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# POLITY & GOVERNANCE - I

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(UPSC MAINS)



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# **POLITY & GOVERNANCE-I**

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# CONTENTS

1. History and Evolution	1-10
2. Salient Features of Indian Constitution	11-41
3. Citizen-State Relations	42-69
4. Indian Federalism	70-99
5. Union & States	100-162
6. Functioning of the Government	163-179
7. Local Government	180-203
8. Judiciary in India	204-236
9. Constitutional Posts & Bodies	237-272
10. Comparative Study of Indian Constitution	273-286
<b>Previous Years' UPSC Questions (Solved)</b>	287-318
<b>Practice Questions</b>	319

# History and Evolution

# 1

Chapter

## HISTORICAL UNDERPINNINGS

### Introduction

The Constitution of India is the supreme law of India. It lays down the framework defining fundamental political principles, establishes the structure, procedures, powers and duties of government institutions and sets out fundamental rights, directive principles and the duties of citizens.

The Indian Constitution has been lauded by many as an insightful and comprehensive document responsible for ushering in an era of 'Rule of Law' and a responsible government in India. However, various sections of academics argue that the Constitution of India is the result of "slavish imitation" of the British by the Constituent Assembly which consisted of lawyers and elites. K. Hanumanthaiah commented – "We wanted the music of Veena or Sitar, but here we have the music of an English Band." Was the Constitution an alien document? Does it remain an exotic foreigner on the native Indian soil?

Addressing the concern of the Indian Constitution being just a 'bag of borrowings', Dr. B.R. Ambedkar said, "One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world... The only new things, if there can be any, in a Constitution framed so late in the day are the variations made to remove the faults and to accommodate it to the needs of the country."

Firstly, it would be unfair to refer to the Constitution merely as a "slavish imitation" since each provision of the Constitution was subject to intense debate and discussion in the Constituent Assembly which itself was composed of men and women who did not necessarily agreed on everything. Usually, an attempt was made to reach a consensus on all the provisions, with the belief that provisions agreed to by all, would not be detrimental to the interests of any particular section. Each provision so debated, was justified in addressing problems and aspirations specific to the Indian diversity. Secondly, even if it is conceded that at the time of independence, the Constitution was an eclectic mixture, it cannot be said that the Constitution – as it stands today – remains an alien document. The Constitution has been subjected time and again to various amendments by the Parliament, which have fine-tuned the provisions of the Constitution to respond well to the Indian conditions. An illustration of this process is the First Amendment, which added the IXth Schedule to the Constitution. It was added in order to remove the obstacles in bringing land reforms in India in the context of the particular land ownership pattern prevalent at that time. In addition, the Supreme Court has evolved Indian judicial interpretations and mechanisms to model the Constitution to India's needs – then and now. An illustration of this is the judicial device of Public Interest Litigation (PIL). The PIL is a judicial innovation (often credited to Justice P.N. Bhagwati) that does away with the requirement of locus standi (locus standi is the ability of a party to demonstrate to the



court sufficient connection to harm/damage that has occurred and himself/herself) and allows 'public-spirited' persons to bring matters of public importance to the attention of the Court. This innovation is significant to the Indian conditions, especially in light of the vast masses of poor and uneducated who are incapable of seeking judicial remedy on their own. Hence today, the Constitution codifies the Indian spirit and identity in its guarantee of justice, liberty, equality and promoting fraternity among all Indians.

## Historical Background

The Indian Constitution was not the result of a revolution. It was influenced and shaped by a series of developments, which often took place within the framework of Constitutional methodologies and principles. In fact, the first phase of the Indian National Movement was dominated by the Moderates who limited their demands to constitutional reforms through constitutional means (3Ps – Prayer, Petition and Protest). This is further highlighted by the fact that Indian Independence was granted through an Act (the Indian Independence Act of 1947) by the British Crown.

There was a growing apprehension about the English East India Company (EEIC) in England. A section of parliamentarians argued that Indian territories were being maladministered and exploited by the EEIC. They proposed greater control over the administrative activities of the Company. The Revolt of 1857 confirmed these fears and following it, the Indian territories of the EEIC came to be governed directly by the British Crown. The Government of India Act, 1858 was the first statute passed by the British Parliament to govern India directly and it is often referred to as the Magna Carta of Queen Victoria. Queen Victoria was proclaimed the Empress of India. As a consequence, all the territories that previously belonged to the EEIC came to belong to the Crown and were to be treated as British territory and all Indians became British subjects. Parts of India, which were ruled by native princes under treaty agreements with EEIC were assured that their treaties would be 'scrupulously maintained'. This meant that no extension of territorial possession of EEIC would be undertaken. The Indian subcontinent therefore, would consist of British Provinces and Indian States ruled by local princes. These princes, however, were not exactly sovereign rulers. They were subject to the suzerainty of the British Crown. The Act also assured impartial protection for religion and religious practices.

