

## UNIT-1

### Chapter1

#### **Constitutional Law:**

A state is defined in International Law as “an independent political entity” “occupying a defined territory” “the members of which are united together for the purpose of resisting external force and preservation of internal order.” This statement lays stress on what may be called ‘police functions’ of the state, viz., preservation of law and order and defence of the country from external aggression. It needs to be emphasized however that no modern state today rests content with such a limited range of functions. A modern state does not rest content with being merely a ‘police’ or ‘law and order’ state. It is much more than that. It tends to become a social welfare state.

Speaking generally, the Constitution of a country seeks to establish its fundamental or basic or apex organs of government and administration, describe their structure, composition, powers and principal functions, define the interrelationship of these organs with one another, and regulate their relationship with the people, more particularly, the political relationship.<sup>1</sup> And even about these basic institutions, only the basic norms are inscribed in the Constitution. All and sundry rules are not brought into discussion under the rubric of Constitutional Law. It may be noted that the term “Constitutional law” is broader than the term “Constitution”, as it comprises of the “Constitution”, relevant statutory law, judicial decisions and conventions. Traditionally, the structure of a country’s government is divided into three institutional components; (1) Legislature to make laws; (2) Executive to implement and execute laws; and (3) Judiciary to interpret the laws and administer justice. Thus, the Constitution deals with such questions as: How is the Legislature structured, composed and organised? What are its powers and functions? Similar questions are to be asked about each of the other two organs as well. Some other questions which the Constitution has to answer are: What is the mutual relationship between the Legislature and the Executive?

Or, between the Executive and the Judiciary? Or, between the Legislature and the Judiciary? What is the relationship between these organs and the people? Does the Constitution guarantee any rights for the people? While these three organs are basic in any country, and the Constitution does invariably deal with them.

### **Definition of Constitutional Law**

The Constitutional law refers to rights carved out in the federal and state constitutions. majority of this body of law has developed from state and federal supreme court rulings, which interpret their respective constitutions and ensure that the laws passed by the legislature do not violate constitutional limits.

### **Constitutionalism**

Modern political thought draws a distinction between ‘Constitutionalism’ and ‘Constitution’. A country may have the ‘Constitution’ but not necessarily ‘Constitutionalism’. For example, a country with a dictatorship, where the dictator’s word is law, can be said to have a ‘Constitution’ but not ‘Constitutionalism’. The underlying difference between the two concepts is that a Constitution ought not merely to confer powers on the various organs of the government, but also seek to restrain those powers. Constitutionalism recognises the need for government but insists upon limitations being placed upon governmental powers. Constitutionalism envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary. Unlimited powers jeopardise freedom of the people. As has been well said: power corrupts and absolute power corrupts absolutely. If the Constitution confers unrestrained power on either the legislature or the executive, it might lead to an authoritarian, oppressive government. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with ‘Constitutionalism’; it should have some in-built restrictions on the powers conferred by it on governmental organs. ‘Constitutionalism’ connotes in essence limited

government or a limitation on government. Constitutionalism is the antithesis of arbitrary powers. 'Constitutionalism' recognises the need for government with powers but at the same time insists that limitations be placed on those powers. The antithesis of Constitutionalism is despotism. Unlimited power may lead to an authoritarian, oppressive, government which jeopardises the freedoms of the people. Only when the Constitution of a country seeks to decentralise power instead of concentrating it at one point, and also imposes other restraints and limitations thereon, does a country have not only 'constitution' but also 'constitutionalism'

## **Historical Background Of The Constitution:**

### **Introduction**

India from the beginning of recorded history, had to face a long succession of foreign invasions. In the 16<sup>th</sup> century, the wealth of India attracted a host of European traders to India. The Dutch, the French and the British merchants became the favorable rivals to the earlier traders, the Portuguese. All of them were attracted to India by its fabulous wealth, and none came to settle here. The British traders came to India in the 17<sup>th</sup> century and certain British traders approached their Queen for a charter to carry on trade with East Indias. The charter was granted in December 31, 1660 and there by the East India Company was given exclusive right to carry on trade with India. During the 17<sup>th</sup> century the Mughal Empire expanded and reached its zenith in India. After the death of Aurangzeb, the Mughal Empire rapidly disintegrated. This gave East India Company a chance to establish its dominion in India. It began its career of conquest in 1757,

the battle of Plassey. A hundred years after the battle, the East India Company established its undisputed sovereignty over the whole of India. By the great revolt of 1857, the company's rule was terminated and the country passed under the direct rule of the British Crown; under the Government of India Act. 1858. The Act was dominated by the principle of absolute imperial control without any

popular participation of Indians in the administration of India. The subsequent history of India upto the making of the constitution (1949) is of gradual relaxation of imperial control and the evolution of responsible government.

