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INTRODUCTION

The Twenty-Sixth January, 1950, was a red letter day in the long and chequered history of India. For, on that day the present Constitution of India was brought into force which announced to the world the birth of a new republic.

What is Constitution?—A Constitution means a document having a special legal sanctity which sets out the frame-work and the principal functions of the organs of the Government of a State and declares the principles governing the operation of those organs.¹

What is Constitutional Law?—There is no hard and fast definition of Constitutional Law. In the generally accepted use of the term it means the rule which regulates the structure of the principal organs of the Government and their relationship to each other, and determines their principal functions. The rules consist both of legal rules in the strict sense and of usages, commonly called conventions, which without being enacted are accepted as binding by all who are concerned in Government. Many of the rules and practices under which our system of Government is worked are not part of the law in the sense that their violation may lead directly to proceedings in a court of law. Though the constitutional lawyer is concerned primarily with the legal aspects of the Government, there is required for a constitutional lawyer some knowledge of the salient features of constitutional history and of the workings of our political institutions.²

Historical Background.—All Constitutions are the heirs of the past as well as the testators of the future.³ The very fact that the Constitution of the Indian Republic is the product not of a political revolution but of the research and deliberations of a body of eminent representatives of the people who sought to improve upon the existing systems of administration, makes a retrospect of the constitutional development indispensable for a proper understanding of this Constitution.⁴

No one will deny the truth of the above statement that if any one seeks to study the law, constitutional or other, of a country, a knowledge of the historical process which led to its present form is indispensable for correct insight and understanding of the subject. It is, however, not necessary to go to any period beyond what is known as the 'British Period' for the modern political institutions originated and developed in that period only. The political institutions established by the Hindus in the olden days and by the Muslims in the medieval period have become a thing of the past, and they do not survive in any form in the present day. The British period in the history of India began with the incorporation of East India Company in the year 1600 in England. Now, let us study the various phases of the growth of our Constitution from the advent of the English on Indian shore till this day. We can broadly divide the period as follows:—

1. Wade and Philips—Constitutional Law, p. 1 (4th ed.).
2. Ibid., p. 4.
3. Jennings—Some Characteristics of the Indian Constitution, p. 56 (1953).
4. D.D. Basu—Introduction to the Constitution of India, p. 3 (3rd ed. 1946).

1. 1600-1765.
2. 1765-1858.
3. 1858-1919.
4. 1919-1947.
5. 1947-1950.

(1) 1600 TO 1765—THE COMING OF THE BRITISH

The coming of the British.—The Britishers came to India in 1600 as traders in the form of The East India Company. Attracted by the stories of the fabulous wealth of India and fortified by the adventurous maritime activity of the Elizabethan era Englishmen were eager to establish commercial contacts with the East.⁵ To facilitate such a venture some of the enterprising merchants of London formed themselves into a company. The company secured for it a Charter from Queen Elizabeth in December, 1600, which settled its constitutions, powers and privileges. The Charter vested the management of the company in the hands of a Governor and 24 members who were authorized to organise and send trading expeditions to the East India. The Charter granted the company a monopoly of trade with the East. It had authority to keep an armed naval force for its security. The Charter was granted in the first instance for 15 years and was terminable on two years' notice. It could be renewed if the interest of the Crown and the people were not prejudicially affected.

Fortified with the Charter, the Company started establishing its trading centres or factories at several places in India. The first settlement of the company was at Surat (1612) which was established as a result of a Royal "Firman" from the Emperor Jehangir granting it land and other concessions. This was followed by Musulipattam—Madras (1639) and later at Hariharpur in Mahanadi Delta (1690). Thus in the course of time the factories at Bombay, Madras and Calcutta became the chief settlements or presidencies of the company. The administration of these presidencies was carried on by President and a Council composed of the servants of the company.

During this period except in case of Bombay which had been ceded with full sovereignty to the British Crown wherever the Britishers settled they did so with the consent of the Indian rulers. The natural consequences of their position would have been their submission to the law of the place. But anyhow they secured the permission of the local kings to retain their own laws. As Illbert observes: "In India concessions granted by or wrested from native rulers gradually established the company and the Crown as territorial sovereigns in rivalry with other country powers and finally left the British Crown exercising undivided sovereignty throughout British India, the paramount authority over the subordinate native States."⁶

Legislative power.—The Charter of 1601 granted to the Governor and company the power to make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances for the good governance of the company. The legislative power of the company was very limited in its scope and character. They were not to be contrary to the laws, statutes or customs of England. The power conferred under the Charter was essentially a power of minor legislation prohibiting any fundamental change in the principles of English law. It was not a power to legislate for some territory because the company was purely a trading concern and not a political sovereign acquiring foreign territory. The legislative power was thus designed to enable the company to regulate its business and to maintain discipline among its servants. Though limited in

5. M.V. Pylee—Constitutional History of India, p. 1.

6. Illbert—The Government of India, p. 1 (2nd ed., 1907).

scope, but the legislative powers of the company was of great historical importance as it is "the germ out of which the Anglo-Indian Codes were ultimately developed."⁷ By the Charters of 1609 and 1661 similar powers were affirmed. The Charter of 1693 makes no mention of legislative powers.

The Charter of 1726.—The Charter of 1726 had a great legislative significance. Hitherto, the legislative power was vested in the Court of Directors in England. They were not conversant with the conditions prevailing in India. It was, therefore, considered desirable to vest law-making power in those who were acquainted with the Indian conditions. Accordingly, the Charter authorized the Governor and Council of the three Presidencies to make, constitute and ordain bye-laws, rules and ordinances for the good governance of the Company and to impose punishments for their contravention. These bye-laws, rules and ordinances and punishments were to be reasonable and not contrary to the laws and statutes of England and they were not to be effective unless approved and confirmed in writing by the Company's Court of Directors. The Charter also established the Mayor's Courts at Calcutta, Bombay and Madras and expressly introduced English laws into these Presidencies.

