AILET

# Key Constitutional Developments Between 1937-1947 for CLAT (Part 1/2)

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As a law aspirant, you are expected to know the history of the Constitution of India, which is the foundation of the legal framework of the country. In exams like CLAT, AILET, SLAT etc, you will be tested on your knowledge of the Indian Constitution. This article discusses the key constitutional developments between 1937-1947:

### 1. Government of India Act, 1919

The purpose of this Act was to increase the participation of Indians in the administration of their country. The provisions of this Act was based on the recommendations contained in a report written by Edwin Montagu, the then Secretary of State for India and Lord Chelmsford, who was the then Viceroy of India. The reforms brought in by this Act are, hence called the Montagu-Chelmsford reforms or Montford reforms.

### Features of the Government of India Act, 1919

- This Act enlarged the central legislature and made it more representative so as to have more influence on the government.
- Substantial representation was also given to the members of Indian Civil Services in the Executive Council. Also the number of Indians to the Council was increased to 3.
- One of the major reforms brought by this Act was that it introduced a dual form of government called Dyarchy (or Diarchy).
- Under Diarchy, governance was divided between two classes of administrators: Executive Councillors and Ministers.
- Two lists were created dividing the areas of governance. The “Transferred List” included areas like agriculture, supervision of local government, health and education, public works, religious endowments etc.

- The “Reserved List” included areas like law and order, defence, foreign affairs and communications, the police, land revenue, finance, irrigation etc.
- The areas mentioned in the Transferred List were to be looked after by the ministers (who were Indians). The areas mentioned in the Reserved List were in the control of the Executive Councillors (which was headed by the Governor of a Province).
- 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.
- This Act marked the introduction of the democratic principle into the executive of British Administration in India.
- It introduced the concept of federal structure in India (with central and provincial lists or Diarchy).
- For the first time, elections were known to the people and it created a political consciousness among the people (as the Ministers were elected through legislature).
- There was increased participation of Indians in the administration (as compared to before). They held some portfolios like labour, health, etc.

## BUILT-UP TILL THE GOVERNMENT OF INDIA ACT, 1935

The Government of India Act, 1919 had been functioning for about 10 years. There was a provision in the Act which provided for the review of the act by the Royal Commission, especially to see if Diarchy was working or not and if it should be continued further.

There were a lot of structural defects in Diarchy and the commission to review it was to be constituted at the end of 10 years by John Simon by 1927. It is certainly one of the key constitutional developments in this time.

But in the back drop of all of this, during the 10 years between Government of India Act, 1919 and the Simon Commission coming to India, there was stagnancy in the freedom struggle. The Non-Cooperation movement which had begun in 1920 after the Jallianwala Bagh massacre had been called off in 1922 by Mahatma Gandhi because of the Chauri Chaura incident.

Owing to the end of the Non-Cooperation Movement there was an internal split or seize within the Indian National Congress (INC). There were two groups: Pro-Changers and No-Changers within INC.

Pro-Changers felt that agitation against the British rule would be of no help in achieving anything. They wanted to be members of the assembly and take part in the government, with the aim of wrecking the working of the government from within.

The No-Changers on the other hand wanted to continue with the non-cooperation ideals and concepts (like Vallabhbhai Patel, Jawarlal Nehru etc.)

The Pro-changers (also called Swarajists) did become the members of assemblies and took part in the government. But by the time their efforts bore fruit 2 significant events happened.

**The first event was** the Simon Commission arrived in India in 1928 to review constitutional reforms for India. But the Commission did not have a single Indian representative. The INC got together and decided to boycott the Simon Commission.

The Commission was greeted with agitation since its arrival. The police responded to the agitation with lathi charge and the violence caused the death of Lala Lajpat Rai (an author and politician from Punjab who was an integral supporter of Swadeshi movement).

**The second event was** the Nehru Report of 1928. After the agitation against the Simon Commission, the British were enraged. Lord Birkenhead, the then Secretary of State to India challenged the Indian to come up with unified reforms or a Constitution of their own. The Nehru Report was the answer to this challenge. It was drafted in 6 months by an All Parties Conference chaired by Motilal Nehru.

This was one of the earliest attempts at drafting a Constitution for India with the intention of India having a ‘dominion status’. However, there was a disagreement within the conference regarding whether to go for “Poorna Swaraj” or “Dominion Status”. While Motilal Nehru believed in concept of “Dominion Status”, other members and the congress (under Jawaharlal Nehru, who was also the secretary of the All Parties Conference) believed and wanted complete severance of all ties with the British.

While drafting, a compromise was struck between both of the sections i.e. if the Nehru Committee report was accepted by the British then the INC would accept “Dominion Status” but if the report was not accepted within a year then it would go for demand of total independence.

The Nehru Report and the report by the Simon Commission (which actually did a thorough work) were submitted almost simultaneously.

