CHAPTER -2

HISTORICAL RETROSPECT

"The State is neigther the handiwork of God, nor the result of superior physical force, nor the creation of resolution or convention, nor a mere expansion of the family. The State is not a mere artificial mechanical creation or invention but an institution of natural growth or historical evolution."

Dr. Garner

I. Origin and Evolution of the State

There is no denying the fact that it is really a very difficult task to trace the origin of a social phenomenon. For long, Political thinkers have been taking pains in digging out the secrets related to the origin of the State. Some of them believe that the secrets related to the origin of the State lie in the hands of God, whereas others believe that they lie in the social contract. While still others argue in favour of the role played by a single force the family or the process of evolution. The recent researches in the modern sciences, namely, Anthropology, Ethnology and Comparative Philosophy, throw a shade of light on the origin of the State. But it is not sufficient. The emergence of the State is not yet historically determined. In this connection, Professor R.N. Gilchrist has very aptly remarked, " of the circumstances surroundings the dawn of political consciousness, we know little or nothing from history. Where history fails we must resort to speculation."[1] No doubt it is true that the Historical and Evolutionary Thoery has enjoyed enduring popularity, yet it is difficult to find the finality of judgement in this theory. Historical method and evolutionary process tell us the various ways by which governments came into being or perished away. But they fail to let us know how mankind originally came to

1. Professor R.N. Gilchrist: "*Principles of Political Science*", 18 (1957)

live under State conditions. Some theories have gained popularity, for they throw a shade of light on the ancient political tendencies, for they deal with certain aspects related to the origin of the State and the comparison of these theories throws shade of light on the origin of the State.

Following are the well-known theories regarding the origin of the State:

(A) Speculative Theories . This category of theories includes: (1) The Theory of Divine Origin; (2) The Force Theory; (3) The Social Contract Theory.

(B) Speculative and Half Actual Theories . The category includes Patriachal and Matriarchal Theories.

(C) Historical Theory . This theory includes the Evolutionary Theory.

(i) Speculative Theories :

A. The Theory of Divine Origin

According to this theory, the state is a divine institution of God who created it for the common welfare. This theory propagates that either God Himself rules over or sends His representative or the deputy to rule over the people. The kind is God's representative and, therefore, he is responsible to God and not to the people. It is the supreme duty of the people that they should obey the commands of the king.

To oppose the king is to oppose God. The king may be a tyrant, yet the people have got no right to go against the king. Disobedience to the king is the disobedience to God. Kings opposition is God's opposition. It is not the people to ask the king to give the account of his deeds. God alone is entitled to ask the king to give the account of his good deeds or bad deeds. In this way the exponents of this theory regard the king and his administration as superior to the people and law. According to this theory no power on earth can put a restraint to the king's will, nor can any authority ban his use of power. The supporters of this theory consider it a sin to protest against the power and authority of the king and call his actions unjustified. Therefore, it is the supreme

duty and highest moral obligation to carry out the commands of the king who is the representative of God on this earth. To violate the dictates of the king and to disobey him is not only a legal offence but also a sin. So the people should unconditionally surrender to the king. Thus, it is quite clear that nobody is entitled to go against the king or to dethrone the king even though he proves to be a tyrant. " Kings", writes James I, "are breathing images of God upon earth", and disobedience to their dictates is the disobedience to God". "As it is atheism and blasphemy to dispute what God can do, so it is presumption and high contempt in a subject to dispute what a king can do, so its presumption and high contempt in a subject of dispute what a king can do or to say that a king cannot do this or that". Rebellion in the cause of religion is regarded as a sacrilege because, " the state of monarchy is the supermost thing upon earth; kings are not only God's lieutenants upon earth and sit upon God's throne but even by God himself they are called Gods". People are "headless multitude", incapable of making laws. The king is the divinely instituted law-giver of his people. The people must submit to the authority of the king. The law resides ultimately " in the breath of the king". " A bad king will be judged by God but he must not be judged by his subjects or by any human agency for enforcing the law, such as the estates or the courts".

The Divine Theory followed by the Hindus

As has already been stated that the Divine Theory of the origin of the State is as old as the State itself. "Manusmriti" is the glaring example of this theory. It has been clearly stated in the "Manusmriti", that "though the king is a human being yet no one should hate him because he is God in the shape of man".[2] It has been futher stated that "people were fed up with the anarchy and so God created the state for their protection".[3]

In the *Gita*, the famous book of the Hindus, Lord Krishna declared himself to be the king of people. Kautilya has stated in his famous book,

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2. "*Manusmuriti*", Ch. VII, at 8.
3. *Ibid.*, CH. VII, at 28.

"*Arthashastra*", that the king is equal to *Indira,* the God of rain and sky or *Yama,* the God of death. And so he must not be insulted. Though it is true that such statements have been given in the books like "*Manusmruti*", the *Gita* and other religious books only with a view to arouse the sentiment of obedience to the king in the heart of the people, yet the authors of these books did not aim at making the king an absolute monarch. It has been further stated in "*Manusmuriti*" that "the king is under the command of religion and he makes use of sceptre only for safeguarding religion. Spiritually, and morally degraded king is killed by his followers".[4]

The Divine Theory followed by Jews

The Divine Theory of the origin of the state takes us back to the earliest stage of political life. "*The Old Testament*", the religious books of the Jews is the glaring example of this theory. In this "Old Testament God is looked upon as the immediate source of royal powers". In the Bible it has been stated, "Let every soul be subject unto the higher powers. For there is no power but of God; the powers that be, are ordained of God.