But the Britishers had not become a ruling power in India until the second-half of the 18th century. It was still a trading concern. Thereafter, events of great importance took place in the interior of Bengal. It was a period of gradual disintegration of the Moghul Empire. Its last strong Emperor Aurangzeb was dead. Soon after the death of Aurangzeb the controlling and powerful unifying force that existed in country under the rule of Aurangzeb declined and India became a battleground of rival contesting principalities. The East India Company took full advantage of this chaotic situation and gradually established itself as the unrivalled master of the Indian sub-continent. The victory of the Company in the battle of Plassey in 1757 against Sirajuddaula, Nawab of Bengal, had laid the foundation of the British Empire in India. In 1765 Shah Alam granted the Diwani, i.e., the responsibility of the collection of revenue to the Company, which automatically involved the administration of civil justice. As Illbert has said:—"The year 1765 makes a turning point in the Anglo-Indian History and may be treated as commencing the period of territorial sovereignty by the East India Company." The Company henceforth threw off the mask of traders and appeared in the true garb of rulers.

(2) 1765 TO 1858—BEGINNING OF THE BRITISH RULE

Regulating Act of 1773.—The grant of Diwani made the East India Company real masters of Bengal, Bihar and Orissa. As a result of Diwani the company became responsible for the administration of civil justice and collection of land revenue. But it was very difficult for the company—a trading body—to administer this vast territory. It did not, therefore, take over these functions immediately. The administration of civil justice and collection of revenue was, therefore, left to Indians. The company, however, appointed two English officers to supervise the working of this system. This system proved to be harmful for the country. The Indian official who were responsible for administration had no effective power to enforce their decisions. On the other hand, the company's servants who were real rulers had no responsibility and they exploited the situation for their selfish ends. They were directly responsible to the Court of Directors in England. The Governors and Councillors were appointed from among the senior servants of the Company. They had manifold business to perform. Under the Governor and the Council there was a body of civil and military servants. These servants were classified into writers, factors Junior and Senior—and merchants. The salaries of these servants of the Company was ridiculously small. In the circumstances, these low-paid servants of the

7. Illbert—*The Government of India*, p. 12 (1915).

Company used their official position freely to get rich quickly and extracted presents, bribes and levies from the poor people. As Lecky has said, "Never before the natives experienced a tyranny which was at once so skillful, so searching and strong, whole districts which had been populous and flourishing were at last utterly depopulated, and it was noticed that on the appearance of a party of English merchants the villages were at once deserted and the shops shut, and roads thronged with panic-stricken fugitives."

Such was the administration of the Company after the Battle of Plassey. The servants of the Company exploited the Indians, amassed wealth and returned to England. The suffering of the people reached to maximum when there was a great famine in Bengal. The climax was reached when the Company approached the British Government for a huge loan. It was indeed a strange thing that while its servants were getting richer, the Company was heading towards bankruptcy. All these led the British public to suspect that something was palpably wrong with the administration of the Company. The members of the British Parliament attracted the attention of the British Government towards the sorry state of Company's administration. A Secret Committee was appointed by the House of Commons to inquire into the affairs of the Company on 13th April, 1772. The Committee in its inquiry reports, exposed several defects and deficiencies in the administration of East India Company and suggested that the affairs of the Company must be regulated by Parliament. Consequently, the Parliament passed the Regulating Act of 1773.

The Act of 1773 is of great constitutional importance because it asserted for the first time the right of Parliament to regulate the affairs of the East India Company. This Act is the first Act of British Parliament which established a definite system of Government of India. *It did the following things—*(a) Changed the constitution of the company in England; (b) Recognised the Government of Calcutta; (c) Brought the Presidencies of Bombay and Madras to some extent under the control of the Governor-General of Bengal; (d) Established a Supreme Court at Calcutta.

(a) Home Government.—Prior to the Regulating Act, the affairs of the Company were managed by the Court of Directors containing 24 members elected annually by the Court of Proprietors. A shareholder who held shares worth £ 500 had right to elect the Directors. The tenure of Directors was only one year. The period of one year was too short to enable a Director to acquire a grip over Company's affairs, and they had to please a large number of proprietors to secure re-election and were thus on the mercy of shareholders. The Regulating Act restricted the voting right to those shareholders who held shares of worth £ 1,000 and increased the term of office of Directors to 4 years, 1/4th of them retiring every year. The Directors were required to submit all correspondence from the Governor-General in India relating to revenue to the Treasury and those relating to the Civil and Military Government to one of Secretary of State. Thus, the Act strengthened the control of the British Government over the Company.

(b) Form of Government in India.—Prior to the passing of the Regulating Act, three Presidencies were separate and independent of one another. They had direct dealings with the Court of Directors in England. The Act of 1773 appointed a Governor-General and four Councillors for the Presidency of Fort William in Bengal and vested in them the whole civil and military Government of the Calcutta Presidency. The Act itself named the first Governor-General and his four Councillors. Warren Hastings was to be first Governor-General. The Councillors were to hold office for 5 years and could not be removed earlier except by the King on the recommendations of the Court of Directors. The Council was to take decision by a majority. The Governor-General had a casting vote in case of a tie in the council. The council was also vested with the power of superintendence and control of Governments of Bombay and Madras Presidencies in matters of war and peace except in case of emergency when they could take orders from

the Directors in London. The Governor-in-Council of the two Presidencies were required to pay due obedience to the orders of the Governor-General-in-Council of Bengal and to transmit to them regularly information regarding all transactions relating to the Government's revenue or interests of the Company. The Governor-General-in-Council of Bengal had power to suspend any offending Governor and his Council. Thus the Governor-General of Bengal and his Council became the supreme authority of India. The Act of 1773 thus, took the first step in the centralization of Administrative machinery in India.

