THE CONSTITUTION OF BRITISH INDIA

1. Introductory : Limits of the Subject.

The Constitution of British India is contained in an enactment called the Government of India Act, 1919. A student of the Constitution of India therefore has not to search for the constitution as the student of the English Constitution has to do. His position is very much like the position of the student of the American Constitution, whose problem is nothing more than to understand and to interpret the statute embodying the Constitution of the United States. From this point of view it would seem unnecessary to raise the question what is Constitutional Law and what are the questions that usually fall within its scope. Secondly assuming that it is necessary to define the limits of the subject of Constitutional Law the question is whether such an inquiry should form a preliminary to the discussion of the subject or whether it should form a concluding part of it. The late Professor Maitland in his Study of the English Constitutional History adopted the latter course. And there is a great deal to be said in favour of such a course. There are reasons however why such a course would not be suitable to the study of the Indian Constitution.

The reasons why the question what is Constitutional Law must be raised at the outset, so that we could be clear as to the limits of our subject and the topics that must fall within it will be obvious from one *or* two illustrations. The Government of India Act does not say anything about the Writ of Habeas Corpus or the Writ of Mandamus or Certiorari. It does not speak of Martial Law or Administrative Law. It does not speak of the right of Paramountcy, what the Government of India undoubtedly exercises in respect of their dealings with the Indian States. Is it necessary to study these questions or is it not ? Are they proper subject to the study of the Indian Constitutional Law or are they not ? Judging by the tests of how these subjects have been dealt with in other countries by authorities who have studied the Constitutional Law of these countries there can be no doubt that by common consent all these matters are treated as pertaining to the domain of constitutional law. If therefore these subjects which do not find a place in the Government of India Act but which all the same must form a part of the study of Constitutional Law, the question of the definition of the subject becomes important.

To the question, what is Constitutional Law, different people have given different answers. One may take Austin and Maitland as types representing two schools of thought. Austin subdivides Public Law or what he calls the Law of Political Conditions into two classes. Constitutional Law and Administrative Law. According to him Constitutional Law determines the persons or the classes of persons who shall bear the sovereign power in the State. He defines the mode in which these persons shall share those powers. Austin's definition of Constitutional Law as is

obvious includes only those rules which determine the constitution and composition of the sovereign body. He excludes from the Constitutional Law all rules which deal with the exercise of the sovereignty by the sovereign body. While Austin makes the definition of the Constitutional Law depend upon the logic of his principles, Maitland makes the limits of Constitutional Law a matter of conscience. To Maitland, Constitutional Law includes not only the rules which determine the rules of the composition of the sovereign body, but it would also include the Privy Council, the Departments of the State, the Secretaries of the State, Judges, Justices of the Peace, Poor Law Guardians, Boards of Health and Policemen. These views represent the two extremes and if Austin's is too narrow, Maitland's undoubtedly is too wide.

There is however a middle position which can be founded upon the views of Prof. Holland—expressed in his Jurisprudence. A right is a capacity residing in one person of controlling, with the assent and assistance of the State, the actions of another. Rights which may be conferred by one citizen against another constitute the subject matter of Private Law. The rights which the State claims to itself against the subjects and the rights which it permits against itself constitute Public Law.

Constitutional Law is undoubtedly part of Public Law and as far as it is so it must discuss the rights of the State against the subjects and the rights of the subjects against the State. But Constitutional Law include more than this. It must include the study of the organisation of the state for the State is an artificial person which claims the right to punish, to possess property, to make contracts and to regulate its rights and duties as between itself and the subjects and also as between the subjects themselves. It is necessary to inquire how this artificial person is constituted. The study of the Constitutional Law therefore must include the study of three matters : (1) The organisation of the State, (2) The rights of the State against the subjects and (3) The rights of the subjects against the State. It is this view of the limits and scope of the Constitutional Law that I propose to follow in these lectures on the Government of India Act and it is the view adopted by Prof. Anson in his Study of the English Constitution.

There is another question which is bound to crop up and which has better be disposed of at the outset. Is the treatment of the subject to be historical or to be descriptive ? Some history cannot be avoided in the study of the Government of India Act. The Government of India Act says that all remedies that were available against the East India Company shall continue to be available against the Secretary of State. The Government of India Act also says that His Majesty may establish High Courts by Letters Patent. The Letters Patent say that the High Court shall exercise all the powers of the Supreme Court which they superseded. Many other Sections of similar character in the Government of India Act could be referred to. But the two mentioned are sufficient to illustrate that history cannot be avoided. For, in dealing

with the Constitution of India, to understand the remedies available against the Secretary of State one must inquire what were the remedies open to a subject against the East India Company. Nor can one understand the powers of the High Court until one enquires what were the powers with which the Supreme Court was invested. Although some history would be necessary, there can be no justification in a study of the Constitutional Law as it operates today to study every part of it historically. All past is of no moment to the present. Only the part of the present need be adverted to, and that is what I propose to do when any particular question requires historical treatment for its proper understanding.

[We have not received any other essay on this subject—ed.]