

CHAPTER- II

EVOLUTION OF THE INDIAN LEGAL SYSTEM AND MAKING OF THE CONSTITUTION

India has a long and checkered history of independence struggle. To understand the philosophy of the legal system in India it is important to trace the genesis of the preamble and know the philosophy that lay behind its framing. The Indian independence movement was able to earn a slow and steady journey towards independence with the enactment of Government of India Act, 1858 by virtue of which the powers of the East India Company was transferred to the British Crown and it was the Crown that ruled India thereafter.¹

I. PRELIMINARY STEPS TOWARDS INDEPENDENCE

It can not be said that the Act of 1858 was a first step towards independence but it was very significant because till 1858 India was merely a market/ trading place for a giant trading company. However, by virtue of sec 1 of the Government of India Act, 1858 India became a territory under the powers of 'Her Majesty' to be exercised in her name. In other words the laws enacted from and after the Act of 1858 became the direct command of the Sovereign. Thus, it may safely be said that imperative school of thought entered the legal system in India at this point of time through the Act of 1858.² The Government of India Act, 1858 introduced Secretary of State scrapping off the position of East India Company's Court of Directors. As proposed by the Government of India Act, 1854 the Government of India Act, 1858 the British Government established a 'Council of India'³ comprising of 15 members to be

¹ Section 1 of the Government of India Act, 1858

TERRITORIES UNDER THE GOVERNMENT OF THE EAST INDIA COMPANY TO BE VESTED IN HER MAJESTY AND POWERS TO BE EXERCISED IN HER NAME

-The Government of the Territories now in the Possession or under the Government of the East India Company, and all Powers in relation to Government vested in or exercised by the said Company in trust for Her Majesty, shall cease to be vested in or exercised by the said Company; and all territories in the possession or under the government of the said Company, and all rights vested in or which if this Act had not been passed might have been exercised by the said Company in relation to any territories, shall become vested in Her Majesty, and be exercised in her name; and for the purposes of this Act India shall mean the territories vested in Her Majesty as aforesaid, and all Territories which may become vested in Her Majesty by virtue of any such Rights as aforesaid.

² M.P. Jain, *Outlines of Indian Legal History*, (N.M. Tripathi Pvt. Ltd., Bombay).

³ Section 7 of the Government of India Act, 1858

known as the Council of the Governor General of India to perform duties as assigned by the British sovereign i.e. Her Majesty. Law and regulations formulated by the Governor General for each Council was invalid unless the assent laid before the British Parliament through the Secretary of State and received the assent of it.⁴ Another significant step taken in the Government of India Act, 1858 was the acknowledgement of the 'Rule of Law' principle in section 65 of the Act. By virtue of this Section the British Government in India represented by the Secretary of State could sue and be sued. The liability of the British Government in any negligence was also questioned in the *Secretary of State for India v. J. Moment*⁵. The 6 judgesbench in this case upheld that since the Crown has taken over the East India Company by virtue of Section 1, Section 2 and Section 39⁶ of the Government of India Act, 1858, the Secretary of State could sue and be sued exactly like the East India Company.

It may be noted that before the entry of East India Company, India was a Muslim empire⁷ and a few independent princely States⁸. The Gupta, Mauryan empires also combination of Princely States. In all these cases/ situation the law was as commanded by the King, a sovereign, even if it passed the scrutiny of the King's Council and advisors. So it can not be said that the concept of law as a command of the Sovereign was a new to India. The Government Act, 1858 introduced a formal and unified legal system in India.

The East India Company entered Indian territory as a trading company in 1612. Due to the invasion of Indian territory several times India has always been found as a great place to trade. This led to rivalry amongst France, Germany and England to establish

For the purpose of this Act a Council shall be established consisting of 15 members and to be styled as the Council of India; and henceforth the Council of India now bearing that name shall be styled as the Council of the Governor General of India.

⁴ M.P. Jain, *Outlines of Indian Legal History*, (N.M. Tripathi Pvt. Ltd., Bombay).

⁵ *Secretary of State for India v. J. Moment* (1913) 15 BOMLR 27.

⁶ Section 39 of the Government of India Act, 1858 has laid down that 1858 onwards the monetary and movable property acquired by the East India Company in India shall be vested with Her Majesty.