(c) *Legislative power.*—The Act empowered the Governor-General and Council to make rules, ordinances and regulations for the good governance of the Company's settlement at Fort William and factories subordinate thereto. But their legislative power was subject to the following restrictions—(1) they were not to be repugnant to the laws of England; (2) they were to be reasonable; (3) they were to valid until "duly registered and published in the Supreme Court." The legislative power was thus controlled by the Supreme Court. They could be set aside by the King-in-Council on the application of any person or persons in India or in England.

(d) *Supreme Court.*—The Act also provided for the establishment of a Supreme Court at Calcutta consisting of a Chief Justice and three other Judges who were to be a barrister of at least 5 year's standing. They were to be appointed by the Crown and were to hold office during his pleasure. The Court was vested with civil, criminal, admiralty and ecclesiastical jurisdictions. Its jurisdiction extended to all British subjects residing in Bengal and Orissa and to hear all complaints against any of His Majesty's subject for crimes, misdemeanours, of oppressions and to suits, actions and complaints against any person employed by or in the service of the Company or of any of His Majesty's subjects. The Governor-General and Councillors and Judges of the Supreme Court were exempt from arrest or imprisonment in any action or suit or proceeding in the court. Appeal from the Supreme Court lay to the King-in-Council in England. The Court was to try cases by jury.

The object of the Act was good but the system that it established was imperfect. It suffered from many defects, *i.e.*, (1) It did not define clearly the relationship of the Governor-General and his Council and the Supreme Court with each other. (2) It did not make clear as to what law the Supreme Court was to administer. (3) It placed the Governor-General at the mercy of his Council.

The Act of Settlement, 1781.—To remove the defects of the Regulating Act of 1773, Parliament passed the Act of Settlement of 1781. The Act of Settlement of 1781 made the following changes in the Regulating Act : (1) It exempted the actions of the public servants of the Company done in official capacity from the jurisdiction of the Supreme Court. (2) It tried to settle the question of jurisdiction of the Court over servants of the Company and the native inhabitants. (3) It made it clear as to what law to be applied by the Supreme Court. (4) The Act recognised and confirmed the appellate jurisdiction of the Governor-General-in-Council in cases decided by the Mufassil Courts. (5) It empowered the Governor-General-in-Council to frame regulations for the Provincial Courts and Councils also.

The Pitts India Act, 1784.—The Act of Settlement of 1781, however, could not cure the defects of the Regulating Act and agitation for an effective control over the Company's Indian affairs continued. The matter was raised in the Parliament. Consequently, Parliament appointed two Committees. The Committee recommended for the recall of the Governor-General Warren Hastings and the Chief Justice Impey. But the Court of Proprietors refused to recall them. This demonstrated the inadequate degree of

parliamentary control over the company and its administration. To remedy this situation the Pitts India Act was passed by the Parliament.

The Act distinguished between commercial and political functions of the Company. The Court of Directors were allowed to manage commercial affairs of the Company, but for political affairs Board of Six Commissioners, known as Board of Control, was appointed to control such affairs. The Commissioners were appointed by the King and were to hold office during his pleasure. The Board was empowered to superintend, direct and control all operations of the civil and military Governments of the British possessions in the East India. But the Court of Directors were still strong, they had retained their vast patronage and had right to appoint and dismiss their servants in India, initiating policies and receiving all informations from India. The function of Board of Control was merely to revise and control over the doings of Directors. The Charter Act of 1793 renewed the Company's monopoly of trade for a further period of 20 years.

The Charter Act of 1813.—The Charter was preceded by the most searching investigation by a Committee of the House of Commons into the financial affairs of the Company. Although the Act renewed the Charter for a further period of 20 years, it took away the exclusive right of the Company to trade in India. The Indian trade was thrown open to all British merchants. By the Charter of 1813 the British Crown asserted a greater control over the power of the Councils. Henceforth the regulations made by the three Councils in India were required to be laid before the Parliament. The monopoly of East India Company was taken away and Indian trade was thrown open to all British subjects.

The Charter Act 1833.—The Charter Act of 1833 introduced important changes in the constitution of the legislature in India. The Governor-General of Bengal was hence forth to be styled as the Governor-General of India. The Act led to the centralisation of power in the hands of the Governor-General-in-Council by vesting the legislative power solely in him. The Governor-General-in-Council was empowered to make laws and regulations for 'all persons, whether British or native, foreigners or others, places and things within the territory of the Company. The Council was enlarged for the purpose of legislative work by the addition of a fourth member—known as the Law Member—who had no voice in executive matters. But this power was not to extend to the enactment of law with respect to certain specified matters. There was also express saving of the right of Parliament to make laws for India.

The laws made under the previous Acts were called Regulations but the laws made under the Act of 1833 were called Acts of Parliament.

