an attempt to resolve the dead lock in India. In June

14, 1945 he broadcasted to the people of India the proposals of the British Government to resolve the deadlock in India.

### ***The Proposals are:***

- Reconstitution of the Governor-General's executive council pending the preparation of a new constitution. Except the Governor-General and the commander-in-chief all other members of the executive council would be nominated from amongst Indian Political leaders.
- Viceroy's executive council will be converted into interim government immediately. Member of the interim government will be half caste hindus and half would be from Muslims. Simultaneously a constituent assembly will be elected on the basis of proportional representation to draft a constitution. The interim government will function till the constitution is drafted.
- Moreover the portfolio of external affairs was also transferred to an Indian member of the council.
- The veto power remains with the Governor General.

To build a consensus for his plan, Lord Wavell called a conference in Shimla. However his Shimla conference had failed.

### **CABINET MISSION 1946**

The cabinet mission, which reached Delhi on March 24, 1946, consisted Lord Pethick Lawrence, Sir Stafford Cripps, and Mr A.V. Alexander. The three members cabinet mission wanted an agreement with the Indian leaders on the principles and procedure relating to the Constitutional issue.

The recommendation of the Mission are:

- There will be a union of India, comprising both British India and the princely states. Which should deal with the subjects of Defence and Communication, Foreign affairs. Moreover they have the powers to raise the finances required for the above subjects.
- The union should have an executive and a Legislature constituted from British India and states representative.

- The provinces would enjoy full autonomy for all subjects other than the union subjects and all residuary powers should vest in the provinces.
- The constituent assembly was to be elected to draft the constitution for whole of India, based on a proportional basis by provincial legislative assemblies. Adult suffrage was ruled out as it would involve delay in the making of the constitution, the members of each provincial Legislative assembly would be divided into three groups General, Muslims and Sikhs and each group would elect its own representatives to the Constituent Assembly by the method of proportional representation with the single transferable vote. The guiding principle should be that they should represent roughly one million population in the Constituent assembly.

The intention of the cabinet Mission was to set in motion a constituent Assembly. The machinery whereby a Constitution could be settled by Indians themselves.

### **FEBRUARY DECLARATION AND MOUNTBATTEN PLAN**

On 20 February 1947, British Prime minister Atlee had announced that, Britain would quit India by 30 June 1948. For that he sent Lord Mount Batten to oversee the transfer process. The statement fixed the deadline by which British would quit India and envisaged a partition of the country which the cabinet mission had completely discountenanced. Moreover, the declaration came in the hope that it would shock the parties and pressurize them to move towards a solution out of the deadlock.

#### **The Mountbatten Plan**

Immediately upon arrival Mountbatten held large number of discussion with Indian leaders. The new viceroy declared his intention to complete the transfer of power into Indian hands within a few months. On 3rd June 1947, Atlee announced Mountbatten plan.

#### ***The Provisions of the Plan are***

- Any constitution framed by the constituent

Assembly cannot apply to those princely states which are unwilling to accept it.

- The plan made provision for the setting up of a Boundary commission to demarcate boundaries in case partition was to be effected.
- Princely states would have complete freedom to decide their own destiny.
- The provincial Assemblies of the Punjab and Bengal were to meet in two parts, one representing the Muslim majority districts and the other representing the rest of the province, to vote whether or not the province should be partitioned or not.
- The Legislative Assembly of Sind was to take its own decision.
- A provision for referendum was provided for N.W.F.P and the district of Sylhet as to whether join Pakistan or to remain with India.
- Therefore it stated about the two dominion status states of India and Pakistan were to be created.

Therefore on the 26th July 1947 the Governor General announced the setting up of a separated Constituent Assembly for Pakistan. Moreover, on the basis of the above plan the India Independent Bill was drafted by the British parliament.

## INDIAN INDEPENDENCE ACT 1947

- The Indian Independence Bill was introduced in parliament on July 4, 1947 and the Indian Independence Act was enacted after a fortnight on July 18. The Act provided for the partition of India and the establishment of the two Dominions India and Pakistan from August 15, 1947 and for the legislative Supremacy of these dominions. That means the constituent Assembly of each Dominion was to have unlimited power to frame and adopt any constitution and to repeal any Act of the British Parliament, including the Indian Independence Act.
- The Act Converted India from a dependency of the crown into two independent Dominions within the British Commonwealth of Nations.
- It abolished the office of the secretary of state

for India and transferred his functions to the Secretary of state for Commonwealth Affairs.

- It abolished the office of viceroy and provided for each dominion a Governor General, who was to be appointed by the British King on the advice of the dominion cabinet. Mountbatten became the first Governor General of India.
- Now the Indian princely states can either join to India or Pakistan or to remain Independent.

The Act of Indian Independence Act 1947 ended the British rule and opened a new and glorious chapter of free India. The Constituent Assembly of India formed in 1946 became the Parliament of the Independent India.

## CONSTITUENT ASSEMBLY OF INDIA

The constituent assembly had held its first sitting on the 9th December 1946 in the undivided India. On December 13, 1946 Jawaharlal Nehru moved the historic ‘‘objective resolution’’ in the Assembly. It laid down the fundamentals and philosophy of the constitutional structure. It again reassembled on the 14th August 1947 as the sovereign constituent Assembly for the Independent India.

The member of the constituent Assembly had been elected by indirect election by the members of the provincial Legislative Assemblies, according to the process recommended by the cabinet mission plan of 1946, the recommendation and process we have mentioned in point twelve of this chapter. Please refer that.

As a result of this scheme the provinces were to elect 292 members while the Indian princely states were allotted a minimum of 93 seats. The seats were calculated on the proportional to their respective population roughly in the ratio of one to a million.

It is very important to mention here that the strength of the constituent Assembly was 389, out of which 93 seats were allotted to princely states. The remaining 296 seats were allotted to British India. Out of which 292 members were to be drawn from governors provinces and 4 members were from chief commissioners province.

In the election to the constituent Assembly for 296 seats of British India held in 1946. The Indian national congress won 208 seats, the Muslim League

73 seats and the remaining 15 seats were won by Independent candidates. princely states decided to stay away from the constituent Assembly as a result of that 93 seats allocated to them were remain vacant.

After Independence the Muslim League members withdraw from the constituent Assembly as a result the strength of the Assembly had came down to 299 as against 389 originally fixed in 1946 under the cabinet mission plan. The strength of Indian provinces was reduced from 296 to 229 and the princely states from 93 to 70.

### **Functions Performed By the Constituent Assembly**

(i) Two separate functions were performed by

the constituent Assembly. One was the making of the constitution for free India and another was to enacting of ordinary laws for the country. These two tasks were to be performed on separate days. These two functions continued till November 26, 1949, when the task of making the constitution was over.

In all the constituent Assembly had conducted 11 sessions over two years 11 months and 18 days. The constitution came into force on 26th January 1950. However the provisions relating to citizenship, elections, provisional parliament, temporary and transitional provisions were given immediate effect from November 26, 1949.