

CHAPTER 1

THE HISTORICAL BACKGROUND

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 system of administration, makes a retrospect of the constitutional development indispensable for a proper understanding of this Constitution.

Practically the only respect in which the Constitution of 1949¹ differs from the constitutional documents of the preceding two centuries is that while the latter had been imposed by an imperial power, the Republican Constitution was made by the people themselves, through representatives assembled in a sovereign Constituent Assembly. That explains the majesty and ethical value of this new instrument and also the significance of those of its provisions which have been engrafted upon the pre-existing system.

For our present purposes we need not go beyond the year 1858 when the British Crown assumed sovereignty over India from the East India Company, and Parliament enacted the first statute for the governance of India under the direct rule of the British Government,—the Government of India Act, 1858 (21 & 22 Vict., c. 106). This Act serves as the starting point of our survey because it was dominated by the principle of absolute imperial control without any popular participation in the administration of the country, while the subsequent history up to the making of the Constitution is one of gradual relaxation of imperial control and the evolution of responsible government. By this Act, the powers of the Crown were to be exercised by the Secretary of State for India, assisted by a Council of fifteen members (known as the Council of India). The Council was composed exclusively of people from England, some of whom were nominees of the Crown while others were the representatives of the Directors of the East India Co. The Secretary of State, who was responsible to the British Parliament, governed India through the Governor-General, assisted by an Executive Council, which consisted of high officials of the Government.

The essential features of the system² introduced by the Act of 1858 were—

(a) The administration of the country was not only unitary but rigidly centralised. Though the territory was divided into Provinces with a Governor or Lieutenant-Governor aided by his Executive Council at the

head of each of them, the Provincial Governments were mere agents of the Government of India and had to function under the superintendence, direction and control of the Governor-General in all matters relating to the government of the Province.²

(b) There was no separation of functions, and all the authority for the governance of India,—civil and military, executive and legislative,—was vested in the Governor-General in Council who was responsible to the Secretary of State.²

(c) The control of the Secretary of State over the Indian administration was absolute. The Act vested in him the 'superintendence, direction and control of all acts, operations and concerns which in any way related to the Government or revenues of India'. Subject to his ultimate responsibility to the British Parliament, he wielded the Indian administration through the Governor-General as his agent and his was the last word, whether in matters of policy or of details.³

(d) The entire machinery of administration was bureaucratic, totally unconcerned about public opinion in India.

The Indian Councils Act of 1861 introduced a grain of popular element insofar as it provided that the Governor-General's Executive Council, which was so long composed exclusively of officials, should include certain additional *non-official* members, while transacting legislative business as a Legislative Council. But this Legislative Council was neither representative nor deliberative in any sense. The members were nominated and their functions were confined exclusively to a consideration of the legislative proposals placed before it by the Governor-General. It could not, in any manner, criticise the acts of the administration or the conduct of the authorities. Even in legislation, effective powers were reserved to the Governor-General, such as—(a) giving prior sanction to Bills relating to certain matters, without which they could not be introduced in the Legislative Council; (b) vetoing the Bills after they were passed or reserving them for consideration of the Crown; (c) legislating by Ordinances which were to have the same authority as Acts made by the Legislative Council.

Similar provisions were made by the Act of 1861 for Legislative Councils in the Provinces. But even for initiating legislation in these Provincial Councils with respect to many matters, the prior sanction of the Governor-General was necessary.

Two improvements upon the preceding state of affairs as regards the Indian and Provincial Legislative Councils were introduced by the Indian Councils Act, 1892, namely that (a) though the majority of official members were retained, the non-official members of the Indian Legislative Council were henceforth to be nominated by the Bengal Chamber of Commerce and the Provincial Legislative Councils, while the non-official members of the Provincial Councils were to be nominated by certain local bodies such as universities, district boards, municipalities; (b) the Councils were to have the power of discussing the annual statement of revenue and expenditure, *i.e.*, the Budget and of addressing questions to the Executive.