Constitutional Development of India is a detailed analysis of how the Constitution of India has evolved from the past to the current. This article helps one to briefly understand the Development of Indian Constitution starting from Regulating Act of 1773 till the time when the Constitution of India came into effect in 1950.

The origin and growth of the Indian Constitution has its roots in Indian history during the British period. From 1773 onwards, various Acts were passed by the British Government for the governance of India. None of them, however, satisfied Indian aspirations mainly because they were imposed by the alien rulers.

The period of historical British Constitutional experiments in India can be divided into two phases:

1. **Phase 1-** Constitutional experiment during the rule of the East India Company (1773-1857)
2. **Phase 2 –** Constitutional experiments under the British Crown (1857-1947)

### **Constitutional Development – Rule under British Crown (1857-1947)**

The 2nd phase of the Constitutional development under British Crown.

#### **Government of India Act of 1858**

1. Government of India Act of 1858 passed by British Parliament, brought an end to the rule of East India Company. The powers were transferred to the British Crown.
2. The Secretary of State for India was given the powers and duties of the former Court of Directors. He Controlled the Indian Administration through the Viceroy of India.

3. The Secretary of State for India was assisted by the Council of India. This Council had 15 members. The Council was an advisory body.
4. Governor General of India was made the Viceroy of India.
5. Lord Canning was the 1st Viceroy of India.

### **Indian Councils Act of 1861**

- It introduced for the first time Indian representation in the institutions like Viceroy's executive+legislative council (non-official). Some Indians entered the Legislative council.
- Legislative councils were established in Center and provinces.
- It provided that the Viceroy's Executive Council should have some Indians as the non-official members while transacting the legislative businesses.
- It accorded statutory recognition to the portfolio system.
- Initiated the process of decentralisation by restoring the legislative powers to the Bombay and the Madras Provinces.

### **India Council Act of 1892**

- Introduced indirect elections (nomination).
- Enlarged the size of the legislative councils.
- Enlarged the functions of the Legislative Councils and gave them the power of discussing the Budget and addressing questions to the Executive.

### **Indian Councils Act, 1909 – Morley Minto Reforms**

The Indian Councils Act 1909 was an act of the British Parliament that introduced a few reforms in the legislative councils and increased the involvement of Indians (limited) in the governance of British India. It was more commonly called the

## Morley-Minto Reforms after the Secretary of State for India John Morley and the Viceroy of India

### **Background of Morley-Minto Reforms**

- Despite Queen Victoria's proclamation that Indians would be treated equally, very few Indians got such an opportunity as the British authorities were hesitant to accept them as equal partners
- Lord Curzon had carried out the partition of Bengal in 1905. This led to a massive uprising in Bengal as a result. Following this, the British authorities understood the need for some reforms in the governance of Indians.
- The Indian National Congress (INC) was also agitating for more reforms and self-governance of Indians. The earlier Congress leaders were moderates but now extremist leaders were on the rise who believed in more aggressive methods.
- INC demanded home rule for the first time in 1906.
- Gopal Krishna Gokhale met Morley in England to emphasise the need for reforms.
- Shimla Deputation: A group of elite Muslims led by Aga Khan met Lord Minto in 1906 and placed their demand for a separate electorate for the Muslims.
- John Morley was a member of the Liberal government and he wanted to make positive changes in India's governance.

### **Major provisions of the Morley-Minto reforms**

- The legislative councils at the Centre and the provinces increased in size.
  - Nominated non-official members: nominated by the Governor-General but were not government officials.
- The elected members were elected indirectly. The local bodies elected an electoral college who would elect members of the

provincial legislative councils. These members would, in turn, elect the members of the Central legislative council.