⁷ Islamic Rule in India spanned for a period from 1206-1857. Islamic rule began in India with the conquering of Northern India by Qutubuddin Aibak who declared himself as Sultan of Delhi. The Islamic Rule ended in India in 1857 with the beginning of the Indian Rebellion of 1857 against the arbitrary rule of East India Company. In 1858 the British Crown entered the political arena of India by virtue of Government of India Act, 1858.

⁸ Princely States were ruled by Indian Princes respectively and formed part of British Indian. However, the British Government did not have full and formal control over princely states of India. These Princely states used to be ruled under 'Indirect rule' whereby the Prince used to retain the power of ruling the State and was bound to the British Government by bilateral treaties.

its supremacy in Indian commercial market. The commercial doctrine existing during seventeenth century was commonly known as mercantilism where the State encouraged export and discouraged import. Mercantilism⁹ was a period in European history is the rule by absolute monarchs based on protectionism and exploitation of captured countries. The era of mercantilism is also marked as an era of confusion between wealth, money and power.¹⁰ According to this theory the power of a State was directly proportional to the amount of accumulation of wealth and money in its hand. Thus, it led to exploitation of weaker States by the comparatively stronger States.

Therefore, it is evident that the British Government followed mercantilism in India for the period from 1612-1858. The Government Act, 1858 brought the British Crown to the arena of Indian politics and empowered the Crown to rule India directly.¹¹ This may be marked as the period when mercantilism was substituted by formal Imperative School of thought in India.

The Indian Councils Act 1861, an Act by the British Parliament, by virtue of Section 29 of the Act has allowed Indians into Legislative Council¹². Thus it was an imperative from the British Government whereby Indian were included in the Council. The effect was that from a market/ trading place, India transitioned as an integral part of British Sovereign and an extension of the British empire.

⁹ Mercantilism is an economic theory that the objective of trade is to generate wealth and the power of a State is measured against the accumulation of wealth in its hand. Mercantilism encourages protectionism and believes in trade at the cost of weaker countries.

¹⁰ Jean Beuve, Eric Brousseau, Mercantilism and Bureaucratic Modernization in Early Eighteenth-Century France, April 13, 2015.

¹¹ M.P. Jain, *Outlines of Indian Legal History*, (N.M. Tripathi Pvt. Ltd., Bombay).

¹² Section 29 of the Indian Councils Act, 1861

For the better exercise of the power of making laws and regulations herein-after vested in the Governors of the said Presidencies in Council respectively, each of the said Governors shall, in addition to the members whereof his Council now by law consist, or may consist, termed herein ordinary members, nominate to be additional members the Advocate-General of the Presidency, or officer acting in that capacity, and such other persons, of making not less than four nor more than eight in number, as to him may laws and seem expedient, to be members of Council, for the purpose of regulations. making laws and regulations only ; and such members shall not be entitled to sit or vote at any meeting of Council, except at meetings held for such purpose; provided, that not less than half of the persons so nominated shall be non-official persons, as herein- before described ; and that the seat in Council of any non-official member accepting office under the Crown in India shall be vacated on such acceptance.

By virtue of the Indian Councils Act, 1869 proclaimed by Queen Victoria (32 & 33 Victoria, Chapter 98)¹³, the Crown directed the Governor General in Council to enact laws for India¹⁴. This Act further extended the law making power of the Governor General of Madras and Bombay province for native Indians subject to dominion of Her Majesty domiciled outside Indian territories.

Indian Councils Act 1870 proclaimed by 33 Victoria, Chapter 3 granted the Executive of Presidency in Council i.e. the Governor, Lieutenant Governor or Chief Commissioner the power to make regulations under certain circumstances¹⁵. However, this power was subject to the approval of its superior authorities.

The Indian Councils Act, 1871 proclaimed by 34 & 35 of VICTORIA, CHAPTER 34¹⁶ empowered the Magistrate to try any dispute involving a European British subject¹⁷. The Government of India Act, 1865 empowered the Governor General of

¹³ An Act enacted under the proclamation of Queen Victoria after her becoming the Empress of Britain.

¹⁴ Section 1 of 32 & 33 Victoria, Chapter 98, An Act of 1869.

Power to make laws for native Indians subjected beyond Indian Territories- from and after the passing of this Act, the Governor – General of India in Council shall have the power at meetings for the purpose of making laws and regulations to make laws and regulations for all persons being native Indian subjects of Her Majesty, Her heirs and successors, without and beyond as well as within the Indian territories under the dominion of Her Majesty.