The Charter Act of 1853.—This was the last of the Charter Acts enacted between 1793 and 1853. The Charter of 1853 took a decisive step in separating the Legislative machinery from the executive. The Act created a separate Legislative Council for India consisting of 12 members. The Council of the Governor-General was enlarged for legislative purposes by the addition of 6 new members. The 12 members were the Governor-General, the Commander-in-Chief, four members of the Council and six legislative members of whom two were English Judges of the Calcutta Supreme Court and the other four were officials, appointed by the local Governments of Madras, Bombay, Bengal and Agra. In this manner the local representation was introduced for the first time, in the Indian Legislature. Legislation was for the first time treated as a special function of Government requiring special machinery and special process. But no law made by the Council could be promulgated without the assent of the Governor-General who had the power to veto any Bill of the Legislative Council. The Act made a separate Governor-General for Bengal. The directors were deprived of their privileged power of appointment for the transfer of Indian Territories to the Crown. According to Punniah, it paved the way for this process and brought the career of the East India Company to an end.

(3) 1858 TO 1919—END OF COMPANY'S RULE

The Government of India Act, 1858.—The objective of the Pitts India Act which introduced a Double Government failed. The Board of Control failed to have proper control over Company's affairs. As a result, the Company's Government in India became thoroughly irresponsible. In the words of the Prime Minister Lord Palmerston, the Double Government was inconvenient, cumbrous and complex. At this stage when the circumstances were going against the Company, the Mutiny of 1857, the first war of Independence gave death blow to the Company's rule. As a result of all this, British Parliament passed the Act for the better Government, the Government of India Act, 1858.

The Act of 1858 transferred Government of India from the Company to the British Crown. India was henceforth to be governed by and in the name of Her Majesty. The Board of Control and the Court of Directors were abolished and their powers were transferred to one of Her Majesty's Secretary of State. The powers of the Crown were to be exercised by the Secretary of State for India assisted by a Council of 15 members. This was known as the 'Council of India'. Eight of its members were to be appointed by the Crown and the remaining seven were to be elected by the Court of Directors. Future vacancies were to be filled up by the Crown. The Council was an advisory body. The Secretary of State was made the Chairman of Council. The Secretary of State was required to lay before the President an account of the annual produce of the revenues of India. He was required to submit to Parliament annually a statement of the moral and material progress of India. The Law member and the Advocate-General or the Governor-General-in-Council of India were to be appointed by the King.

The Act of 1858 constituted the Secretary of State in Council as a body corporate, capable of suing and being sued in India and in England.

The transfer of Company's Government to the British Crown was announced by a 'Royal Proclamation' made by the Queen of England. The proclamation had a great constitutional importance. According to G.N. Singh "the passing of the Government of India Act, 1858 closed one great period of history and ushered in another great era—the direct rule of the Crown".⁸

Indian Council Act of 1861.—The Indian Council Act of 1861 was of basic importance. It brought about the beginning of the representative institutions. It provided India with the framework of Government which lasted up to the present time. Under this Act Indians were for the first time associated with the work of legislation.

Legislative power.—The Act enlarged the Council of the Governor-General for the purpose of making laws and regulations by the addition of not less than 6 and not more than 12 'Additional members': half of these were to be non-official members. The term of the office of these members was of two years. The Legislative Council was given the power to frame laws and regulations for all persons. Courts of Justice, places and things and public servants, inside and outside the British India. The Act restored legislative powers to the Presidency Governments of Bombay and Madras. The Provincial Legislative Councils were empowered to make laws for the benefit of the Province. The Governor-General's assent on every Bill passed by the Legislative Council was necessary and only then it could become an Act. In addition to this, the Governor-General had the power to veto any Bill. He was also empowered to issue ordinances. He had also power to alter the limits of the Provinces, Presidencies and territories. The Provincial legislatures were not empowered to make any laws that might alter the Acts of Central Legislature. According to G.N. Singh, the Indian Council Act of 1861 is

8. G.N. Singh—Landmark in Indian Constitutional and National Development. p. 73.

important in the Constitutional History of India for two chief reasons. First, because it enabled the Governor-General to associate the people of the land with the work of legislation and, secondly, by vesting legislative power in the Governments of Bombay and Madras and making provision for good government, it laid down the foundation of the policy of legislative devolutions, which resulted in the grant of almost complete internal autonomy to the Provinces in 1937.

The Indian Council Act of 1861, however, suffered from many defects. It gave unlimited power to the Governor-General. The non-official members had no right in the Governor-General's Council. They could not ask questions and discuss the Budget. Moreover, the non-official members were used to be native Princes or Zamindars. They were not men of intelligence and had absolutely no interest in the legislation for India.

The political situation in India was very explosive. The period from 1861 to 1892 was the rise of Indian National Movement. The chief factors that gave rise to the movement have been grouped by G.N. Singh into 6 heads: (1) inspirations of the political ideals of the West; (2) religious revival and faith in the ancient glory of India; (3) economic discontent and disappointment at the non-fulfillment of British promises; (4) the influence of Indian press and the vernacular literature; (5) the development of the means of communications and the holding of Imperial Darbars; and (6) the increase in feeling of racial bitterness due to the arrogant and insolent attitude of the ruling race, the plundering administration of Lord Lytton and the display of violent temper and organised scurrilous propaganda carried on by Europeans and Anglo-Indians over the Ilbert Bill.⁹ The Indian National Congress was founded in 1885 and in its first session passed resolution expressing grave dissatisfaction at the existing system of Government and demanded reform and expansion of the Legislative Councils by admitting a considerable proportion of elected members as well as an increase in their powers. The Viceroy Lord Dufferin felt that the time had come to accept the demands of the Congress for reform seriously. He appointed a Committee and drew up plans for the enlargement of the Council and association of Indians with the work of Government. The report of the Committee was sent to the British Government. On the basis of these principles a bill was introduced in the Parliament which was passed after two years and became the Indian Councils Act of 1892.