- The elected members were from the local bodies, the chambers of commerce, landlords, universities, traders' communities and Muslims.
- In the provincial councils, non-official members were in a majority. However, since some of the non-official members were nominated, in total, a non-elected majority was there.

### **Assessment of the Morley-Minto reforms**

- The Act introduced communal representation in Indian politics. This was intended to stem the growing tide of nationalism in the country by dividing the people into communal lines. The culmination of this step was seen in the partition of the country along religious lines. The effects of differential treatment of different religious groups can be seen to this day.
- The act did nothing to grant colonial self-government which was the Congress's demand.
- The Act did increase Indian participation in the legislative councils, especially at the provincial levels.
- Indians were given membership to the Imperial Legislative Council for the first time.
- It introduced separate electorates for the Muslims. Some constituencies were earmarked for Muslims and only Muslims could vote their representatives.
- The members could discuss the budget and move resolutions. They could also discuss matters of public interest.
- They could also ask supplementary questions.
- No discussions on foreign policy or on relations with the princely states were permitted.
- Lord Minto appointed (on much persuasion by Morley) Satyendra P Sinha as the first Indian member of the Viceroy's Executive Council.

- Two Indians were nominated to the Council of the Secretary of State for Indian affairs.

## **Government Of India Act 1919 or Montagu-Chelmsford Reform**

The Government of India Act 1919 was an act of the British Parliament that sought to increase the participation of Indians in the administration of their country. The act was based on the recommendations of a report by Edwin Montagu, the then Secretary of State for India, and Lord Chelmsford, India's Viceroy between 1916 and 1921. Hence the constitutional reforms set forth by this act are known as **Montagu-Chelmsford reforms** or Montford reforms.

### **Principle Features of Government of India Act 1919**

#### **Provincial Government**

- Executive:
  - Dyarchy was introduced, i.e., there were two classes of administrators – Executive councillors and ministers.
  - The Governor was the executive head of the province.
  - The subjects were divided into two lists – reserved and transferred.
  - The governor was in charge of the reserved list along with his executive councillors. The subjects under this list were law and order, irrigation, finance, land revenue, etc.
  - The ministers were in charge of subjects under the transferred list. The subjects included were education, local government, health, excise, industry, public works, religious endowments, etc.
  - The ministers were responsible to the people who elected them through the legislature.
  - These ministers were nominated from among the elected members of the legislative council.



- The executive councillors were not responsible to the legislature, unlike the ministers.
- The Secretary of State and the Governor-General could interfere in matters under the reserved list but this interference was restricted for the transferred list.
- Legislature:
  - The size of the provincial legislative assemblies was increased. Now about 70% of the members were elected.
  - There were communal and class electorates.
  - Some women could also vote.
  - The governor's assent was required to pass any bill. He also had veto power and could issue ordinances also.

## **Central government**

- Executive:
  - The chief executive authority was the Governor-General.
  - There were two lists for administration – central and provincial.
  - The provincial list was under the provinces while the centre took care of the central list.
  - Out of the 6 members of the Viceroy's executive council, 3 were to be Indian members.
  - The governor-general could issue ordinances.
  - He could also certify bills that were rejected by the central legislature.
- Legislature:
  - A bicameral legislature was set up with two houses – Legislative Assembly (forerunner of the Lok Sabha) and the Council of State (forerunner of the Rajya Sabha).
  - Legislative Assembly (Lower House)
  - Members of the Legislative Assembly:
    - The nominated members were nominated by the governor-general from Anglo-Indians and Indian Christians.

- The members had a tenure of 3 years.
- Council of State (Upper House)
  - Only male members with a tenure of 5 years.
  - Members of the Council of State:
- The legislators could ask questions and also vote a part of the budget.
- Only 25% of the budget was subject to vote.
- Rest was non-votable.
- A bill had to be passed in both houses before it became a law.
- There were three measures to resolve any deadlock between both the houses – joint committees, joint conferences and joint sittings.
- Governor-General
  - The governor-general's assent was required for any bill to become law even if both houses have passed it.
  - He could also enact a bill without the legislature's consent.
  - He could prevent a bill from becoming law if he deems it as detrimental to the peace of the country.
  - He could disallow any question, adjournment motion or debate in the house.