The Divine Theory followed by the Christians

With the rise of Christianity this theory received a new impetus. The Church - fathers founded this theory on the well-known saying of Paul: "Let every soul be subject unto the higher powers; for there is no power but of God; the powers that be, are ordanied of God. Whatsoever resisteth the power, resisteth the ordinance of God and they that resist shall receive to themselves damnation". The Church fathers preached this theory in the entire Europe. According to them, man in the beginning lived in heaven but for his own sins, he was hurled from the Paradise. Then God created the state on the earth and appointed the kings as its head. Hence, the king was regarded as the "infallible head" over the people. The Divine Right of the Kings became a supreme weapon in the hands of the despotic monarchs who were thought to be

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4. *Ibid.*

responsible to God alone. James I ruled over Britain in accordance with the principle of the Divine Right of the kings. In his famous book - "Law of Free Monarchies", James I [5] has stated the following rights of the king:

(1) Kings derived power straight from God.

(2) Kings have no legal obligations to the people.

(3) Laws were products of King's authority and they, therefore, could not be above the king.

(4) Kings had power of life and death over their subjects.

(5) Subjects should obey the king's orders and even if he happened to be bad, they could not rise in rebellion against him as they were the "breathing images of God upon earth."

The followers of Christianity regarded the state as a divine institution and considered the king the representative of God on this earth. Therefore, they thought that it was the moral obligation of the subjects to obey the commands of the king. Saint Augustine and Pope Gregory, the Great also supported the theory known as Divine Rights of kings.

Divine Rights of kings

After having sought the assistance of the Divine Theory, the kings of Europe formulated their own theory known as "Divine Rights of kings." Dr. J.N. Figgs is the supporter of the Divine Rights of kings. According to him : (1) the king was given political power by God; (2) Political power is hereditary; (3) the king is a great source of intelligence and wisdom and is reponsible to God alone; (4) it is a sin to disobey the king or to be against his will. [6]

In the seventeenth century James I, the Stuart king who ruled over Britain has beautifully justified the king's status on this earth. In his well-known book, "Law of Monarchy", he wrote "kings are justly called gods, for they exercise a manner of resemblance of divine power upon earth.

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5. James I: "*Law of Monarchy*".
6. J.N. Figgs: "*The Divine Rights of Kings*". at 5-6.

As it is atheism and blashphemy to dispute what God can do, so it is persumption and high contempt in a subject to dispute what a king can do or to say that a king cannot do this or that, kings are breathing images of God upon earth'.[7]

The Divine Theory was deemed fit and significant in its own time. But now it has lost its importance. The study of this theory enables us to know the inpact of religion on politics in ancient times. It enables us to know how this theory aroused in the heart of the public the sentiment of obedience to the king. This sentiment of obedience is essential for the stability of the State. Kings were also a bit afraid of God.

According to this theory God created the states and so the kings had to take the oath of religion. The Divine Origin of the state gave it moral support. This theory helped a lot in removing the chaos and anarchy from the state. It maintained peace which is the life and soul of the state. In ancient times the commands of political laws were in the hands of religion and, therefore, it was very easy to administer them. The public also easily embraced the laws which were adminstered by religion.

B. The Force Theory

This theory holds that the state originated and developed by the use of naked force applied by the strong over the weak and their consequent subjugation. In the very beginning man lived in small groups (Guilds) and wandered from one place to another in search of food. Many times a fight broke out in these groups. Whenever the strong group succeeded in having its control over the weak group the State was organised, because the leader of the strong group used to become the king and brought the defeated group into his subjection. In his famous book "*History Politics*" Jenks points out, "Historically speaking there is not the slightest difficulty in proving that all political communities of the modern type owe their existence to successful warfare" [8]. This statement of Jenks makes it very clear that the State is the out-come of

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7. James I: "*Law of Monarchy*".

war and that "war begets the king." Voltaire has also admitted that "the first king was fortunate warrior." Hume gave expression earlier in the eighteenth century when he wrote, " It is probable that the first ascendancy of one man over multitudes began during a state of war, where the superiority of courage and genius discovers itself most visibly, where unanimity and concert are most requisite and where pernicious effects of disorder are most easily felt. The long continuance of that state, an incident common among savage tribes inured people to submission.

The progressive growth from tribe to kingdom and from kingdom to empire is but a continuation of the same process."[9] According to Professor R.N. Gilchrist, "Theory of Force states that civil society originated in the subjudation of the weaker by the stronger ..... From the more rudimentary political organisations, it spread in successive steps to the more advanced. Finally, kingdom and empires fought against each other and survived and died according to their strength." [10.]

Undoubtly, it is true that force has played decisive role in expanding the State, yet it will be wrong to say that force alone expanded the State. For example, the establishment of Federations in several countries prove it very well that the co-operation of the public can also expand the State. In U.S.S.R., U.S.A., and India, Federations came into being in the same way. In these countries, force was not used for establishing Federations. On the contrary, common defence and common interests led to the establishment of these Federations. In this connection, Seeley has very aptly remarked, "The emergence of the State was not due to force although in the process of expansion force has undoubtedly played a part" [11] The theory of force," observes Dr. Leacock, "errs in magnifying what has been only one factor in the evolution of society into the sole controlling force."[12]

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8. Jenks: "*History of Politics*", at 71.
9. Leacock : *"Elements of Political Science"*, at 32.
10. Prof. R.N. Gilchrist, *"Principles of Political Science"*, 75 (1957).
11. Seeley : "*Introduction to Political Science"*, at 73-75.
12. Leacock : *"Elements of Political Science"*, at 33.