The Indian Councils Act, 1892.—The Indian Councils Act of 1892 achieved three things: (a) it increased the number of members in the Central and Provincial Council, (b) introduced the election systems partially, and (c) enlarged the functions of the Councils. The Governor-General's Council was to have not less than 10 and not more than 16 members. He was empowered to make regulations for the nomination of additional members. In Bombay and Madras the number was to be not less than 8 and more than 20. The maximum for Bengal was fixed at 20 and for the North-West Provinces and Oudh at 15. The Councils were to have power of discussing the budget and subject to certain restrictions to ask questions from the Government. But the President of the Council had the power to disallow any question without giving a reason.

It is true that the Act laid down the foundation of the representative Government but it also suffered from many defects. The first defect was that the system of election introduced by it was defective. It did not give the representation to the people in the real sense. Certain classes of people were over-represented while others had no representation at all. For instance, in the Bombay Council 6 seats were allotted to the European merchants but the Indian merchants were given none. Secondly, the power of Legislative

9. G.N. Singh—Landmark of Indian Constitutional and National Development, p. 108.

Councils were very limited. The members had no right to ask questions on budget. Thirdly, the number of non-official members was very small.

Although the Act of 1892 fell far short of the demands made by the Indian National Congress, yet it could be said that it was a great advance upon the existing state of things. It certainly paved the way for future progress by conceding the principles of elections and giving the Legislative Councils some control over the Executive.

Morley Minto Reforms—The Indian Councils Act of 1909.—The first attempt at introducing a representative and popular element was made by Morley-Minto Reforms, known by names of the Secretary of State (Lord Morley) and the Viceroy (Lord Minto) which were implemented by the Indian Councils Act, 1909. By this Act, the size of Legislative Councils, Central as well as provincial, was considerably increased. The number of additional members in the Governor-General's Council was raised from 16 to 60. By the Act of 1909 the powers of the Legislative Councils, both Central and Provincial, were also enlarged. Now the Councils were empowered to discuss any matter, ask questions and supplementary questions. The Councils had also the right of discussing and moving a resolution on the financial statement but they were not given the power of voting.

(4) 1919 TO 1947—INTRODUCTION OF SELF-GOVERNMENT

1. Montagu-Chelmsford Report—The Government of India Act, 1919.—The next landmark in the constitutional development of India was the Montagu-Chelmsford Report which led to the enactment of the Government of India Act, 1919. The Morley-Minto Reforms failed to satisfy the aspirations of the Indians as they did not establish Parliamentary system of Government in the country. Indian National Congress became very active during the time of the 1st World War and pressed for reforms. In response to this popular demand the British Government made a declaration on August 20, 1917, that the future policy of His Majesty's Government was that of "increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to progressive realisation of responsible Government in British India as an integral part of the British Empire". No doubt this was the step which paved the path for Independence of India.

Main features of the 1919 Act

(1) *The Declaration.*—It promised a responsible Government to the Indians.

(2) *Dyarchy in the provinces.*—The Act introduced a system of Dyarchy in the Provinces. Dyarchy has been derived from the Greek word 'di-arche', means double rule. The object of the Dyarchy was to train the natives in the act of self-Government. In matter of legislation subjects were divided into Central and Provincial. The provincial subjects were divided into 'reserved' and 'transferred'. Jail, Police, Justice, Finance and Irrigation, comparatively more important subjects, were the 'reserved' subject and they were to be governed by the Governor and his Executive Council without any responsibility to the Legislature, Education, Agriculture, Local Self-Government, etc., subjects of lesser importance were transferred to the Indian Ministers and the Governors. The Governor could override both the Ministers and the Executive Council. The Provincial Legislative Council was empowered to legislate in respect of provincial matters only. But there were many restrictions on their powers of legislation. In several cases the previous sanction of the Governor-General was necessary. He had the power to stop the consideration of a Bill or a part of it. He could secure legislation on reserved subjects notwithstanding that the Council had not consented to it. He had also the power to veto Bills. The proportion of the elected members was increased upto 70% in the Provincial Legislative Councils but the separate electorate for Muslims was continued.

(3) *Central Government.*—The principle of responsible Government was not introduced in the Centre. The Central Government remained responsible to the British Parliament through the Secretary of State. The Central Legislature was to have a bicameral legislature. It was now a more representative body. The Council of State (Upper House) was composed of sixty members of whom thirty-four were elected and the Legislative Assembly (Lower House) was composed of 144 members of whom 104 were elected and the rest nominated. Among the nominated members about 26 were officials. The powers of both the Houses were equal except that the power to veto a Bill was given exclusively to the Lower House. In respect of financial Bills both the Houses had equal powers. The Central Legislature retained the power to legislate for the whole of India relating to any subject.

The Governor-General had overriding powers in respect of legislature. First, his prior sanction was required to introduce Bills relating to certain matters. Secondly, he had the power to veto or reserve for consideration of the Crown any Bill passed by the Indian Legislature. Thirdly, he had the power of certifying any Bill and sign it as a permanent law despite Legislature's opposition to it, in which case it would have the same effect as if it was passed or made by the Legislature. Fourthly, he could make Ordinances having the force of law for a temporary period in cases of emergency.

(4) *Structure of Government to remain unitary.*—The Central Legislature had power to legislate on any matter. So, it was not possible to challenge the validity of the Central Laws. In case of controversy it was the Governor-General and not the Courts, who had the authority to decide whether a particular subject was a Central or Provincial subject. Thus, the Government of India remained a unitary and centralised Government with the Governor-General-in-Council as the key-stone of the whole constitutional edifice.