This Act is notable for its object, which was explained by the Under-Secretary of State for India thus:

"to widen the basis and expand the functions of the Government of India, and to give further opportunities to the *non-official and native elements* in Indian society to take part in the work of the Government."

The first attempt at introducing a representative and popular element was made by the Morley-Minto Reforms, known by the names of the then Secretary of State for India (Lord MORLEY) and the Viceroy (Lord MINTO), which were implemented by the Indian Councils Act, 1909.

The changes relating to the Provincial Legislative Councils were, of course, more advanced. The size of these Councils was enlarged by including elected non-official members so that the official majority was gone. An element of election was also introduced in the Legislative Council at the Centre but the official majority there was maintained.

The deliberative functions of the Legislative Councils were also increased by this Act by giving them the opportunity of influencing the policy of the administration by moving resolutions on the Budget, and on any matter of public interest, save certain specified subjects, such as the Armed Forces, Foreign Affairs and the Indian States.

On the other hand, the positive vice of the system of election introduced by the Act of 1909 was that it provided, for the first time, for separate representation of the Muslim community and thus sowed the seeds of separatism⁴ that eventually led to the lamentable partition of the country. It can hardly be overlooked that this idea of separate electorates for the Muslims was synchronous with the formation of the Muslim League as a political party (1906⁵).

Subsequent to this, the Government of India Act, 1915 (5 & 6 Geo. V., c. 61) was passed merely to consolidate all the preceding Government of India Acts so that the existing provisions relating to the government of India in its executive, legislative and judicial branches could be had from one enactment.

The next landmark in constitutional development of India is the Montagu-Chelmsford Report which led to the enactment of the Government of India Act, 1919. It was, in fact, an amending Act, but the amendments introduced substantive changes into the existing system.

The Morley-Minto Reforms failed to satisfy the aspirations of the nationalists in India inasmuch as, professedly, the Reforms did not aim at the establishment of a Parliamentary system of government in the country and provide for the retention of the final decision on all questions in the hands of the irresponsible Executive.

The Indian National Congress which, established in 1885, was so long under the control of Moderates, became more active during the First World War and started its campaign for self-government (known as the 'Home Rule' movement). In response to this popular demand, the British

Government made a declaration on August 20, 1917, that the 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."

The then Secretary of State for India (Mr. E.S. Montagu) and the Governor-General (Lord CHELMSFORD), entrusted with the task of formulating proposals for carrying out the above policy and the Government of India Act, 1919, gave a legal shape to their recommendations.

Main Features of the System introduced by the Act of 1919. The main features of the system introduced by the Government of India Act, 1919, were as follows⁶:

I. *Dyarchy in the Provinces.* Responsible government in the Provinces was sought to be introduced, without impairing the responsibility of the Governor (through the Governor-General), for the administration of the Province, by resorting to device known as 'Dyarchy' or dual government. The subjects of administration were to be divided (by Rules made under the Act) into two categories—Central and Provincial. The Central subjects were those which were exclusively kept under the control of the Central Government. The Provincial subjects were sub-divided into 'transferred' and 'reserved' subjects.

Of the matters assigned to the Provinces, the 'transferred subjects' were to be administered by the Governor with the aid of Ministers responsible to the Legislative Council in which the proportion of elected members was raised to 70 per cent. The foundation of responsible government was thus laid down in the narrow sphere of 'transferred' subjects.

The 'reserved subjects', on the other hand, were to be administered by the Governor and his Executive Council without any responsibility to the Legislature.

II. *Relaxation of Central control over the Provinces.* As stated already, the Rules made under the Government of India Act, 1919, known as the Devolution Rules, made a separation of the subjects of administration into two categories—Central and Provincial. Broadly speaking, subjects of all-India importance were brought under the category 'Central', while matters primarily relating to the administration of the provinces were classified as 'Provincial'. This meant a relaxation of the previous Central control over the provinces not only in administrative but also in legislative and financial matters. Even the sources of revenue were divided into two categories so that the Provinces could run the administration with the aid of revenue raised by the Provinces themselves and for this purpose, the provincial budgets were separated from the Government of India and the Provincial Legislature was empowered to present its own budget and levy its own taxes relating to the provincial sources of revenue.