C. The Social Contract Theory

The Social Contract Theory which dominated the European political thought in the eighteenth century, has played a very important part in the development of the modern political theory and practice. Of all the speculative theories, the Social Contract Theory is most important. It is one of the oldest theories. This theory came into being as a result of reaction against the theory of Divine Origin.

According to this theory, the state was not created by God. On the contrary, under the compulsion of circumstances, people contracted with the rulers and as a result the State was organised. This theory offers an explanation for the origin of the state and shows the relationship between those who govern and those who are governed. It is mechanical theory which starts with the assumption that prior to the organisation of the state man lived in "a state of nature". It deals with two fundamental assumptions - first " a state of nature", second a contract.

In sixteenth and seventeenth century this theory gained enduring popularity. Richard Hooker (1554-1600), Hugo Grotious, Milton, etc. also supported this theory, but the Social Contract Theory reached its culmination in the hands of Hobbes, Locke and Rousseau.

Hobbes, Locke and Rousseau are the chief exponents of the Contract theory. All of these three exponents establish their thesis from the begining of hina habitation. But their ideas and opinions are quite distinct.

(a) Views of Thomas Hobbes (1588 -1679)

Thomas Hobbes, once a tutor to Charles II of England, was a great English Philosopher. He was born in 1588 and lived in the stirring times of the Great Rebellion and the Commonwealth. He witnessed the Civil War (1642-49) in England and was deeply affected by its miseries. He was so much shocked by the after effects of the Civil War that he concluded that the salvation of the country lay in the absolute system of the government. He started believing in

the fact that only powerful monarchy could save England and maintain peace there. Since he had been the tutor to Charles II, he attempted to justify the rule of the Stuarts and defended the absolute powers of the monarch. He used the doctrine of the Social Contract for this purpose. This is the reason why he sought to justify the absolute power of the sovereign in his book, "*Leviathan*". He never had a mind to propound a theory regarding the origin of the State. His sole object was to defend the despotism of the Stuarts ad support despotic monarchy.

(b) Views of John Locke (1632-1704)

John Locke, another English political philosopher, belonged to seventeeth century. He was an ardent advocate of constitutional monarchy and an opponent of absolute monarchy in England. He expressed his views in his book, "Two Treaties on Civil Government", published in 1689. In this book, he attempted to justify the Glorious Revolution (1688) and the deposition of James II. He has very aptly asserted that parliament reserved the right to dethrone the king. If he disobeyed the commands and overlooked or ignored the claims of the public will. In this way, he justified the deposition of James II and supported the coronation of King William and Queen Mary. This is the reason why John has called this contract social and political. The historical background of both Hobbes' and Locke's theories is very similar. "Hobbes impressed by the miseries of the Great Rebellion", says Professor Gilchrist, "argued on the basis of the Social Contract for a system of absolute monarchy. Locke on the same basis tried to justify the deposition of James II and establishment of constitutional government". Like Hobbes, John Locke also begins his essay with the description of the State of nature. But his view are different from those of Hobbes. His description of the State of nature is different from that of Hobbes.

(c) John Locke's Social Contract

John Locke deals with dual contracts - social and governmental (of political). Social contract leads to the formation of civil society and the

governmental contract to the establishment of the government. Social contract puts the Primitive state to the end. In the words of John Locke, "The State of nature has a law of nature to govern it which obliges everyone; and reason, which is that law which teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions".[13] Thus, "Locke's state of nature with its sequence of recognised rights, is already a politicial society".[14]

Society is organised for protecting human life and safeguarding his property and freedom. Man has authorised and given up not all of his right to society but only the rights of health, liberty or possession. Anybody who disobeys is liable to be punished by society. For this purpose, society transfers some of its powers to a selected few persons who form the government. Such type of government is established through a government contract. The ruler and the people entered into this contract.

(d) Rousseau's Views on Social Contract

Jeans Jaques Rousseau (1712-1778), the renowned French philosopher and a great political thinker of the eighteenth century, had elaborated his theory of Social Contract in his famous book, "Social Contract". Born in Geneva in 1712, Rousseau settled in Paris after visiting many places. Unlike Hobbes and Locke, Rousseau had no purpose to serve and no axe to grind. He expressed his views about the social contract without having any consideration in his mind. Rousseau was deeply affected by the crumbling state of the political order of the contemporary France. He came under the influence of Plato, Montesquieu and Cicero, etc. He thoroughly stuided the ideas of Hobbes and Locke. His own ideas deeply influenced Kant and Hegel, the well-known German Philosopher. First of all his views were severely criticised and his ideas were vehemently condemned and his books were burnt to ashes. Being

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13. John Locke: "*Two Treaties of Civil Government*", Bk, 2, Ch. 2.
14. Barker : "*Social Contract*", See Introduction.

disgusted and disappointed with the sorry state of affairs, he committed suicide in 1778. But after his death, his views gathered force and his ideas began to be widely appreciated. His ideas became so popular and powerful that it led to the outbreak of the French Revolution in 1789 after eleven years of his death. That is the reason why he is regarded as the herald of the French Revolution.