The Indian Councils Act and the Acts Amending it, 20a, National Press, Madras (1893)

¹⁵ Section 1 of 33 VICTORIA, CHAPTER 3, An Act of 1870

Power of the Executive Government of British India to make regulations for certain parts thereof- every Governor of a Presidency in Council, Lieutenant Governor, or Chief Commissioner, whether the Governorship or Lieutenant Governorship, or Chief Commissionership be now in existence or may hereinafter be established, shall have power to propose to the Governor General in Council drafts of any regulations, together with the reasons for proposing the same, for the peace and government of any part or parts of the territories under his Government or Administration to which the secretary of State for India shall from time to time by resolution in Council declare the provisions of this section to be applicable from any date to be fixed in such resolution.

And the Governor General in Council shall take such drafts and reasons into consideration; and when any such draft shall have been approved of by the Governor General in Council and shall have received the Governor General's assent, it shall be published in the Gazette of India and the local Gazette, and shall thereupon have like force of law and be subject to the like disallowances as if it had been made by the Governor General of India in Council at a meeting for the purpose of making laws and regulations.

The Indian Councils Act and the Acts Amending it, 20b, National Press, Madras (1893).

¹⁶ Proclamation by Queen Victoria after becoming the Empress of Britain.

¹⁷ Sec 1 of 34 & 35 of VICTORIA, CHAPTER 34- Power to the Local Legislatures to confer jurisdiction over European British subjects to magistrates in certain cases.

No law or regulations heretofore made or hereafter to be made by any Governor or Lieutenant-Governor in Council in India in manner prescribed by the aforesaid Act shall be invalid only by reason that it confers on magistrates, being justices of the peace, the same jurisdiction over European British subjects such as Governor or Lieutenant-Governor in Council, by regulations made as

India to frame law and regulations for British subjects within the dominion of India of Her Majesty¹⁸. Thus the Proclamation by the Queen Victoria in 1871 just extended the legislative power to legislate on British subjects within Indian territory and empowered the Magistrate for the same.

The Council of India Act, 1876 did not introduce any significant provision except introducing that the further appointment of members in the Council might be subject to certain qualifications if the Secretary of the State in council asked for it.¹⁹ The Indian Councils Act, 1892²⁰ was significant as this Act is assumed to be the beginning of Parliamentary system of government in India. The Act of 1892 has empowered the Governor General in Council to appoint Indians as additional member of Council²¹. The Indian Councils Act of 1892 was distinct from the Indian Councils Act 1861 because of the following reasons-

- a. It allowed Indians to be appointed as an additional members in the Council.
- b. Unlike the Indian Councils Act, 1861 the Indian Councils Act 1892 allowed the members of the Council to ask questions and discuss annual financial statement but with 6 days of prior notice.²²

aforsaid, could have lawfully conferred or could lawfully confer on magistrates in the exercise of authority over natives in like cases.

The Indian Councils Act and the Acts Amending it, 20d, National Press, Madras (1893).

¹⁸ Sec 1 of the Government of India Act, 1865

Governor General may make laws for all British subjects- The Governor General of India shall have power, at meetings for the purpose of making laws and regulations for all British subjects of Her Majesty within the dominion of Princes and States in India in alliance with Her Majesty, whether in service of the Government of India or otherwise.

Panchanandas Mukherji, INDIAN CONSTITUTIONAL DOCUMENTS (1773-1915), 137, Thacker Spink & Co, Calcutta (1915).

¹⁹Panchanandas Mukherji, INDIAN CONSTITUTIONAL DOCUMENTS (1773-1915), 134, Thacker Spink & Co, Calcutta (1915).

²⁰ Proclaimed by 55 & 56 Victoria, Chapter 14, PanchanandasMukherji, INDIAN CONSTITUTIONAL DOCUMENTS (1773-1915), 184, Thacker Spink & Co, Calcutta (1915).

²¹ Section 1 (3) of the Indian Councils Act 1892- Provision for increase of number of members of Indian Councils for making laws and regulations

Any person resident in India may be nominated an additional member of Council under section 10 and 29 of the Indian Councils Act, 1861, touching the making of laws and regulations, have been or are hereafter extended or made applicable.