At the same time, this devolution of power to the Provinces should not be mistaken for a *federal* distribution of powers. Under the Act of 1919, the

Provinces got power by way of delegation from the Centre. The Central Legislature, therefore, retained power to legislate for the whole of India, relating to any subject, and it was subject to such paramount power of the Central Legislature that the Provincial Legislature got the power "to make laws for the peace and good government of the territories for the time being constituting that province".

The control of the Governor-General over Provincial legislation was also retained by a laying down that a Provincial Bill, even though assented to by the Governor, would not become law unless assented to also by the Governor-General, and by empowering the Governor to reserve a Bill for the consideration of the Governor-General if it related to matters specified in this behalf by the Rules made under the Act.

III. *The Indian Legislature made more representative.* No responsibility was, however, introduced at the Centre and the Governor-General in Council continued to remain responsible only to the British Parliament through the Secretary of State for India. Nevertheless, the Indian Legislature was made more representative and, for the first time, *bi-cameral*. It was to consist of an Upper House, named the Council of State, composed of 60 members of whom 34 were elected, and a Lower House, named the Legislative Assembly, composed of about 144 members of whom 104 were elected. The powers of both the Houses were equal except that the power to vote supply was given exclusively to the Legislative Assembly. The electorates were, however, arranged on a communal and sectional basis, developing the Morley-Minto device further.

The Governor-General's overriding powers in respect of Central legislation were retained in the following forms—(i) his prior sanction was required to introduce Bills relating to certain matters; (ii) he had the power to veto or reserve for consideration of the Crown any Bill passed by the Indian Legislature; (iii) he had the converse power of certifying any Bill or any grant refused to be passed or made by the Legislature, in which case it would have the same effect as if it was passed or made by the Legislature; (iv) he could make Ordinances, having the force of law for a temporary period, in case of emergency.

The Reforms of 1919, however, failed to fulfil the aspiration of the people in India, and led to an agitation by the Congress (then under the leadership of Mahatma Gandhi) for 'Swaraj' or 'self-government', independent of the British Empire, to be attained through 'Non-cooperation'. The shortcomings of the 1919 system, mainly, were—

(i) Notwithstanding a substantial measure of devolution of power to the Provinces the structure still remained unitary and centralised "with the Governor-General in Council as the keystone of the whole constitutional edifice; and it is through the Governor-General in Council that the Secretary of State and, ultimately, Parliament discharged their responsibilities for the peace, order and good government of India".⁷ It was the Governor-General and not the Courts who had the authority to decide whether a 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.

(ii) The greatest dissatisfaction came from the working of Dyarchy in the Provincial sphere. In a large measure, the Governor came to dominate ministerial policy by means of his overriding financial powers and control over the official block in the Legislature. In practice, scarcely any question of importance could arise without affecting one or more of the reserved departments. The impracticability of a division of the administration into two water-tight compartments was manifested beyond doubt. The main defect of the system from the Indian standpoint was the control of the purse. Finance being a reserved subject, was placed in charge of a member of the Executive Council and not a Minister. It was impossible for any Minister to implement any progressive measure for want of funds and together with this was the further fact that the members of the Indian Civil Service, through whom the Ministers were to implement their policies, were recruited by the Secretary of State and were responsible to him and not to the Ministers. Above all was the overriding power of the Governor who did not act as a constitutional head even with respect to the transferred subjects. There was no provision for collective responsibility of the Ministers to the Provincial Legislature. The Ministers were appointed individually, acted as advisers of the Governor, and differed from members of the Executive Council only in the fact that they were non-officials. The Governor had the discretion to act otherwise than in accordance with the advice of his Ministers; he could certify a grant refused by the Legislature or a Bill rejected by it if it was regarded by him as essential for the due discharge of his responsibilities relating to a reserved subject.

It is no wonder, therefore, that the introduction of ministerial government over a part of the Provincial sphere proved ineffective and failed to satisfy Indian aspirations.