(e) Rouseau's Theory of General Will

According to Rousseau, there was only one contract which was social and political at the same time. The individual surrendered himself completely and unconditionally to the contract of which he became the member. The contract so entered was moral and collective. Rousseau called this contract General Will. The salient feature of the General Will was that it attached no importance to private interests. People did not care for their private ends and willed the General Good. In other words, the will of the individual that willed the best interests of the State was his best will and it was indeed more real than his will that willed private ends. Rousseau goes to the extent of saying, "My will which wills the best interests of the State is my best will and it is indeed more real than my will which wills my private interests. All actions are the result of the will but my will for the good of the State is morally superior to any other will private or associated which may from time to time determine my conduct. The general will being the compound of the best wills of the citizens willing the best interests of the community and its lasting welfare, it must be sovereign". Rousseau further says, "Since it is my will, my own will, I ought always to follow it, then the General Will can legitimately compel me to obey it. Indeed it is the only authority that can legitimately coerce me, for it is my own will coming back to me even though I do not always recognise it as such. And in following it, I am fulfilling myself and am thus finding true freedom. Whoever refuses to obey the General Will shall be compelled to do so by the wholebody. This means nothing less than that he will be forced to be free; for this is the condition which secures him again all personal dependence".

(ii) Speculative and Half Actual Theories

A. Patriarchal and Matriarchal Theories

So limited is the knowledge of the Political Scientists, regarding the origin of the State that it becomes very difficult, if not impossible to say when and how the state originated. But it can safely be asserted that the State is the outcome of historical evolution. Because family is the oldest of all human institutions and because family is the first constituent of society, it has played a dominant role in the organisation of State. Maclver, an eminent political and social scientist, is also of the same opinion. He says, "in the family, the primary social unit, there are always present the curbs and controls that constitute the essence of government, which is in continuation by the more inclusive society of a process of regulation that is highly developed within the family. The same necessities that create the family also regulate it. Here is government in miniature and already government of a quite elaborate character." Therefore, it can safely be asserted that family has been a very important link in the development of State.

Patriarchal Theory of the State

This theory explains that the family with the father as head expanded into the clan and the clan into the tribe and finally the state came into being. The tribe expanded into the State. Blood relationship made its valuable contribution in the expansion of the family into the clan and of the clan into the tribe. While dealing with this process Leacock writes, "First a household, then a patriarchal family, then a tribe or persons of kindered descent and finally nation - so emerges the social series erected on this basis," while Aristotle believed that the state took form "as a natural expansion of the family.

Sir Henry Maine was the strongest supporter of Patriarchal Theory of State,. At one time, he was the legal member of the Governor-General's Council in India. He has ardently advocated this theory through his well-known books - "Ancient Law" and "Early History of Institutions." According to Sir Henry Maine, "the eldest male parent - the eldest ascendant - was absolutely supreme

in his household and his dominion extended to life and death and was as unqualified master over his children and their houses as over his saves."[15] He further remarks, "Over the members of his household, the eldest male parent possessed despotic authority. He was not only absolute owner of property including even what his children had acquired but he could even chastise and even kill, could sell or transfer by adoption could marry or divorce any of his children at will. "Sir Henry Maine has beautifully outlined the process of State. He says "The elementary group is the family, connected by common subjection to highest male ascendent. The aggregation of families forms the Gens or houses. The aggregation of house make the tribe.The aggregation of tribes constitutes the commonwealth."[16] In the support of his theory, Sir Henry Maine has given references to the Jewish scripture and to the powers of heads of the families in Greece, Rome and India.

(iii) Historical or Evolutionary Theory

This theory attempts to explain the origin of the State most scientifically. According to this theory, the state is a historical growth. The state is neither the result of an artificial creation not it originated at a particular period of time. Dr. Garner has very aptly observed in this connection: "The State is neither the handiwork of God, nor the result of superior physical force, nor the creation of resolution or convention, nor a mere expansion of the family. The state is not a mere artificial mechanical creation but an institution or natural growth of historical evolution".[17] Leacock has also very aptly remarked, "The State is a growth, an evolution, the result of a gradual process, running throughout all the known history of man and receding into remore and unknown past".[18] According to Burgess, "State is a continuous development of human society out of a grossly imperfect beginning through crude but improving

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15. Sir Henry Maine : "*Ancient Law*", at 123-24.
16. *Ibid.*, at 138.
17. Prof. Garner: "*Political Science and Government*".
18. Leacock: "*Essentials of Political Science*", (1832), at 37.

forms of manifestations towards a perfect and universal organisation of mankind".[19]

A close analysis of the rise of the State tells us about a number of factors which played an important role in the growth and development of the State. The following are a few important factors :

(1) Natural Social Instinct

(2) Kinship

(3) Religion

(4) Force

(5) Economic Activities

(6) Political Consciousness

No doubt a close analysis of the rise of the State shows the factors which played an important role in the growth and development of the State, yet it is not to be supposed that these factors are actually separated in the process of state-building. A clear-cut division is impossible.

A. Evolution of The Modern Nation State

As has already been stated, the State is the product of slow and steady process of evolution over a long period of time embracing a number of factors. But this process of evolution of the State has not been uniform, regular and continuous . Different factors produced different types of states in different societies. Therefore, it is very difficult to show the stages of evolution which the modern nation-state had to undergo during the process of its slow and steady evolution. However, speaking in terms of history the tribal State, the Oriental Empire, the Greek City-state, the Roman Empire, Feudal State, the Modern Nation State have generally been regarded as the stages of evolution of the State. Hence, it is instructive to mark the following stages through

19. Burgess: "*Political Science and Constitution Law*," Vol. I, at 59.

which the state has evolved:

(1) The Tribal State

(2) The Oriental Empire

(3) The Greek City-State

(4) The Roman Empire

(5) Feudal State

(6) The Modern Nation-State

Modern Nation State

Feudalism was "a temporary scaffolding or frame work of order". Its decline and fall was bound to occur. In Europe, the Renaissance and the Reformation, the Industrial Revolution and the invention of gun-powder and the mutual disputes led to the fall of feudal states and gave rise to the growth of modern nation-states. The powerful king captured the feuds with the help of gun-powder and with the co-operation of the lower middle class. For example, Sir Henry VII and VIII in England, King Louis XIV in France, Phillip II in Spain, and Peter the Great in U.S.S.R overpowered the feuds there and refuted the supremacy of the church and established the nation-states.