Shortcoming of Act of 1919.—The Reforms of 1919, however, failed to fulfill aspirations of the people of India, which led to an agitation by the Congress for 'Swaraj' or 'self-Government' to be attained through non-co-operation. Its reasons were:—

(1) *Non-fulfilment of the demand for responsible Government.*—Though the Act gave a substantial measure of power to the Provinces, yet the structure of the Central Government remained unitary and centralised, with the Governor-General-in-Council as the key-stone of the whole constitutional edifice and it was through the Governor-General-in-Council that the Secretary of State and ultimately the Parliament discharged their responsibility for the peace, order and good Government of India.¹⁰ It was the Governor-General and not the Courts who had the authority to decide whether particular subject was Central or provincial. The Provincial Legislature could not, without the previous sanction of the Governor-General, take up for consideration any Bill relating to a number of subjects.

(2) *The failure of Dyarchy.*—The greatest difficulty came from the working of the system of Dyarchy in the Provinces. In a large measure the Governor came to dominate the ministerial policy by means of his overriding powers and the control over the official members in the Legislatures. The main defect of the system from the Indian point of view was the control of the purse. Finance, being a reserved subject, was placed in charge of a member of the Executive Council and not in charge of Minister. Thus it was impossible for a Minister to implement any progressive measure for want of funds. There was no provisions for collective responsibility of the ministers to the Provincial Legislature. They were appointed individually and acted as advisers to the Governor and different from the members of the Executive Council only in the sense that they were non-officials.

10. Report of the Joint Parliamentary Committee, Vol. I pp. 232-238.

Simon Commission.—The persistent demand for further reforms led the British Government to appoint a Statutory Commission known as Simon Commission. The Government of India Act had provided for the appointment of a Statutory Commission after the expiry of ten years of the passing of the Act to inquire into and report on the working of the Act in 1927. The Commission, headed by Sir John Simon, submitted his report in 1930. The report was considered at a Round Table Conference, consisting of the representatives of the British Government and of British India as well as the Rulers of the States. A white paper was prepared as a result of this Conference embodying the outlines of the reforms. The white paper was submitted to the Select Committee of the Parliament. In accordance with the recommendations of the Select Committee the Government of India Bill was introduced in the Parliament and passed with certain amendments as the Government of India Act, 1935.

The Government of India Act, 1935.

The Government of India Act, 1935, is regarded as the second milestone on the highway leading to a full responsible Government. It was a lengthy document, detailed and complicated having 321 sections with 10 Schedules. The basic features of the Act were, the introduction of partial responsibility at the Center, Provincial autonomy and an All India Federation.

(1) *The All India Federation.*—The Act provided for the establishment of an All India Federation comprising of the British India Provinces and such Indian State who would desire to come into the Federation. While under all the previous Government of India Acts, the Government of India was unitary, the Act of 1935 proposed a Federation taking the Provinces and the Indian States as one unit. But the accession of the States to the Federation was optional. It could not be established until the States had given their assent to join the Federation. At the time of joining it, each ruler of the State was required to sign an *Instrument of Accession* mentioning therein the extent to which it consented to surrender its authority to the Federal Government. The Rulers of Indian States never gave their consent and thus the Federation envisaged by the Act never came into being.

(2) *Dyarchy at the Centre.*—The Act of 1935 abolished Dyarchy at the Provincial level and introduced it at the Centre. The Executive authority of the Centre was vested in the Governor-General. The Federal subjects were divided into two categories—the 'reserved' and the 'transferred' : (a) The administration of 'reserved subjects' like defence, external affairs, ecclesiastic affairs and tribal areas, was to be made by the Governor-General in his discretion with the help of Councillors appointed by him who were not responsible to the Legislature. (b) The 'transferred' subjects, on the other hand, were to be administered by the Governor-General who was to act on the advice of the Council of Ministers who were responsible to the Legislature. But even in regard to this later sphere he could act contrary to the advice given by the ministers, if any of his special responsibilities were involved. As regards the special responsibilities, he was to act under the control and direction of the Secretary of State for the Crown.

(3) *Provincial Autonomy.*—The important feature of the new Act was that it marked the beginning of Provincial Autonomy. It was definitely an advance on the Act of 1919. The Act divided Legislative power between the Provincial and Central Legislatures, and within its defined sphere the Provinces were no longer delegates of the Central Government but were autonomous units of administration. To this extent the Government of India assumed the role of a Federal Government vis-a-vis the Provincial Governments, though the Indian States did not join the complete scheme of Federation. The executive authority of a Province was also exercised by a Governor on behalf of the Crown and not as subordinate of the Governor-General. The Governor was required to act with the advice of ministers responsible to the Legislature.

But notwithstanding the Provincial Autonomy, the Act of 1935, retained the control of the Central Government over the Provinces in certain spheres requiring the Governor to act in his discretion or in the exercise of his individual judgment in certain matters. In such matters, the Governor was to act without ministerial advice and under the control and directions of the Governor-General and through him of the Secretary of State.

(4) *Federal Legislature*.—The Federal Legislature was to consist of two Houses, the Council of States and the Legislative Assembly (Lower House) was to consist of 375 members, 250 of British Indian Provinces and 125 representing the Indian States. Its tenure was, unless dissolved earlier, five years. The Council of States (Upper House) was to consist of 260 members, out of which 156 members were to represent British India, 6 representatives to be nominated by the Governor-General and the rest elected directly. One hundred and four members were to be nominated by the Princes of the Indian States. The powers of the Federal Legislature were extremely limited. They had in general equal powers but demands of supply of votes and financial Bills were to originate in the Lower House. If there was any difference between the two Houses, the Act provided for a joint session of the two Houses for solving the deadlock.