The Simon Commission report was **against federalism in India** as they believed it to be a distant possibility. But the Nehru Report **proclaimed a federal structure**. The Simon Commission recommended British rule for foreign affairs. Also, it said finance should not be given to Indians.

The Simon Commission report recommended a Round Table Conference to discuss the report and constitutional reforms.

**First Round Table Conference** was proposed to be conducted in London and delegates from both political parties from Britain and India, as well as representatives from princely states were supposed to attend it.

But the issue with the round table conference was that it was looking at India not as an independent state but it wanted British presence in India. The point of contention was to what extent British shall exercise their powers? This agenda completely overshadowed Nehru Committee report and the government paid no attention to it.

In the backdrop of this, there were calls for “Poorna Swaraj” (independence in complete sense) in Lahore. The INC started the Civil Disobedience Movement in 1930. Mahatma Gandhi went on Dandi March and owing to both many congress leaders and members were arrested.

The first Round Table Conference began and the INC boycotted it. This was also the point where the Muslim leaders started pointing that INC was more or less a Hindu organisation and they do not represent the whole country. The Muslim League attended the conference.

In the **second Round Table Conference** held in 1931 however, owing to the Gandhi-Irwin pact, Mahatma Gandhi was the sole representative of the INC. But the approach of the second conference also did not help. The outcome of the conference was a host of communalism issues which had to be solved.

The **third Round Table Conference** held in 1932 also did not see any representative from INC. Issues of federal structure for India was taken up here.

Finally in 1934, it was decided to formulate the Government of India Act 1935, based on reports of the round table conferences and the Simon Commission report.

## 2.GOVERNMENT OF INDIA ACT, 1935

We have looked at the built-up which eventually led to the formulation of the Government of India Act 1935. Here we would look into the features of the 1935 Act and while doing so would also draw parallels to our present Constitution and see the similarities.

Before this Act was enacted, there was a **white paper** published in 1934 and the white paper essentially focused on two aspects:

**First** was the need of devolution of powers in some form or the other on a federal model. The question to be resolve by the act was not the degree of devolution but to what extent devolution needed to happen. In other words, the power had to be distributed between two sets of government, one at the level of the union and the other at the level of the states or provinces.

**Second** was, the government "as far as possible" would have to be a "responsible government". What it meant by the expression "responsible government" implied two things: one, the participation of the Indians in the process of governance shall be to the maximum possible extent; two, only such powers which were considered necessary in the overall interest of the British rule in India, would be retained by the British.

For example- areas of defence, foreign affairs, transport and communication etc. were considered necessary by the British to have control over.

Though these points were discussed in the white paper and were recommended for the Parliament to include in the act, but when the actual Act came out the steps taken by the British government to make a responsible government were not as great as they were charted out. Looking into the features of the Act would give us better understanding.

### Features of the Government of India Act, 1935

This Act was, for all purposes the Constitution of India till we got our own Constitution. It was mostly referred to as the Government of India Act of 1935 in the Privy Council and the Federal Court cases. Even the Supreme Court judgements till 1950 were given with respect to the 1935 Act.

Even as late as in 2006, in ***Rameswar Prasad vs. Union of India*** which is popularly known as the case of Bihar Assembly dissolution case, the SC starts its discussion on the scope and ambit of Article 356 (State emergency or President's rule) with respect to Article 93 of the Government of India Act of 1935.

**Federal Structure:** The Act provided for the formation of an All India Federation. All the British India provinces (ex- Assam, Bengal, Bihar, Bombay etc.) were to join the federation mandatorily but the native Indian states or the princely states (ex- Hyderabad, J&K, Mysore etc.) had the choice to join the federation voluntarily by an Instrument of Accession.

The British Indian states and the princely provinces were separately allotted seats in the Federal Assembly and the Council of States. The Viceroy was the representative of the Crown to perform all his functions in India.

However, the process of accession was like a one way ticket i.e. there was an option to accede but no option to secede. Even in our present Constitution this principle is reflected. In the first article of our Constitution which says "**India that is Bharat shall be a union of state**" means India is a union of states and if the states would move out there would be no India that is Bharat. Hence, there was accession but no option of secession.

This is exactly opposite to how the American model works. In America, the states came together first and then they formed the federation and decided what powers the Federation is going to have. After the Civil War of 1865, America never became a Federation but it what it became was a confederation of states who had come together so as to facilitate some of their mutual needs.

Each state in America has its own Constitution and its own citizenship; hence America has what we call dual citizenship where a person if a citizen of the state where they reside as well as of the United states of America.

India, on the other hand, formed a union first and then devolved powers to the states. India has top-down model where power is given to the centre from where the power trickles down to the lower levels.