In such nation-states measures were adopted to mitigate the imperial effect of any to give impetus to the business and service classes. The kings used to exercise their absolute authority for the welfare of the public and for maintaining law and order. Every such state was extended to all the territorial lines of the country and attempts were made to make the whole nation politically awakened. National feelings were aroused through similar administration, common history, common language and common religion etc.

Democratically Organised nation-states (Great Britain, France, Netherland, Sweden, Norway, Denmark, Greece, Austria, Japan, India, U.S.A., Canada, Australia etc.)

The nation-states which were established in the very beginning were absolute monarchies. In such states the authority of the king was supreme. In the very beginning, the common public being completely terrorised by the tyranny of feuds tolerated the absolute authority of the king. But with removal of the terror created by Feudalism the public started demanding its rights. At last the public rose in revolt against the king England faced the Civil War during the regime of Charles I in seventeenth century. As a result of it, the king was defeated and the parliament won. The king was given capital punishment. This gave a very heavy blow to the authority of the king. During the regime of Oliver Cromwell monarchy was abolished. But later on , Charles II was again enthroned. After Charles II when James II attempted to extend the scope of his authority, England faced the Glorious Revolution in 1688 and the authority of the king was curtailed. In 1789, Revolution broke out in France. With the advent of the revolution tyranny ended over there. But after some time Napoleon emerged as powerful ruler. After the fall of Napoleon democarcy flourished in France. Third Republic was established but it came to an end during the 2nd World war when Hitler overran it. When Hitler was overthrown in 1945, then the 4th Republic was established which lasted till 1958. After that fifth Republic was established. In India, Democracy was established after Independence. In this way, after a continued struggle for a very long period most of the states of the world, if not all, have got democracy. These nation-states have nourished the sentiment of nationality. These nation-states have their fixed territory. Sometimes, disputes arise regarding the territory. At this critical time the U.N. mediates in such matters. These state are seeking co-operation from the U.N. intending helping hand to them.

The State has been envisaged from various points of views. Theorists conceive and define the state in terms of their own science. Each gives his own theory regarding the origin, nature, sphere, function and ends of the state. These theories often differ from one another in form and substance. Here we shall make an attempt to deal with the various theories regarding the nature of the state.

II Sovereignty

(i) Meaning of Sovereignty

The term "*Sovereignty*" has been derived from the Latin word "*Superanus*" which means supreme or paramount. Although the term "*Sovereignty*" is modern yet the idea of "*Sovereignty*" goes back to Aristotle who spoke of the "supreme power of the state". Throughout the Middle Ages the Roman jurists and the civilians kept this idea in their mind and frequently employed the terms "*Summa*" potestas and "*Plenitude potestatis*" to designate the supreme power of the State. The terms "*Sovereign*" and *Sovereignty*" were first used by the French jurists in the fifteenth century and later they found their way into English, Italian and German political literature. The use of the term "Sovereignty" in political Science dated back to the publication of Bodin's "The Republic" in 1576. "The word sovereign" says J.S. Roucek and others, "entered the vocabulary of political theory from the feudal order, wherein it designated a relationship between persons. The term sovereign had been applicable to any feudal overlord with authority over subjects in his own dominions".[20]

(ii) Definitions of Sovereignty

Sovereignty is "the common power of the state, it is the will of the nation organised in the state, it is right to give unconditional orders to all individuals in the territory of State".[21]

Burgess characterised sovereign is the "Original , absolute, unlimited power over the individual subjects and over all associations of subjects.[22]

"Sovereignty is that power which is neither temporary nor delegated, nor subject to particular rules which it cannot alter, not answerable to any other power over earth".[23]

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20. J.S. Roucek and others: "*Introduction to Political Science*" (1954), at 49.
21. Duguit, *Droit Constitutional* Vol. I, at 113.
22. Burgess : *"Political Science and Constitutional Law"*, Vol. I, at 52.
23. Pollock : *"History of the Science of Politics"*, at 59.

(iii) Austin's Theory of Sovereignty

John Austin (1790-1859) had been an eminent English jurist in the nineteenth century. He stated his theory a little more than a century age. His theory is well explained in the famous book "Lectures on Jurisprudence". This book was published in 1832. Though he was much impressed by the views of Hobbes and Bentham, yet his theory of sovereignty is quite distinct. He explained very clearly and precisely the legal or monistic theory of sovereignty in his famous book "province of Jurisprudence Determind" (1832). In his another famous book "Lectures on Jurisprudence" he drew a line of difference between law an morality. His statement of the theory of sovereignty runs like this, "If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of given society, that determinate human superior is the sovereign and that society (including the superior) is a society political and independent. Every positive law or every law simple or strictly so called, is set directly or circuitously by a sovereign person or body to a member or members of the independent political society wherein that person or body is severeign or supreme".