The persistent demand for further reforms, attended with the dislocation caused by the Non-cooperation movement, led the British Government in 1927 to appoint a Statutory Commission, as envisaged by the Government of India Act, 1919 itself (s. 84A), to inquire into and report on the working of the Act and in 1929 to announce that Dominion Status was the goal of Indian political developments. The Commission, headed by Sir John Simon, reported in 1930.

The 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 (inasmuch as the scheme was to unite the Indian States with the rest of India under a federal scheme). A White Paper, prepared on the results of this Conference, was examined by a Joint Select Committee of the British Parliament and the Government of India Bill was drafted in accordance with the recommendations of that Select Committee, and passed, with certain amendments, as the Government of India Act, 1935.

Before analysing the main features of the system introduced by this Act, it should be pointed out that this Act went another step forward in perpetuating the communal cleavage between the Muslim and the non-Muslim

"Communal Award."

communities, by prescribing separate electorates on the basis of the 'Communal Award' which was issued by Mr. Ramsay MacDonald, the British Prime Minister, on August 4, 1932, on the ground that the two major communities had failed to come to an agreement. From now onwards, the agreement between the two *religious* communities was continuously hoisted as a condition precedent for any further *political* advance. The Act of 1935, it should be noted, provided separate representation not only for the Muslims, but also for the Sikhs, the Europeans, Indian Christians and Anglo-Indians and thus created a serious hurdle in the way of the building up of national unity, which the makers of the future Constitution found it almost insurmountable to overcome even after the Muslims had partitioned for a separate State.

The main features of the governmental system prescribed by the Act of 1935 were as follows—

(a) *Federation and Provincial Autonomy.* While under all the previous Government of India Acts, the government of India was unitary, the Act of 1935 prescribed a federation, taking the Provinces and the Indian States as units. But it was optional for the Indian States to join the Federation; and since the Rulers of the Indian States never gave their consent, the Federation envisaged by the Act of 1935 never came into being.

Main features of the system introduced by the Government of India Act, 1935.

But though the Part relating to the Federation never took effect, the Part relating to Provincial Autonomy was given effect to since April, 1937. The Act divided legislative powers 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 Government, though the Indian States did not come into the fold to complete the scheme of federation.

The executive authority of a Province was also exercised by a Governor on behalf of the Crown and not as a subordinate of the Governor-General. The Governor was required to act with the advice of Ministers responsible to the Legislature.

But notwithstanding the introduction of Provincial Autonomy, the Act of 1935 retained control of the Central Government over the Provinces in a certain sphere—by 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.

(b) *Dyarchy at the Centre.* The executive authority of the Centre was vested in the Governor-General (on behalf of the Crown), whose functions were divided into two groups—

(i) The administration of defence, external affairs, ecclesiastical affairs, and of tribal areas, was to be made by the Governor-General in his discretion with the help of 'counsellors', appointed by him, who were not

responsible to the Legislature, (ii) With regard to matters other than the above reserved subjects, the Governor-General was to act on the advice of a 'Council of Ministers' who were responsible to the Legislature. But even in regard to this latter sphere, the Governor-General might act contrary to the advice so tendered by the ministers if any of his 'special responsibilities' was involved. As regards the special responsibilities, the Governor-General was to act under the control and directions of the Secretary of State.

But, in fact, neither any 'Counsellors' nor any Council of Ministers responsible to the Legislature came to be appointed under the Act of 1935; *the old Executive Council provided by the Act of 1919 continued to advise the Governor-General until the Indian Independence Act, 1947.*

(c) *The Legislature.* The Central Legislature was bi-cameral, consisting of the Federal Assembly and the Council of State.

In six of the Provinces, the Legislature was bi-cameral, comprising a Legislative Assembly and a Legislative Council. In the rest of the Provinces, the Legislature was uni-cameral.