Under the Act, the British Indian provinces became the part of the federal structure *ipso facto* (automatically). But as far as the princely states were concerned, the states which wanted to become the part of the federal structure had to sign an instrument of accession.

The other aspect of this was once the British Indian provinces became a part of the federation they would be governed by the provisions of the 1935 act *ipso facto* as well. There was no special requirement or procedure for them. But as far as the princely states were concerned ,their relationship vis-s-vis the federal structure would be in accordance to the instrument of accession that they sign. If the instrument of accession says that a particular provision would not be

applicable to the particular state then it would not be.

This was something which is followed in our present Constitution in totality. 567 princely states became a part of Indian union in 1947. The constitutional provisions applied to them with respect to the instrument of accession that they signed.

It is because of this that according to Article 370 of the constitution J&K gets a special status (for ex- Indian Penal Code is not applicable to J&K and they have their own penal code called the Ranbir Penal Code). There were several other states like Andhra Pradesh, Arunachal Pradesh, Jharkhand (part of Bihar earlier), on whom laws made by the Parliament either does not apply or applies in a modified manner.

### Privy Purses Case

This case reiterates the significance of the instrument of accession. When princely states became a part of India, all the rulers were allowed a certain sum of money by the government of India which was called their Privy Purse. It was meant for their personal expenses since they cannot use their own states' revenue after it became a part of India. This was a quid pro quo arrangement between the states and the government.

The Parliament later tried to abolish the Privy Purses by passing an order but the SC intervened in this and said the privy purses arrangement was firstly provided for by the constituent and the constitution has recognised the position of these states.

Hence, it cannot be abolish it by passing an order as doing so would amount to the president unilaterally changing the conditions of the instrument of accession, which cannot be done. The instrument of accession is like a contract and the terms of a contract can only be signed bilaterally when both parties agree to the change.

**Division of Power:** The Act provided for the division of power between the centre and the provinces through 3 lists, namely the federal, provincial and the concurrent list. As regards the concurrent list, both the federal legislature and the provincial legislatures were given the power to pass laws on the subjects as stated in the list, but the federal legislature was in a superior position.

**Diarchy at the Centre:** The Act established diarchy at the centre and the diarchy which was established in the provinces under the Act of 1919 was abolished. At the centre, a part of the federal executive was declared "Reserved" while another part was "Transferred". T

he reserved part consisted of important subjects of defence, external affairs, finance etc. in the administration of the other federal subjects the Governor General was to be aided and advised by a Council of maximum 10 ministers.

**Bicameral federal legislature:** The federal legislature was to be bicameral, consisting of Federal Assembly and the Council of States. Life of the Federal Assembly was fixed for five years. The Council of States was to be a permanent body of which one-third members were to be nominated by the rulers. The representatives from British India were to be elected. Communal representation in elections was retained.

**Establishment of Federal Court**– The Act established a Federal Court with original and appellate jurisdiction to decide disputes between the federating units, between the federal government and a unit or units and with regard to the interpretation of the Constitution. However, the Privy Council remained the final court of appeal.

### Defects of the Government of India Act, 1935

**Option to Join the Federation:** The act contained a provision which said that the federation would come into existence only when at least 50% of the princely states would agree to join the federation. This provision turned out to be the nemesis of the Act.

The All India Federation never happened because more than 50% of the princely states never joined in. Even before the Act could properly come into force, it was doomed and it just remained on paper. It only served as an academic reference point for our Constitution framers, who took inspiration and came up with the present quasi-federal structure.

**Residuary Powers:** Under the present Constitution, according to Article 248, the residuary powers lie with the Parliament. But under the 1935 Act, the residuary powers were given to the Governor-General. This was criticised as providing one person with the residuary powers is allowing scope for a lot of exploitations to happen.

**Ordinances:** Under Article 123 of the present Constitution, when the two preconditions are present i.e. when the Parliament is not is session and there is an urgent need for a particular law then the President of India with advice from the Union Cabinet can pass an ordinance which will have the effect of a law.

But under the 1935 Act, the Governor General could promulgate ordinances even when the Parliament was in session. This basically meant that the Governor General could override or

outsmart the Parliament. This gave little value to the work of the Parliament.

**Emergency Provisions:** in the 1935 Act, the power to declare emergency under Article 93 is provided to the Governor-General. He can take over any function of the government of any province or any other function as well. These powers were criticised to be dictatorial and overriding powers of the governor.

**Diarchy at the Centre:** Indians weren't given control over the government of India. They weren't given power to amend the Constitution. Diarchy that was introduced in 1919 in the Provinces was introduced at the Centre (at least in the 1919 Act the Transfer List was under the Council of Ministers which was mostly composed of Indians).

**The Council of Ministers:** It was reduced to merely an advisory body under this Act whose decisions could be easily undone.

***Stay tuned for the second part of the Key Constitutional Developments Between 1937-1947 for CLAT series.***

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