Austin is of the opinion that the determinate human superior is the only law-maker and his commands are laws. But Sir Henry Maine with other historical jurists has vehemently criticised and condemned Austin's theory of Sovereignty. Sir Henry Maine believes that Sovereignty does not reside in the determinate human superior. According to him "vast masses of influences, which we may call for shortness moral, that perpetually shapes, limits or forbids the actual direction of the forces by its sovereign".[24] Maine cites the example of Ranjit Singh whom he regards as an absolute despot possessing qualities of Austin's determinate human superior "Ranjit Singh", says Maine, "could have commanded anything; the smallest disobedience to his commands would have been followed by death or multilation". Yet Ranjit Singh never "once in all his life issued a command which Austin could call law ..... The rules which regulated the life of his subjects were derived from their immemorial usages

24. Sir Henry Maine: *"Early History of Institution"*, at 359.

and these rules were administered by domestic tribunals, in families or village communities".[25] Clark, Sidwick, Marby, Lowell, Wilson, T.H. Green, Lightwood, Marriam and Willoughby. All these political thinkers are of the opinion that John Austin has laid unnecessary emphasis on this only one element (the order of the sovereign) and ignored many other elements.[26] John Austin attempted to defend this charge by saying that "whatever the Sovereignty permits, that is also law. But this defence of Austin could not satisfy the critics. The critics argued that the development of the Common law was a great political stir which could not be averted by the sovereign. Hence, the sovereign had no other alternative than to permit the common law to exist. Maclver has very aptly remarked, "The state has little power to make custom and perhaps less to destroy it, although indirectly it influences customs by changing the conditions out of which they spring".[27]

III. Concept of Law

The Hindu jurisprudence or the legal system (Vyavahara Dharmasastra) is embedded in Dharma as propounded in the Vedas, Puranas, Smritis and other works. Dharma is a Sanskrit expression of the widest import. There is no corresponding word in any other language. It would also be futile to attempt to give any definition to what word. It can only be explained. It has wide varieties of meanings. A few of them would enable us to understand the width of that expression. For instance, the word Dharma is used to mean justice (Nyaya), what is right in a given circumstances, moral, religion, pious or righteous conduct, being helpful to living beings, giving charity or alms, natural

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25. *Ibid.*

26. Clark, *"Practical Jurisprudence"*, *"A commentary on Austin"*, at116 ff. Sidgwick: *"Elements of Politics"*, Appendix A. Markby: *"Elements of law"*, at 24 Lowell: *"Essays on Government"*8 (Chapter 5 on Sovereignty); Wilson, *"An old Master and other Essays"*, Chapter 5; T.H. Green, *"Political Obligations"*, at 93-122; Lightwood, *"Nature of Positive Law"*, Ch. 13; Marriam, *"History of Society"* at145ff; Willoughby, *"Funda mental Concept of Public Law"*, at 116 ff and at 129 ff.

27. Maclver: *"Modern State"*, at161.

qualities or characteristics or properties of living beings and things, duly, law and usage or custom having the force of law, and also a valid Rajashasana (royal edict)

(i) Meaning of Dharma

Mahabharata contains a discussion of the meaning of Dharma. On being questioned by Yudhistira about the meaning and scope of *Dharma*, Bhishma States:[28]

> **It is most difficult to define *Dharma*. *Dharma* has been explained to be that which helps the upliftment of living beings. Therefore that which ensures welfare (of living beings) is surely *Dharma*. The learned rishis have declared that which sustains is *Dharma*.**

Taittiriya Samhita States:[29]

> ***Dharma* constitutes the foundation of all affairs in the world. People respect one who adheres to *Dharma*. *Dharma* insulates (man) against sinful thoughts and actions. Everything in this world is founded on *Dharma*. *Dharma*, therefore, is considered supreme.**

Jaimini 1.2:

> ***Dharma* is that which is indicated by the Vedas as conductive to the highest good.[30]**

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28. *Mahabharata Shantiparva*-109-9-11.
29. *Taittiriyopanishat - Jnanasadhana Nirupanam* - vide Sasvara Vedamantra at128.
30. *Sabara* at 4-7; *Yudhistira* at 10.

Madhavacharya, the Minister to Hakka and Bukka, founder kings of Vijayanagar Empire, in his commentary on *Parashara Smriti*, has briefly and precisely explained the meaning of *Dharma* as follows:

> ***Dharma* is that sustains and ensures progress and welfare of all in this world and eternal bliss in the other world. The *Dharma* is promulgeted in the form of commands.**[31]

Therefore *Dharma* embraces every type of righteous conduct covering every aspect of life essential for the sustenance and welfare of the individual and society and includes those rules which guide and enable those who believe in God and heaven to attain *moksha* (eternal bliss).

(ii) Origin of Dharma

Dharma was founded as the solution ot the eternal problems confronting the human race, originating from natural human instincts.

Manu II : 4:

> **There is no act of man which is free from desire; whatever a man does is the result of impulse of desire.**

In the above verse, analysing the human instinct, *Manu* states that the force behind every action of human being in his desire (*kama*). Then the next question is what are the natural desires of man. The natural desire of man was found to be the desire to have sexual and emotional enjoyment and wealth i.e., material pleasure (*artha*). Artha is explained by Vatsayana as connoting material wealth such as gold, cattle, corn, including education or knowledge necessary to earn wealth.[32] The source of all evil actions of human beings was traced to

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31. *Parashara Dharma Samhita* - Sayana Madhavacharya Krita - Tikasahita (Sanskrit) - edited by Vamanasharma (1893), Bombay Sanskrit Series, at 63.
32. *Kamasutra* 1-20.

the desire for material pleasure which in turn gave rise to conflict of interests among individuals.