²² Section 2 of the Indian Councils Act, 1892- Notwithstanding any provision in the Indian Councils Act, 1861, the Governor General of India in Council may from time to time make rules authorising at any meeting of the Governor- General's council for the purpose of making laws and regulations the discussion of the annual Financial Statement of the Governor General in Council and the asking of

For the first time in 1892 the British Committee while having discussion on the Indian Councils Bill had thought of introducing 'elective principles'. Mr. Bryce, regarding elective principle, observed that strong expression of opinion is not possible unless members are elected. However, he remained silent as to what would be the process of that election.²³ However, following the discussion as to the introduction of elective principle in India William Gladstone, the then leader of Opposition of the United Kingdom, made it clear that it should be left to the Indian Government to decide what kind of election process it would like to have if it wanted to adopt election process at all.²⁴

Both the Indian Councils Act of 1874 and the Indian Councils Act, 1904 were enacted to amend the provision of increasing or decreasing the members of legislative body by Her Majesty as required²⁵. The Indian Councils Act 1909 also did not bring about any significant change to the administration of India. The Executive i.e. Her Majesty was still retaining all the power to govern Indians and Indian territory.

Following the First World War (1914-1919) there was an upsurge in the demand of Indians for involvement of more Indians into the governance of Indian territory. The growing co-operation between Congress and the Muslim League became the matter of concern for the British Government. It was at that time the British Government introduced the Dyarchy system through the Government of India Act, 1919 as an instrument to appease the dissatisfied Indian mob. Following the Montagu and Chelmsford Report²⁶ the British Parliament enacted the Government of India Act 1919. The Preamble of the Government of India Act, 1919 stated the following-

'Whereas it is declared policy of Parliament to provide for the increasing association of Indians in every branch of Indian administration, and for the gradual development

questions, but under such conditions and restrictions as to subject or otherwise as shall be in the rules prescribed or declared.....

²³ Introduction of elective principle in India through the Indian Councils Bill (1893)

²⁴ Samaraditya Pal, *India's Constitution: Origin and Evolution*, Vol 1, lii, (Lexis Nexis , Haryana, 2015).

²⁵ The Indian Councils Act, 1874 and the Indian Councils Act, 1904.

²⁶ Montagu Chelmsford Report was an attempt in post World War I era to introduce self-governing institutions gradually. The reforms take their name from Edwin Samuel Montagu , the Secretary of State for India during the latter parts of World War I and Lord Chelmsford , Viceroy of India between 1916 and 1921.

*of self governing institutions, with a progressive realisation of responsible government in British India is an integral part of the empire.*²⁷

The Government of India Act, 1919 laid down that there would be two chambers i.e. Council of states and Legislative Assembly of Indian legislature²⁸. The system of diarchy introduced by the Act of 1919 divided provincial subjects into two parts i.e. transferred where Governor was guided by the advice of the Ministers and 'reserved' which was administered by the Governor in association with the Executive Council who owed no responsibility to the legislature.²⁹

Following the enactment of the Government of India Act in 1919 there was a National Convention in April 1924 which drafted the Commonwealth of India Bill, 1925. The Bill proposed the British Government to declare India as 'Commonwealth of India'. The Commonwealth of India Bill, 1925 could aptly be said to be the predecessor of the Constitution of India. The Bill consisted of a portion named "Fundamental Rights" declaring the rights of people of Commonwealth of India. The Bill also proposed to repeal the existing Government of India Act, 1919. However, this Bill could not be passed by the British Parliament which eventually led to dissatisfaction and preparation of Nehru Committee Report.³⁰

The Nehru Committee Report³¹ submitted the following demands

- a. Dominion status to India i.e. independence within British Commonwealth,
- b. To declare India as federation having bicameral legislature at Centre and having Ministers accountable to it,
- c. No separate electorate to elect members of legislature,
- d. To make the Governor General of India the Head of the State having similar and equal power to the British Crown,

²⁷H.N. Mitra, The Government of India Act, 1919, Rules Thereunder & Govt. Report 1920, 29, (Annual Register Office, Shibpur Kolkata) 1921.

²⁸ Sec 17 of the Government of India Act, 1919, Available at H.N. Mitra, The Government of India Act, 1919, Rules Thereunder & Govt. Report 1920, 29, (Annual Register Office, Shibpur Kolkata) 1921.

²⁹Samaraditya Pal, *India's Constitution: Origin and Evolution*, Vol 1, lvii, (Lexis Nexis , Haryana, 2015).