(5) *Provincial Government*.—The Provincial Executive was to consist of the Governor and a Council of Ministers to advise him. The Governor was the head of the Executive. Three types of powers were given to the Governor: (a) Discretionary; (b) Powers exercised in his individual judgment; (c) Powers to be exercised on the advice of the ministers. But in regard to matters involving his special responsibility he had right to override the advice given by the ministers.

(6) *Provincial Legislatures*.—After this Act, the Legislatures of Bombay, Bengal, Madras, Bihar, Assam and the United Provinces were made bicameral (*i.e.* two houses) and in other five Provinces unicameral. The composition of the Provincial Assembly varied from Province to Province. The voting qualifications for the membership of the Council were not the same in all Provinces. The principle of communal electorate was preserved in the election of the members of the Assembly. The normal duration of the Assembly was of five years. The Provincial Legislature had power to make laws on the subjects given in the Provincial List. They could also make laws on the subjects in the Concurrent List. The power also extended to those residuary subjects which were assigned to it by the Governor-General. The previous sanction of the Governor and Governor-General for introducing almost all the Bills was obligatory. Financial Bills could only be introduced on the recommendation of the Governor. No Bill passed by the Legislature could become an Act without the assent of the Governor. The Governor had the right to return Bills for reconsideration. The discretionary powers and the responsibilities of the Governor made him to act as a dictator in the Provinces.

(7) *Distribution of Legislative power between the Centre and the Provinces*.—The Act made a three-fold division of power between the Centre and the Provinces—Federal List, Provincial List and Concurrent List. The Federal Legislature had exclusive power of 59 subjects. These subjects were subjects of national importance and essential and vital currency and coinage, naval, military and air force, census, etc. The Provincial Legislature consisted of 54 subjects which were subjects of local importance. The main amongst them were, police, provincial public services, education, etc. The Federal and Provincial Legislatures were to have concurrent powers to legislate on subjects mentioned in the Concurrent List. The subjects in the Concurrent List were essentially of a provincial and

local nature but required a uniform policy throughout India. It contained 26 subjects: Criminal Law, criminal procedure, civil procedure, marriage and divorce, arbitration, etc., were most important subjects amongst them.

The Federal Legislature had the power to legislate with respect to the subjects enumerated in the Provincial List if a proclamation of emergency was made by the Governor-General. The Federal Legislature could also legislate with respect to a Provincial subject if the Legislatures of two or more Provinces desired this in their common interest. In case of repugnancy in the concurrent field, a Federal law prevailed over a Provincial law to the extent of the repugnancy. But if the Provincial law received the assents of the Governor-General or of his Majesty, having been reserved for the consideration of this purpose the Provincial law was to prevail. The allocation of residuary power of legislation in the Act was unique. It was not vested in either of the Legislatures, Central or Provincial. But the Governor-General was empowered to authorise, either the Federal or the Provincial Legislature to enact a law with respect to any matter which was not enumerated in any of three Legislative Lists.

The Federal Court.—The Act established a Federal Court. The Federal Court had one Chief Justice and not more than six other Judges. The retiring age of these judges was sixty-five years. The necessary qualifications for the Judges were also given in the Act. The Judges were appointed by the Crown.

Jurisdiction of Federal Court.—The Federal Court had three kinds of jurisdiction, i.e., original, appellate and advisory. The Court had exclusive *original jurisdiction* in any dispute between the Federation and its units or the units *inter se*. The *appellate jurisdiction* of the Federal Court extended to appeals from the judgment of any High Court in India to the Federal Court if the High Court certified that the case involved a substantial question of law as to the interpretation of the Government of India Act, 1935 or any Order in Council made thereunder. An appeal could go to the Privy Council from decisions of the Federal Court. The Federal Court had also *advisory jurisdiction*. The Governor could refer any question of law to the Court to obtain its opinion whenever he liked to seek its advice.

The Government of India Act, 1935, was greatly criticised by almost all the parties of India. The Act came into force in regard to the Provinces in April, 1937, but the Central Government continued to be governed in accordance with the provisions of the Government of India Act, 1919, with minor amendments. The elections took place and popular ministries came into office in the Provinces but they lasted only for two years.

In 1939 the 2nd World War broke out in Europe. The British Government declared India as a belligerent country at war with Germany. This was done without consulting Indian leaders and the Indian Legislatures. Consequently, the Congress ministers resigned from office on the issue of participation of India in the War.

The Cripps Mission.—In the year 1942 the British Government realised that it was difficult to remain indifferent towards the Indian problem any longer. Therefore on March 22, 1942, the British Government sent Sir Stafford Cripps to negotiate with Indian leaders and secure their co-operation in the prosecution of War. Sir Stafford Cripps suggested the following proposals for the settlement of the Indian problem:—

- (a) Immediately after the end of the war steps shall be taken to set up in India an elected body for framing a new Constitution of India.
- (b) Provision shall be made, as set out below for participation of Indian States in the Constitution-making body.
- (c) The British Government undertakes to accept and implement the Constitution so framed subject only to : (i) The right of any Province of British India, which is not

prepared to accept the new Constitution, to retain its present constitutional provision being made for its subsequent accession if it so decides. If they so desire, His Majesty's Government will be prepared to agree upon a Constitution giving them the same full status of the Indian Union, (ii) The signing of a treaty which shall be negotiated between His Majesty's Government and the Constitution-making body.