Further it was found that the desire (*kama*) of human beings could also be influenced by the other impulses inherent in human beings such as anger (*krodha*), passion (*moha*), greed (*lobha*), infatuation (*mada*) and enmity (*matsarya*). These six natural impulses were considered as six enemies of man (*arishadvarga*), which if allowed to act uncontrolled could instigate him to entertain evil thoughts i the mind for fulfilling his own selfish desires and for that purpose cause injury to others, *Manu* on this basis explained the causes of all civil and criminal injuries by the action of one against the other.[33]

Dharma or rules of righteous conduct was evolved as a solution to this eternal problem arising out of natural instinct of man. In *Mahabharata Shantiparva*, after explaining that an ideal state of affairs did exist when people protected each other acting according to *Dharma* (*Shanti 59-14*), *Bhishma* proceeded to state that people deflected from the path of *Dharma* being overpowered by sensual desires, passion and greed, and stronger persons began to harass the weaker ones and as a remedy to this situation, the three-fold ideals called *Dharma, Artha* and *kama* (*Trivarga*) were laid down for the welfare and happiness of the people, and a fourth ideal namely *Moksha*- the desire to secure eternal happiness - was also prescribed and the king was entrusted with the responsibility of enforcing *Dharma.*

The object of layig down the three-fold ideals was that *Kama* (desire) for material pleasure (*Artha* must be entertained and enjoyed only in conformity with *Dharma* and not otherwise. Further, if one has before him the ideal of *Moksha* is would it would also influence him to conform to *Dharma* in the worldly life.

After deep study and meditation, the great seers declared that unless *kama* (the desire) to have all earthly i.e, material pleasure (*Artha*) and those proceeding from anger, greed, passion, infatuation and enmity of every

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33. *Manu XIII* 3-7

individual is controlled by rules and not by the strength or weakness of the individual human beings, incessant conflict, fight and consequential loss of happiness, peace as also the loss of material pleasure itself would be the inevitable consequence. It is for this purpose rules of *Dharma* were expanded to cover all aspects of life. It is thus, the whole body of rules which declared as to what were the proper desires which one should entertain and as also what were the proper ways and means to acquire the material pleasure properly desired, came to be known collectively as *Dharma.*

Artha and *Kama* Subject to *Dharma*

The propounders of *Dharma* did appreciate that fulfilment of desires of human beings was an essential aspect of life, but were of the opinion that unless the desires were regulated by law, it was bound to have undesirable results. Therefore, all the propounders of *Dharma* were unanimous that for the existence of an orderly society, peace and happiness of all, the desires *(kama)* for material enjoyment, and pleasures (*Artha*) should always conform to *Dharma* (Law) and never inconsistent with it.

Bhagavadgita 16-24

> **Let the sastras be your authority in deciding what you should do and what you should desist from doing. Having understood what is ordained by the sastras you should act accordingly.**

Manu II 224 and IV 176.

> **For achieving welfare and happiness some declare *Dharma* and *Artha* are good. Others declare that *Artha* and *kama* are better. Still others declare that *Dharma* is the best. There are also persons who declare *Artha* alone secures happiness.**

But the correct view is that the aggregate of *Dharma, Artha* and *kama (Trivarga)* secure welfare and happiness.

However the desire (*kama*) and mterial wealth (*Artha*) must be rejected if it is contrary to *Dharma*.

Vatsayana Kamasutra 1.2.7-15: after explaining the meaning of *Dharma*, *Artha* and *Kama*, states:

> **Out of *Dharma, Artha and Kama,***
> **each preceding one is superior**
> **to the following.**[34]

This indicates that proper means of acquisition of *Artha* i.e., material wealth and pleasure must prevail over the desire (*kama*), and *Dharma* must control the desire *(kama)* as well as the meas of acquisition of material pleasure (*Artha*). All the works on *Dharma* therefore prescribed rules of right conduct, observance of which was considered necessary for the welfare of the individual and the society.

In laying down *Dharma* its propounders took an interated view of life, consequently, rules of right conduct covering almost every sphere of human activity such as religion, rules regulating personal conduct of individuals, as a student, as a teacher, as a house-holder, as a husband, as a wife, as a son, as a hermit, as an ascetic, including rules regulating taking of food and the like were prescribed. *Dharma* therefore laid down a code of conduct covering every aspect of human behaviour, observance of which was considered a must for peace and happiness of individuals and the society.

(iii) Vyavahara Dharma and Rajadharma

While explaining the origin of State (*Rajya*) and creation of kingship, Bhishmacharya states that in the hoary past there was an ideal stateless society and that every one acted according to *Dharma* and each was protecting the order. But as powerful individuals, overwhelmed by their desires began to encroach upon the life, liberty and property of other weaker individuals, the

34. *History of Dharmashastra*, Vol. II part I at 9.

king was created with the right to collect the tax and duty to protect the people and punish the wicked. In the opening verse of his *Smriti, Narada* explains that there were no legal proceedings when people were habitually veracious, but as the standard of behaviour declined, the system of legal proceedings for enforcement of rights and punishment of wrongs was established and the king was appointed to decide law suits as he has the power to enforce the law and punish the wrong doer.

It is at this stage of the evolution of human society in India when positive civil and criminal law (the law laying down the powers, duties and responsibilites of the king - *Rajadharma*), including the law regulating the establishment of courts, their powers, functions and procedure, as part of *Dharma*, was laid down which marks the commencement of its legal and constitutional history.

Consequent on the creation of kingship and the system of legal proceedings, the positive civil and criminal law, as also the law regulating the constitution and organisation of State (Rajya), the duties and powers of kings were laid down as part of *Dharma* and came to be called *Vyavaharadharma* and *Rajadharma*, respectively.