³⁰ The Commonwealth of India Bill, 1925.

³¹ Nehru Committee Report was formulated by a committee headed by Motilal Nehru on being asked by the Secretary of the State for India to frame Draft Constitution for India.

- e. Also defined citizenship and fundamental right.

The inception of the Nehru Committee Report, 1928 was the sending of a committee headed by Sir John Simon to India by the British Government to examine whether Indians were fit to be entrusted with further responsible governance. However, absence of any Indian member in the Committee spurred the anger amongst Indians and both the Congress and Muslim League boycotted it. The demands for future independent India in Nehru Committee Report, 1928 was a reaction against the decision of British Government to decide the fate of Indians without considering any Indian in the Simon commission.³²

The next major development came with the enactment of the Government of India Act 1935. The Act of 1935 seemed to be exhaustive as to the governance of Indian territory by Indians and regulation of legislature and its ministers. However the fallacy of this Act was that in Section 2(1) of this Act. Section 2 of this Act clearly mentioned that the governance of Indian territory shall be carried by a person authorised by His Majesty. The Act even went on calling such authority as the representative of His Majesty functioning under the Crown.³³ The Governor- General was at the head of Federal Government and exercised its executive power on behalf of the Crown. The Governor was exercising its executive power on behalf of the Crown in provinces.³⁴ Therefore, the Government of India Act, 1935 also failed to fulfil the demand of self governance by Indians.

³²Samaraditya Pal, *India's Constitution: Origin and Evolution*, Vol 1, lvii, (Lexis Nexis , Haryana, 2015).

³³ Sec 2 (1) of the Government of India Act, 1935- Government of India by the Crown

All rights, authority and jurisdiction heretofore belonging to His Majesty the King, Emperor of India, which appertain or are incidental to the government of the territories in India for the time being vested in him, and all rights, authority and jurisdiction exercisable by him in or in relation to any other territories in India, are exercisable by His Majesty, except in so far as may be otherwise provided by or under this Act, or as may be otherwise directed by His Majesty : Provided that any powers connected with the exercise of the functions of the Crown in its relations with Indian States shall in India, if not exercised by His Majesty, be exercised only by, or by persons acting under the authority of, His Majesty's Representative for the exercise of those functions of the Crown.

³⁴ Section 7 of the Government of India Act, 1935. Function of Governor General

(1) Subject to the provisions of this Act, the executive authority of the Federation shall be exercised on behalf of His Majesty by the Governor-General, either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal Legislature from conferring functions upon subordinate authorities, or be deemed to transfer to the Governor-General any functions conferred by any existing Indian law on any court, judge or officer, or on any local or, other authority. (2) References in this Act to the functions of the Governor-General shall be construed as references to his

However, the demand for a Constituent Assembly was already raised in 1934 at Swaraj Party Conference. The demand for having a Constituent Assembly for framing Draft Constitution became stronger after the failure of the Government of India Act, 1935. During post 1935 in several meetings and through several actions the Congress and Muslim League tried to emphasise on their demand of having a Constituent Assembly for framing the Draft Constitution for India.³⁵

The advent of Second World War (1939-1945) made it difficult for the British Government to have a stable control over its colonies since it already exhausted its wealth in war. Following this situation the British Government sent another Mission headed by Sir Stafford Cripps to India with a 'Draft Declaration' for consultation with Indian Leaders. Proposals of Cripps Mission were following-

- a. Giving India a Dominion status, India would be free to join any international institution,
- b. Creation of Constituent Assembly for framing,
- c. No force could be applied if any province does not want to join unified India,
- d. Regarding the sharing of powers there would be a negotiation between the British Government and Indian leaders.

The Cripps Mission proved to be another failed attempt in 1942 of British Government for following reasons-

- a. Congress did not want disintegration of any province of India,
- b. Muslim League was not in agreement with the election procedure of members in the Constituent Assembly, and

powers and duties in. the exercise of the executive authority of the Federation and to any other powers and duties conferred or imposed on him as Governor General by or under this Act, other than powers exercisable by him by reason that they have- been assigned to him by His Majesty under Part I of this Act. (3) The provisions of the Third Schedule to this Act shall have effect with respect to the salary and allowances of the Governor-General and the provision to be made for enabling him to discharge conveniently and with dignity the duties of his office.