### **Who could vote?**

- The franchise was restricted and there was no universal adult suffrage.
- Voters should have paid land revenue of Rs.3000 or have a property with rental value or have taxable income.
- They should possess previous experience in the legislative council.
- They should be members of a university senate.
- They should hold certain offices in the local bodies.
- They should hold some specific titles.
- All this narrowed the number of people who could vote to an abysmal number.

## **Indian Council**

- There were to be at least 8 and a maximum of 12 members in the council.
- Half of the members should have ten years of experience in public service in India.
- Their tenure was to be 5 years.
- Their salaries were increased from £1000 to £1200.
- There were to be 3 Indian members in the Council.

## **Government of India Act, 1919 – Other Salient Features**

- This act provided for the first time, the establishment of a public service commission in India.
- The act also provided that after 10 years, a statutory commission would be set up to study the working of the government. This resulted in the Simon Commission of 1927.
- It also created an office of the High Commissioner for India in London.

## **Merits of the Government of India Act 1919**

- Dyarchy introduced the concept of responsible government.
- It introduced the concept of federal structure with a unitary bias.
- There was an increased participation of Indians in the administration. They held some portfolios like labour, health, etc.
- For the first time, elections were known to the people and it created political consciousness among the people.
- Some Indian women also had the right to vote for the first time.

## **Limitations of the Government of India Act 1919**

- This act extended consolidated and communal representation.
- The franchise was very limited. It did not extend to the common man.

- The governor-general and the governors had a lot of power to undermine the legislatures at the centre and the provinces respectively.
- Allocation of the seats for the central legislature was not based on population but the 'importance' of the province in the eyes of the British.
- The Rowlatt Acts were passed in 1919 which severely restricted press and movement. Despite the unanimous opposition of Indian members of the legislative council, those bills were passed. Several Indian members resigned in protest.

The Government of India Act was passed by the British Parliament in August 1935. It was the longest act enacted by the British Parliament at that time. So, it was divided into two separate acts namely, the Government of India Act 1935 and the Government of Burma Act 1935.

### **Government of India Act, 1935 – Background**

1. There was a growing demand for constitutional reforms in India by Indian leaders.
2. India's support to Britain in the First World War also aided in British acknowledgement of the need for the inclusion of more Indians in the administration of their own country.
3. The Act was based on:
  - Simon Commission Report
  - The recommendations of the Round Table Conferences
  - The White Paper published by the British government in 1933 (based on the Third Round Table Conference)
  - Report of the Joint Select Committees

### **Creation of an All India Federation**

1. This federation was to consist of British India and the princely states.
2. The provinces in British India would have to join the federation but this was not compulsory for the princely states.
3. This federation never materialised because of the lack of support from the required number of princely states.

### **How Government of India Act 1935 divided powers?**

1. This Act divided powers between the centre and the provinces.
2. There were three lists which gave the subjects under each government.
  - Federal List (Centre)
  - Provincial List (Provinces)
  - Concurrent List (Both)
3. The Viceroy was vested with residual powers.

Certain changes that were brought through the government of India Act, 1935 are mentioned in the table below, followed by details:

### **Provincial autonomy**

1. The Act gave more autonomy to the provinces.
2. Diarchy was abolished at the provincial levels.
3. The Governor was the head of the executive.
4. There was a Council of Ministers to advise him. The ministers were responsible to the provincial legislatures who controlled them. The legislature could also remove the ministers.
5. However, the governors still retained special reserve powers.
6. The British authorities could still suspend a provincial government.

### **Diarchy at the centre**

1. The subjects under the Federal List were divided into two: Reserved and Transferred.
2. The reserved subjects were controlled by the Governor-General who administered them with the help of three counsellors appointed by him. They were not responsible to the legislature.

These subjects included defence, ecclesiastical affairs (church-related), external affairs, press, police, taxation, justice, power resources and tribal affairs.

3. The transferred subjects were administered by the Governor-General with his Council of Ministers (not more than 10). The Council had to act in confidence with the legislature. The subjects in this list included local government, forests, education, health, etc.
4. However, the Governor-General had 'special powers' to interfere in the transferred subjects also.