The legislative powers of both the Central and Provincial Legislatures were subject to various limitations and neither could be said to have possessed the features of a sovereign Legislature. Thus, the Central Legislature was subject to the following limitations:

(i) Apart from the Governor-General's power of veto, a Bill passed by the Central Legislature was also subject to veto by the Crown.

(ii) The Governor-General might prevent discussion in the Legislature and suspend the proceedings in regard to any Bill if he was satisfied that it would affect the discharge of his special responsibilities.

(iii) Apart from the power to promulgate Ordinances during the recess of the Legislature, the Governor-General had independent powers of legislation, concurrently with those of the Legislature. Thus, he had the power to make temporary Ordinances as well as permanent Acts at any time for the discharge of his special responsibilities.

(iv) No bill or amendment could be introduced in the Legislature without the Governor-General's previous sanction, with respect to certain matters, *e.g.*, if the Bill or amendment sought to repeal or amend or was repugnant to any law of the British Parliament extending to India or any Governor-General's or Governor's Act, or if it sought to affect matters as respects which the Governor-General was required to act in his discretion.

There were similar fetters on the Provincial Legislature.

The Instruments of Instructions issued under the Act further required that Bills relating to a number of subjects, such as those derogating from the powers of a High Court or affecting the Permanent Settlement, when presented to the Governor-General or a Governor for his assent, were to be reserved for the consideration of the Crown or the Governor-General, as the case might be.

(d) *Distribution of legislative powers between the Centre and the Provinces.* Though the Indian States did not join the Federation, the federal provisions

of the Government of India Act, 1935, were in fact applied as *between the Central Government and the Provinces*.

The division of legislative powers, between the Centre and the Provinces is of special interest to the reader in view of the fact that the division made in the Constitution between the Union and the States proceeds largely on the same lines. It was not a mere delegation of power by the Centre to the Provinces as by Rules made under the Government of India Act, 1919. As already pointed out, the Government of India Act of 1935 itself divided the legislative powers between the Central and Provincial Legislatures and, subject to the provisions mentioned below, neither Legislature could transgress the powers assigned to the other.

A three-fold division was made in the Act—

- (i) There was a Federal List over which the Federal Legislature had exclusive powers of legislation. This List included matters such as External affairs; Currency and coinage; Naval, military and air forces; census, (ii) There was a Provincial List of matters over which the Provincial Legislature had exclusive jurisdiction, *e.g.*, Police, Provincial Public Service, Education.
- (iii) There was a Concurrent List of matters over which both the Federal and Provincial Legislature had competence, *e.g.*, Criminal law and procedure, Civil procedure, Marriage and divorce, Arbitration.

The Federal Legislature had the power to legislate with respect to matters 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 having been reserved for the consideration of the Governor-General received his assent, the Provincial law prevailed, notwithstanding such repugnancy.

The allocation of residuary power of legislation in the Act was unique. It was not vested in either the Central or the Provincial Legislature 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 the Legislative Lists.

It is to be noted that 'Dominion Status', which was promised by the Simon Commission in 1929, was not conferred by the Government of India Act, 1935.

The circumstances leading to the enactment of the Indian Independence Act, 1947,⁸ will be explained in the next Chapter. But the changes introduced by this Act into the structure of government pending the drawing up of a Constitution for independent India by Constituent Assembly, should be pointed out in the present context, so as to offer a correct and comprehensive picture of the background against which the Constitution was made.

In pursuance of the Indian Independence Act, the Government of India Act, 1935, was amended by the Adaptation Orders, both in India and Pakistan, in order to provide an interim Constitution to each of the two Dominions until the Constituent Assembly could draw up the future Constitution.

The following were the main results of such adaptations:—

(a) *Abolition of the Sovereignty and Responsibility of the British Parliament.* As has been already explained, by the Government of India Act, 1858, the Government of India was transferred from the East India Company to the Crown. By this Act, the British Parliament became the direct guardian of India, and the office of the Secretary of State for India was created for the administration of Indian affairs,—for which the Secretary of State was to be responsible to Parliament. Notwithstanding gradual relaxation of the control, the Governor-General of India and the Provincial Governors remained substantially under the direct control of the Secretary of State until the Indian Independence Act, 1947, so that—

“in constitutional theory, the Government of India is a subordinate official Government under His Majesty’s Government.”