### The Government of India Act, 1858

- The Act created the office of Secretary of State who had all the power with respect to matters relating to India. He was only responsible to the British Parliament and was assisted in the performance of his functions by the Council of 15 members who were nominees of the British Parliament and included representatives of the Court of Directors of the EEIC. The Secretary of State exercised absolute control over the Governor General.
- The second tier was that of the Governor General and his Executive Council. He stood at the apex of government in India. The administrative system in India was highly centralized and all the powers – executive as well as legislative were vested in the office of the Governor General.
- Under the Governor General at the Centre, were several provinces headed by the Governors and their executive council. The Governors were completely subordinate to the Governor General and functioned under his direction and control. Therefore, the system of governance in India was unitary and the Provinces had no independent and autonomous status.



## Indian Councils Act, 1861

There was increasing resentment in Britain, towards the office of the Governor General of India. It was felt by some members of the British Parliament that the office was too powerful to be left unregulated. On the other hand, it was argued that India was too unruly and un-civilized a society to be introduced to the parliamentary system of governance. Subsequently, a middle ground was sought to allay the fears of both the sides. The landmark legislation, Indian Councils Act of 1861 was a step in finding such a solution. There were two distinct features of this legislation – firstly, it introduced some elements of separation of powers and secondly, it brought about some level of decentralization.

- Regarding separation of powers, the Councils Act of 1861 reconstructed the Governor General’s Council by separating legislative and executive functions through the creation of the Legislative Council. Some non-official members were added to the Governor General’s Executive Council to form the Legislative Council. At least half of the total members of the Legislative Council were to be non-official. These non-official members were to be nominated. In this manner, the Act introduced a grain of popular element through the introduction of non-official members while transacting legislative business. It is important to highlight here that, even though a separate legislative institution was formed, the separation of legislative and executive functions was actually quite cosmetic. The Legislative Councils were neither representative (since they lacked any elected representatives) nor deliberative. In fact, the executive (Governor General and his Executive Council) exercised extensive controls over the legislative processes through the following mechanisms:
  - Before any legislative proposal regarding certain matters (relating to public revenue or debt, religion, military or naval affairs) could be taken up in the Legislative Council prior permission of the Governor General was necessary.
  - Even after Bills were passed, the Governor General could still veto them. Additionally, he also possessed the power to reserve Bills for consideration of the Crown (through the Secretary of State).
  - The Governor General himself, had the power to legislate through Ordinances having the force of law.

- Regarding decentralization of powers, the Councils Act of 1861 restored independent powers of legislation of Bombay and Madras, which had earlier been revoked in 1833.

After the passing of the Act of 1861, certain transformational developments occurred which significantly altered the administrative ethos of the country. These are enumerated below:

- The Indian Penal Code was passed in 1862 by the newly formed Legislative Council. Landmark procedural legislations, the Criminal Procedure Code (1861) and the Civil Procedure Code (1859) were amended in the 1880s. This radically transformed the criminal justice administration in the country.
- The Indian Civil Service Act of 1861 regularized all irregular appointments to the bureaucracy and mandated a formal appointment system for members. This was meant to address the problem of irregular appointments to bureaucratic posts made by the EEIC as a mechanism to patronize loyal company servants.

From the above developments, it can be seen that attempts were being made to demarcate separate spheres for the legislative, judicial, executive and bureaucratic organs of the

government. All of this was being done gradually through the relaxation of imperial government towards the introduction of responsible government. Therefore, the next step in this 'gradualism' was to increase Indian representation in the councils and the Indian Councils Act, 1892 proclaimed to aim at doing exactly that.

### **Indian Councils Act, 1892**

The objective of this Act was '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 Act increased the number of nominated members in the Governor General's Executive Council. In the Legislative Council, even though official majority was retained, the number of non-official members was increased. The Legislative Council was also given more powers to discuss annual statements of revenue and expenditure (the Budget). In addition to discussing the Budget, the Act also gave the Legislative Council the power to address questions to the Executive regarding the Budget. The Act of 1892 introduced a system of indirect elections to the Legislative Council, where Provincial Legislative Councils elected some non-official members.