³⁵Samaraditya Pal, *India's Constitution: Origin and Evolution*, Vol 1, lx- lxii, (Lexis Nexis , Haryana, 2015).

- c. Congress wanted immediate rule while the Cripps Mission proposed them to wait till the end of the World War II.³⁶

Therefore, on 8th August 1942 the All India Congress Committee called upon the British Government to 'Quit India'. The in 'Quit India Resolution' was that 'the power remains to the people of India once it comes to India'. This incident paved the way for Shimla Conference in 1945. Shimla Conference was initiated to discuss Wavell plan.³⁷ In this Conference Muslim League made a strange demand that all the Muslim members to the executive council must come from Muslim League party. Therefore, it demanded that Congress could not give any Muslim member representing the Congress party.

The conflicting interests of two major political parties in India led to the failure of Shimla Conference.³⁸

Another attempt was taken by Sir Pethick Lawrence in 1946 to send a Mission of Cabinet Ministers to India consisting of himself, Sir Stafford Cripps and A.V. Alexander to promote in conjunction with Indian leaders the early realisation of 'full self-government in India'.³⁹ Cabinet Mission issued a statement enumerating its plan for the independence of India rejecting the idea proposed by the Muslim League to form a separate Sovereign State of Pakistan⁴⁰.

II. CABINET MISSION PLAN

Following the failure of Congress and Muslim league to come to an agreement in Simla Conference, 1945 regarding the fate of India the British Government decided to send to India another Mission to speed up the process of ' Full Self- Government in India'. The Cabinet Mission was consisted of Mr.Pethick Lawrence, the Secretary of State for India, Stafford Cripps and A.V. Alexander. The Cabinet Mission rejected the idea of formation of a separate Sovereign state on the communal line named as

³⁶Sukanta Pramanik, Cripps Mission: the Beginning Process to the way of Indian Independence, 19 (3), *IOSR-JHSS*, 1-7, (2014).

³⁷ Lord Wavell, the Viceroy and the Governor General called a Conference in Shimla in 1945 to resolve the deadlock in India in the field of self governance.

³⁸Samaraditya Pal, *India's Constitution: Origin and Evolution*, Vol 1, lxiv, (Lexis Nexis , Haryana, 2015).

³⁹ Ibid.

⁴⁰ B. Shiva Rao, *The Framing of India's Constitution: A Study*, Vol 1, 208, (N.M. Tripathi Private Ltd., Bombay).

Pakistan and suggested the following points to agree upon by both the Congress and Muslim League-

1. An arrangement should be made for Indians to frame the Constitution for future and establishment of an interim government till the time of adoption of the Constitution of India.
2. Despite Mission's negative stand on the partition of India on a communal line it was assured that the Cabinet Mission would examine the matter of partition closely and impartially so that interest of Muslim community was not hampered. The Cabinet Mission acknowledged that the cultural, political and social life of Muslim community was different from that of Hindu Community and might be submerged in unitary India.
3. Apart from partition issue another area of concern was defence sector. According to the Cabinet Mission partition of the country would also lead to division and allocation of armies in Indian Armed, Navy and Air Force.
4. Communications between two halves of the proposed country Pakistan are away from each other by some seven hundred miles which did not seem feasible to rule.
5. The Cabinet Mission was of the view that British India was still not able to handle the responsibility of that of a Sovereign State. Thus, it would be improper on behalf of the British government to hand over the power of a sovereign state upon India hastily.

The Mission also recommended following basic forms that the Constitution of India should have according to it-

- a. There should be a Union of India, embracing both British India and the States, which should deal with the following subjects- Foreign Affairs, Defence and Communications; and should have the power to raise finances requires for the above subjects.
- b. The Union should have Executive and Legislature comprised of representatives from British India and States. Any communal issue shall be decided by the majority present and voting in the legislature.

- c. All subjects other than Union subjects and all residuary powers shall vest on Provinces.
- d. The State shall retain all subjects and powers except those ceded to the Union.
- e. Provinces should be free to form Groups with executives and legislatures and each group could determine the Provincial subjects to be taken in common.
- f. The Constitutions of the Union and the Groups should contain a provision whereby, if necessary, Provinces could reconsider terms and conditions of such group after an interval.⁴¹

However, the Cabinet Mission made it clear that it does not intend to provide the details of the future Constitution of India and the framing of it would be handed over to the members of Constitution-making machinery.