The Indian Independence Act altered this constitutional position, root and branch. It declared that with effect from the 15th August, 1947 (referred to as the ‘appointed day’), India ceased to be a Dependency and the suzerainty of the British Crown over the Indian States and the treaty relations with Tribal Areas also lapsed from the date.

The responsibility of the British Government and Parliament for administration of India having ceased, the office of the Secretary of State for India was abolished.

(b) *The Crown no longer the source of authority.* So long as India remained a Dependency of the British Crown, the Government of India was carried on in the name of His Majesty. Under the Act of 1935, the Crown came into further prominence owing to the scheme of the Act being federal, and all the units of the federation, including the Provinces, drew their authority direct from the Crown. But under the Independence Act, 1947, neither of the two Dominions of India and Pakistan derived its authority from the British Isles.

(c) *The Governor-General and Provincial Governors to act as constitutional heads.* The Governors-General of the two Dominions became the constitutional heads of the two new Dominions as in the case of the other Dominions. This was, in fact, a necessary corollary from ‘Dominion Status’ which had been denied to India by the Government of India Act, 1935, but conceded by the Indian Independence Act, 1947.

According to the adaptations under the Independence Act, there was no longer any Executive Council as under the Act of 1919 or ‘counsellors’ as envisaged by the Act of 1935. The Governor-General or the Provincial Governor was to act on the advice of a Council of Ministers having the confidence of the Dominion Legislature or the Provincial Legislature, as the case might be. The words “in his discretion”, “acting in his discretion” and “individual judgment” were effaced from the Government of India Act,

1935, wherever they occurred, with the result that there was now no sphere in which these constitutional heads could act without or against the wishes of the Ministers. Similarly, the powers of the Governor-General to require Governors to discharge certain functions as his agents were deleted from the Act.

The Governor-General and the Governors lost extraordinary powers of legislation so as to compete with the Legislature, by passing Acts, Proclamations and Ordinances for ordinary legislative purposes, and also the power of certification. The Governor's power to suspend the Provincial Constitution was taken away. The Crown also lost its right of veto and so the Governor-General could not reserve any bill for the signification of His Majesty's pleasure.

(d) *Sovereignty of the Dominion Legislature.* The Central Legislature of India, composed of the Legislative Assembly and the Council of States, ceased to exist on August 14, 1947. From the 'appointed day' and until the Constituent Assemblies of the two Dominions were able to frame their new Constitutions and new Legislatures were constituted thereunder,—it was the Constituent Assembly itself, which was to function also as the Central Legislature of the Dominion to which it belonged. In other words, the Constituent Assembly of either Dominion (until it itself desired otherwise), was to have a dual function, *constituent* as well as *legislative*.

The sovereignty of the Dominion Legislature was complete and no sanction of the Governor-General would henceforth be required to legislate on any matter, and there was to be no repugnancy by reason of contravention of any Imperial law.

REFERENCES

1. The Constitution of India was adopted on 26-11-1949 and some of its provisions were given immediate effect. The bulk of the Constitution, however, became operative on 26-1-1950, which date is referred to in the Constitution as its 'Date of Commencement', and is celebrated in India as the "Republic Day".
2. Report of the Indian Statutory Commission (Simon Report), Vol. I, pp. 112 *et seq.*
3. SETON, *India Office*, p. 81.
4. PANIKKAR, *Asia and Western Dominance*, 1953, p. 155.
5. NEHRU, *Discovery of India*, 1956, p. 385.
6. Simon Report, Vol. I, pp. 122-26, 148-56.
7. Report of the Joint Parliamentary Committee; Simon Report, Vol. I, pp. 232-38.
8. For the text of the Government of India Acts, 1800-1935, the Indian Councils Acts, 1861-1909, the Indian Independence Act, 1947 and Orders thereunder, see BASU, *Constitutional Documents*, Vol. I (1969).