### **Morley-Minto Reforms (Indian Councils Act, 1909)**

The next significant step in the Constitutional history of India was the Morley-Minto Reforms of 1909, which marked the first attempt at introducing a representative and popular element into the governance of India. At the time of introduction of these reforms, the following institutional structures were established:

- **At the Centre:** The number of members in the Legislative Council was increased. Some of these new members were to be elected by a limited electorate. However, the official majority was retained. Powers of the Legislative Council were increased as well. They were now given an opportunity to move resolutions on the Budget (earlier the council could only discuss and ask questions on the Budget) and on any matter of public interest (except on matters like the armed forces, foreign affairs, and the Indian states).
- **At the Provinces:** In the Provincial Legislative Councils the number of members was increased and the official majority was removed.
- In the elections that were introduced through these reforms, the principle of separate electorates was introduced. Separate electorates had been demanded by the Muslim League in 1906 for the first time. It is the provision that required seats in certain constituencies to be reserved for some communities such that only members of those communities can cast their vote. The incorporation of this principle sowed the seeds of communalism in defining political identity in India. This trend ultimately culminated in the Two-Nation Theory and the gruesome Partition of the country.

#### ***Merits***

- The reforms marked an important stage in the growth of representative institutions in India. They were also a step towards the responsible association of elected Indians with the administration.
- They incorporated the principle of elections as the basis of the composition of the Legislative Council for the first time.



### **Criticism**

- These reforms failed to satisfy the demand to establish a Parliamentary system in India. Indians had demanded a responsible government and what the reforms of 1909 offered was 'benevolent despotism' aimed at establishing a 'constitutional autocracy'. The real solution lay in self-rule and accountable governance, but the 1909 Act was only a face-saving device. The veto powers of the Governor General were retained and the office continued to remain unaccountable to the Legislature.
- The Reforms introduced separate electorates and through this the Act added a new political problem of communalism in the country.

The above shortcomings of the reforms of 1909 were pursued by the INC, which was no longer under the control of the Moderates. In response to the demands of the nationalists, the Government made a declaration stating that the policy of the British Government was to 'increase association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to progressive realization of responsible government in British India as an integral part of the British Empire'. In the context of this declaration, the Montague-Chelmsford Reforms of 1919 were introduced.

### **Montague-Chelmsford Reforms, 1919**

The Government of India Act of 1919 differed from the Morley-Minto Reforms in the fact that it was for the first time in the colonial history that the reforms categorically stated that this was a concession to India with a view to the progressive realization of responsible government in India. Now, because the mode of realization of self-government in India was to be progressive, it would have to come about in phases. In this first phase, the Government of India Act, 1919 did the following:

- The Act introduced the system of 'Dyarchy' in the Provinces. This system was described as a step towards responsible government in the Provinces. Under this system, subjects entrusted to the Provinces were divided into two – the reserved and transferred subjects.
- The transferred subjects were to be administered by the Governor with the aid of Ministers responsible to the Provincial Legislative Council in which the proportion of elected members was raised to 70%. The reserved subjects were to be administered by the Governor and his Executive Council solely, without responsibility to the Legislature. Thus, in the limited sphere of transferred subjects, responsible government was introduced.
- Secondly, there was a relaxation in Centre's control over the Provinces, i.e., increased decentralization as subjects were divided into Central and Provincial. In matters entrusted to the Provinces, they were allowed to raise revenue from their territories. Consequently, provincial Budgets were separated from Government of India. This division of powers was not federal in nature, however, as the Centre exercised absolute control over the provinces as a Provincial Bill would not become a law until assented to by the Governor General.
- In the realm of institution building, the Legislative Councils were made more representative. The Legislative Council at the Centre was made bicameral, consisting of an Upper House (Council of States) and a Lower House (Legislative Assembly). Elections continued to be conducted according to separate electorates.

### Shortcomings

The reforms fell short on the demands made by the nationalists and the Non-Cooperation Movement was launched under the leadership of Mahatma Gandhi. The demand of the nationalists was for 'Swaraj' or Self-Rule. The following are the shortcomings of the reforms of 1919:

- The Act did provide for the devolution of powers to the Provinces through the division of subjects between the Centre and Provinces. However, the ultimate power remained in the hands of the Governor General. The government at the Provinces had to function in subordination to the Governor General due to provisions like prior sanction before taking up a Bill for consideration. Additionally, it was the Governor General (and not the Courts) who had the power to decide whether a subject was Central or Provincial.
- Another major criticism of this Act is that the system of Dyarchy failed miserably. This was primarily due to impractical division of powers into watertight compartments. Finance was a reserved subject and therefore, was beyond the control of the elected councils and the executive council members were in control of finances. It was, therefore, impossible for any minister to implement any progressive measure for want of funds and, together with this was the fact that the members of the Indian Civil Services, through whom the ministers were to implement their policies, were recruited by the Secretary of State and were responsible to him. On top of all this, the Governor had the power to act independently of the advice of the ministers and he could refrain from sanctioning any expenditure for a policy even after it was approved by the ministers. There was no provision for collective responsibility and the ministers were appointed and acted individually.
- The Congress also criticised the reforms of 1919 for failing to include the Declaration of Rights of 1918 (which included the right to bear arms, life, liberty and freedom of the press) into the GoI Act of 1919. Additionally, the Rowlatt Act (1919) and the Jallianwallah Bagh massacre (1919) followed the reforms. In response to this, the INC boycotted the elections that were to be held in November 1920 and launched the Non-Cooperation Movement in 1920. The movement was formally withdrawn by Mahatma Gandhi in 1922 after the Chauri-Chaura incident.