III. FORMATION OF CONSTITUENT ASSEMBLY AND RESOLUTION MOVED BY PANDIT JAWAHARLAL NEHRU

The Constituent Assembly was officially summoned on 20th November, 1946⁴². However the demand for formation of Constituent Assembly for drafting a Constitution for India was raised for the first time at Swaraj Party Conference on 3rd May, 1934⁴³.

The Cabinet Mission Plan, 1946 made it clear that there would be a Constitution-making body in which provinces would be represented on the basis of their population respectively elected through election. However, it was also pointed out by the Cabinet Mission that introduction of an election process based on adult franchise could lead to unnecessary delay. Therefore, the idea to conduct an election for the Constituent Assembly was dropped and it was decided that the Mission was going to utilize

⁴¹ B. Shiva Rao, *The Framing of India's Constitution: A Study*, Vol 1, 209-214, (N.M. Tripathi Private Ltd., Bombay)

⁴² Samaraditya Pal, *India's Constitution: Origin and Evolution*, Vol 1, lxxxvi, (Lexis Nexis, Haryana, 2015).

⁴³ *Id* at lx

recently elected Provincial Legislative Assemblies as the electing bodies⁴⁴. The announcement as to the elections of Central and Provincial Assemblies was declared by the then Viceroy of India in 1946 where the elected members became the members of the Constituent Assembly. The Indian Provincial Election 1946 has paved the way for the creation of Pakistan as Muslim League for the very first time won the Election with 73 Muslim seats out of 78 Muslim seats.⁴⁵ The demand of Muslim League for Pakistan and the constant denial for the same by the British Government could have been a reason for League's staying away from the Sessions and Deliberations of the Constituent Assembly. Following the absence of elected members of Muslim League in Constituent Assembly the Objective Resolution moved on 13th December, 1946 by Pandit Jawaharlal Nehru could not be adopted.⁴⁶

In the first session of the Constituent Assembly on 13th December, 1946 the resolution was moved by Pandit Jawaharlal Nehru regarding the Aims and Objectives of the Constituent Assembly. In his first speech in the Constituent Assembly Pandit Jawaharlal Nehru pointed out that the order for formation of this Constituent Assembly for drafting the Constitution for Independent India came along with some conditions⁴⁷ in form of a State Paper. In the words of Pandit Jawaharlal Nehru

*'You all know that this Constituent Assembly is not what many of us wished it to be. It has come under particular conditions and the British Government has its hand on its birth. They have attached to it certain conditions. We have accepted the State paper, which may be called the foundation of this Assembly, after serious deliberations and we shall endeavour to work within its limits.'*⁴⁸

⁴⁴ Members of Provincial Legislative Assemblies as the members of Constituent Assembly, 1946, available at B. Shiva Rao, *The Framing of India's Constitution: A Study*, Vol 1, 214, (N.M. Tripathi Private Ltd., Bombay)

⁴⁵Fazlur Rahman, The Significance of 1945-1946 Elections in the Creation of Pakistan, *Pakistan Journal of History and Culture*, Vol.XXIX, No.2, 2008, pp 167- 187.

⁴⁶ Absence of Muslim League in Constituent Assembly.

⁴⁷ The Cabinet Mission in its Statement has provided guidelines as to what should be the proper format of the Constitution of independent India. The Mission also recommended some guidelines as to the basic forms that the Constitution of India should have. In that statement itself the Cabinet Mission proposed for the Constitution- making machinery to be brought into being immediately. Available at B. Shiva Rao, *The Framing of India's Constitution: A Study*, Vol 1, 208-214, (N.M. Tripathi Private Ltd., Bombay)

⁴⁸ Constituent Assembly Debates.

Thus, the Constituent Assembly, which took up the task of framing the Constitution of a Sovereign State, was itself a Sovereign with limited powers⁴⁹. It was not until the proclamation of Mountbatten Plan (3rd June, 1947), which also confirmed partition of India into two separate States namely India and Pakistan, the Constituent Assembly did not get its Sovereignty⁵⁰.

On 13th December, 1946 India was yet to attain its independence, nonetheless, in the Objective Resolution along with other resolutions Pandit Jawaharlal Nehru moved ‘This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution’.

⁴⁹ Bentham’s Limited Sovereignty.

⁵⁰S.K. Chaube, *Constituent Assembly of India*, 30-55, (Calcutta 1986),