### **Bicameral legislature**

1. A bicameral federal legislature would be established.
2. The two houses were the Federal Assembly (lower house) and the Council of States (upper house).
3. The federal assembly had a term of five years.
4. Both houses had representatives from the princely states also. The representatives of the princely states were to be nominated by the rulers and not elected. The representatives of British India were to be elected. Some were to be nominated by the Governor-General.
5. There were to be separate electorates for the minority communities, women and the depressed classes.
6. Bicameral legislatures were introduced in some provinces also like Bengal, Madras, Bombay, Bihar, Assam and the United Provinces.

### **Federal court**

1. A federal court was established at Delhi for the resolution of disputes between provinces and also between the centre and the provinces.
2. It was to have 1 Chief Justice and not more than 6 judges.

### **Indian Council**

1. The Indian Council was abolished.

2. The Secretary of State for India would instead have a team of advisors.

## **Franchise**

1. This Act introduced direct elections in India for the first time.

## **Reorganisation**

1. Sindh was carved out of Bombay Presidency.
2. Bihar and Orissa were split.
3. Burma was severed off from India.
4. Aden was also separated from India and made into a Crown colony.

## **Other points**

1. The British Parliament retained its supremacy over the Indian legislatures both provincial and federal.
2. A Federal Railway Authority was set up to control Indian railways.
3. The act provided for the establishment of Reserve Bank of India.
4. The Act also provided for the establishment of federal, provincial and joint Public Service Commissions.
5. The Act was a milestone in the development of a responsible constitutional government in India.
6. The Government of India Act 1935 was replaced by the Constitution of India after independence.
7. The Indian leaders were not enthusiastic about the Act since despite granting provincial autonomy the governors and the viceroy had considerable 'special powers'.
8. Separate communal electorates were a measure through which the British wanted to ensure the Congress Party could never rule on its own. It was also a way to keep the people divided.

## **Indian Independence Act 1947 Or Mountbatten Plan Background**

- Lord Mountbatten came to India as the last Viceroy and was assigned the task of a speedy transfer of power by the then British Prime Minister Clement Atlee.
- In May 1947, Mountbatten came up with a plan under which he proposed that the provinces be declared independent successor states and then be allowed to choose whether to join the constituent assembly or not. This plan was called the 'Dickie Bird Plan'.
- Jawaharlal Nehru, when apprised of the plan, vehemently opposed it saying it would lead to balkanisation of the country. Hence, this plan was also called Plan Balkan.
- Then, the viceroy came up with another plan called the June 3 Plan. This plan was the last plan for Indian independence. It is also called the Mountbatten Plan.
- The June 3 Plan included the principles of partition, autonomy, sovereignty to both nations, right to make their own constitution.
- Above all, the Princely States such as Jammu and Kashmir were given a choice to either join India or Pakistan. The consequences of these choices would affect the new nations for decades to come.
- This plan was accepted by both the Congress and the Muslim League. By then, the Congress had also accepted the inevitability of the partition.
- This plan was put into action by the **Indian Independence Act 1947** which was passed in the British Parliament and received the royal assent on 18 July 1947.

## **Provisions of the Mountbatten Plan**

- British India was to be partitioned into two dominions – India and Pakistan.
- The constitution framed by the Constituent Assembly would not be applicable to the Muslim-majority areas (as these would



become Pakistan). The question of a separate constituent assembly for the Muslim-majority areas would be decided by these provinces.

- As per the plan, the legislative assemblies of Bengal and Punjab met and voted for the partition. Accordingly, it was decided to partition these two provinces along religious lines.
- The legislative assembly of Sind would decide whether to join the Indian constituent assembly or not. It decided to go with Pakistan.
- The date for the transfer of power was to be August 15, 1947.
- To fix the international boundaries between the two countries, the Boundary Commission was established chaired by Sir Cyril Radcliffe. The commission was to demarcate Bengal and Punjab into the two new countries.
- The princely states were given the choice to either remain independent or accede to India or Pakistan. The British suzerainty over these kingdoms was terminated.
- The British monarch would no longer use the title 'Emperor of India'.
- After the dominions were created, the British Parliament could not enact any law in the territories of the new dominions.
- Until the time the new constitutions came into existence, the Governor-General would assent any law passed by the constituent assemblies of the dominions in His Majesty's name. The Governor-General was made a constitutional head.

On the midnight of 14th and 15th August 1947, the dominions of Pakistan and India respectively came into existence. Lord Mountbatten was appointed the first Governor-General of independent India and M .A. Jinnah became the Governor-General of Pakistan.