In the spirit of gradual and progressive realization of self-government, the GoI Act of 1919 also included a provision for review of the system after 10 years. However, the deep-seated resentment against the reforms caused the review commission to come two years before its appointed date. The review commission – the Simon Commission – envisaged by the GoI Act of 1919 came 'to inquire into and report on the working of the Act of 1919'.

### Simon Commission & Government of India Act, 1935

The Simon Commission announced that Dominion Status was the goal of political developments in India. The report of the Simon Commission was discussed in three Round Table Conferences (1930, 1931 and 1932) and based on these discussions, the Government of India Act of 1935 was passed. The following were the main features of this landmark legislation:

- **Federation:** The GoI Act of 1935 provided for the establishment of a federation of Indian States and British Provinces. Before this, the form of Indian polity had been unitary and centralized. The formation of a federation would give the territorial units an independent constitutional existence and mandate. This would mean greater autonomy



for the Indian States (ruled by Princes) and British Provinces (administered by Governors). The choice to join a federation was given to the Indian States. The Indian princes were apprehensive that joining a federation would curtail their autonomous powers within their States. As a result the federal setup was never established under the Act of 1935. Despite this, the Part relating to Provincial Autonomy was given effect in April 1937. This section divided powers between the Centre and the Provinces in such a manner that the Provincial Governments were no longer delegates of the Central Government. However, certain provisions of the Act diluted this provincial autonomy. For example, the Governor of the Province was given the power to act 'in his discretion' in certain matters. In such matters, the Governor was supposed to act under the direction and control of the Governor General and not the ministers.

- **Dyarchy:** The Act removed Dyarchy from the Provinces, but introduced it at the Centre. In the exercise of defence, external affairs, etc. the Governor General acted 'in his discretion' through 'counsellors' appointed by him. These councillors were not responsible to the legislature. However, the system of counsellors was never actually implemented and the Governor General and Executive Council system established by the Act of 1919 continued to function till 1947. In all other matters, however, the Governor General acted on the advice of the 'Council of Ministers' responsible to the legislature. The Governor General was given great discretion even in these matters and if any advice tendered by the Council of Ministers affected his 'special responsibilities' then the Governor General could act contrary to the advice. In undertaking his special responsibilities, the Governor General functioned under the control of the Secretary of State.
- **Legislative Councils:** At the Central level, the legislature was bicameral. This had been introduced by the Act of 1919. At the Provincial level, the legislatures of six provinces were bicameral whereas the rest of the Province had uni-cameral legislatures. These legislative institutions were subject to various limitations which inhibited their ability to act independently. The fetters on the Central Legislatures are listed below:
  - The legislations passed were subject to a Veto by the Governor General and the British Crown.
  - The Governor General could suspend the proceedings of the Legislative Council if he felt that the proceedings would interfere with his special responsibilities.
  - The Governor General had the power to make ordinances when the Legislature was not in session. This power was concurrent with the powers of the Central Legislature. These Ordinances were temporary in nature and had to be ratified by the Legislature. However, with respect to discharging his 'special responsibilities' the Governor General had the additional power to promulgate permanent ordinances.
- **Division of Powers:** The GoI Act of 1935 divided powers between Centre and Provinces through a three-fold division, i.e., the Federal, Provincial and Concurrent list. During an Emergency (proclamation issued by the Governor General), the Centre could legislate on matters in the Provincial List. In matters listed in the Concurrent list, in case of repugnancy between the Central and Provincial legislations, the Central legislations prevailed. A special feature of the GoI Act of 1935 was that residuary power (the power to enact a law with respect to matters not listed in any of the three lists) was not vested in either the Centre or the Provinces, but with the Governor General.
- It provided for elected ministries at the Provinces, i.e., popular government at the Provincial level. It increased the franchise to 14% of the population. At the Union level, no major changes were introduced except that the size of the legislative assembly and franchise for elections was increased.