(d) The Constitution-making body shall be composed of persons elected by Provincial Legislatures and nominated by the Indian Princes unless the leaders of Indian origin of the principal communities agreed upon some other form before the end of hostilities.

(e) His Majesty's Government must bear the responsibility for and retain the control and direction of defence of India.

Indians were not satisfied with the above proposals and, therefore, they rejected it. The Indian leaders found in it the seed of partition of the country. The main cause for its rejection was inadequacy of the proposals and the insistence of Congress on Cabinet Government.

The Labour Party came into power in England. The Labour Government was more sympathetic towards India and wanted to solve the Indian problem. With this end in view, the Cabinet Mission was sent to India.

The Cabinet Mission, 1946.—The Cabinet Mission came to India on 4th March, 1946. It consisted of three British Cabinet Ministers—Lord Pethic Lawrence, Sir Stafford Cripps and Mr. Alexander. The mission recommended the following proposals:—

(1) There should be a Union of India embodying both British India and the States and with the exception of certain reserved subjects, all subjects were to be retained by the States.

(2) The paramountcy of Crown was to lapse.

(3) For the purpose of framing a new Constitution a Constituent Assembly was to be elected.

(4) An interim Government was to be set up having the support of major political parties.

The proposals of Cabinet Mission were accepted and in July 1946 elections to Constituent Assembly took place.

The Indian Independence Act, 1947.—The provisions of the Act were as follows:—

1. The Act provided for the creation of two independent Dominions, India and Pakistan from 15th August, 1947.

2. Each Dominion was to have a Governor-General who was to be appointed by the King.

3. The Constituent Assemblies of both Dominions were empowered to frame laws for their respective territories till the new Constitution came into force.

4. After August 15, 1947 the British Government was not to control the Dominion or the Provinces.

5. For the time being, till the new Constitutions were framed, each of the Dominions and the Provinces were to be governed by the Government of India Act, 1935.

6. The post of Secretary of the State for India was to be abolished and was taken over by Secretary of the Commonwealth of Nations.

7. The Act proclaimed lapse of British paramountcy over Indian States.

The Indian Independence Act, 1947, came into force on August 15, 1947, when the British rule in India came to an end.

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(5) 1947 TO 1950—THE FRAMING OF THE NEW CONSTITUTION

The struggle for independence was thus over by 15th August, 1947. But the attainment of independence was not an end itself. It was only the beginning of a struggle, the struggle to live as an independent nation and, at the same time, establish a democracy based on the ideas of justice, liberty, equality and fraternity. The need of a new Constitution forming the basic law of the land for the realisation of these ideas was paramount. Therefore, one of the first tasks undertaken by independent India was framing of a new Constitution.¹¹

As provided in the Cabinet Mission Plan the Constituent Assembly came into being in November, 1946. Its members were elected by the Provincial Assembly by indirect election. Out of 296 seats for British India, the Congress captured 211 seats and Muslim League 73 seats. The rest were not filled up.

It is to be noted that this Constituent Assembly could not be called a sovereign body. It was brought about by the British Government and could be abolished by it. Its authority was limited. It was to work within the framework of the Cabinet Mission Scheme. It could not change the outlines of the Constitution as given in the Cabinet Mission Plan. But on the passing of the Indian Independence Act of 1947, the above mentioned limitations were removed. According to the terms of the Act of 1947 it became a sovereign body. It was not to work within the framework of the Cabinet Mission Plan. It was free to frame any Constitution it pleased.

The important members of the Constituent Assembly were Jawaharlal Nehru, Rajendra Prasad, Sardar Patel, Maulana Azad, Gopalaswami Ayyangar, Govind Ballabh Pant, Abdul Ghaffar Khan, T.T. Krishnamachari, Alladi Krishnaswami Ayyar, H.N. Kunzru, Sri H.S. Gour, K.V. Shah, Masani, Acharya Kripalani, Dr. Ambedkar, Dr. Radha Krishnan, Dr. Jaykar, Liaquat Ali Khan, Khwaia Nazimuddin, Sir Feroze Khan Noon, Suhrawardy, Sir Zafarullah Khan, Dr. Sachchidananda Sinha.

The first meeting of the Assembly was held on 9th December, 1946 as the sovereign Constituent Assembly for India. On December 11, Dr. Rajendra Prasad was elected its permanent Chairman. It was held in an atmosphere of uncertainty, because the Muslim League boycotted the Assembly. In spite of this, the Assembly made a substantial progress and adopted an 'Objective Resolution' which later became the Preamble of the Constitution. It appointed various Committees to deal with different aspects of the Constitution. The report of the committees formed the basis on which the first draft of the Constitution was prepared. On August 29, 1947, a Drafting Committee of 7 members was set up under the Chairmanship of Dr. Ambedkar.

The Draft Constitution was published in January, 1948. The people of India were given 8 months to discuss the draft and propose amendments. As many as 7,635 amendments were proposed and 2,473 were actually discussed. The Constituent Assembly held 11 sessions. The Draft Constitution was considered for 114 days. In all, the Constituent Assembly sat for 2 years, 11 months and 18 days.

The new Constitution of India was adopted by the Constituent Assembly on 26th November, 1949 and signed by the President, Dr. Rajendra Prasad, Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 372, 380, 388, 391, 392 and 393 came into force at once. The remaining provisions of the Constitution came into force on 26th January, 1950, which is the date of the commencement of this Constitution.

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11. M.V. Pylee—Constitutional History of India, p. 24.