Therefore though the word *Dharma* has such wide meaning as to covers rules concerning all matters, such as spiritual, moral and personal as also civil, criminal and constitutional law, it gives the precise meaning depending upon the context in which it is used. For, instance, when the word '*Dharma*' is used to indicate the giving of one's wealth for a public purpose, it means charity; when it is referred to the giving of *Dharma* to a beggar, it means giving of alms; when it is said that in a given case *Dharma* is in favour of the plaintiff, it mean law or justice is in his favour; when it is said that it is the *Dharma* of the sons to look after their aged parents, it means duty; when it is said that it is the *Dharma* of a debtor to repay the debt to the creditor, it means a legal as well as pious obligation. Similarly when the word *Dharma* is used in the context of civil rights (civil law), it means that it if enforceable by the state; in the case of a criminal offence (in criminal law) it means breach of a duty which is

punishable by the State; and when '*Dharma*' is used in the context of duties and powers of the king, it means constitutional law (*Rajadharma*). Likewise when it is said that *Dharmarajya* is necessary for the peace and prosperity of the people and for establishing and egalitarian society, the word *Dharma* in the context of the word *Rajya* only means law, and *Dharmarajya* means Rule of Law and not rule of religion or a theocratic State.

Dharma in the context of the legal and constitutional history only means *Vyavahara-dharma* and *Rajadharma* evolved by the society through the ages which is binding both on the king (the ruler) and the people (the ruled). The expression *Dharma* is used only in this sense while dealing with these topics in this book. *Rajadharma* conferred power on the king to enforce obedience to *Vyavaharadharma* through the might of the State.

(iv) Definition of Law

Having evolved the concept of enforceability of the law through the institution of kingship, ancient Indian jurists proceeded to define the law. Law was recognised as a mighty instrument necessary for the protection of individual rights and liberties. Whenever the right or liberty of an individual was enroached by another, the injured individual could seek the protection of the law with the assitance of the king, how ever powerful the opponent (wrong doer) might be. The power of the king (State) to enforce the law or to punish the wrong doer was recognised as the force (Sanction) behind the law which could compel implicit obedience to the law. After declaring the kshatra power (i.e. the king) was created by the creator, *Brihadaranyakopanishad* proceeds to state, finding that the mere creation of kingship was not enough, the most excellent *Dharma* (law), a power superior to that of the king, was created to enable the king to protect the people, and gives the definition of law (*Dharma*) as follows:[35]

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35. *Brihadaranyaka Upanishad,* 1-4-14 (SBE Vol. XV 89 - 14) ; *History of Hindu Law* by Sarvadhikari Tagore Law Lectures - 1880, at 10

Law is the king of kings;
Nothing is superior to law;
The law aided by the power of the king
enables the weak to prevail over the strong

Commenting on the above provision, Dr. S. Radhakrishnan observes- "*Even kings are subordinate to Dharma, to the Rule of law.*"[36]

Manu VII - 22 :

There is hardly an individual in this world, who on his own, is pure in his conduct. King's (Sovereign's) power to punis, keeps the people in righteous path. Fear of punishment (by the king) only yields worldly happiness and enjoyment.

***Sureshwaracharya*, the first head of *Sringeri Mutt* established by *Sankara*, defines Sovereignty thus -**

Here (in this world) he who has none else as his king and who is himself the king is the sovereign. And his status here is described as sovereignty.[37]

The most ancient and perhaps the earliest definition of law given in the *Upanishad* brings forth the essential aspects of the word 'law' as defined in the modern jurisprudence. The law, according to western jurisprudence, is an imperative command which is enforced by some superior power or sovereign. The superior power which serves as an instrument of coercion for the enforcement of law is called the 'sanction'.[38]

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36. *The Principal Upanishads* by Dr. S. Radhakrishanan (former President of India), at 170.
37. *The Taittiriyopanishad, Bhashyavartika of Sureswara,* part I at 121.
38. Salmond's *Jurisprudence* 12th Edition, at 25-26.

According to Austin, law consists of the general command issued by the State to its subjects and enforced if necessary by the Physical power of the state.

Therefore declaration of law by a political superior or sovereign (the king) and the availability of the power of the Stater machinery for enforcement of that law are stated to be the essential requisities of an imperative law. The law as defined in Hindu jurisprudence also meant that it was enforceable against individuals with the aid of the physical power of the king as is made clear from the clause. '*The law aided by the power of the king enables the weak to prevail over the strong*'. The power of the king constituted the instrument of coercion.

IV. Rajadharma or the Constitutional Law

> **"The proper function of the Ruler is to rule according to *Dharma* (the Law) and not to enjoy the luxuries of life".**

The origin of the State (Rajya) as well as the office of the king and the conferment of power on the king to maintain the rule of law has been explained in *Shanti Parva* of the Mahabharata. At the end of the epic war of Kurukshetra, Yudhistira requested Bhishma, who was master of *Rajadharma*, to reveal the law gocerning kings. The chapter on *Rajadharma* in *Shanti Prava* incorporates Bhima's authoritative exoposition about the origin and purpose of the State, the rule of law , the institution of kingshop, and duties and the powers of the king. Great stress is also laid on the personal charcter and qualities which a king, in whom vast political power is vested, must possess for the proper and effictive discharge of his functions. *Rajadharma* so clarly laid out is vast like an ocean and consists of invaluable and eternal principles worthy of emulation under any system of polity and by all persons exercising political power. The Mahabharta discourse on the topic of *Rajadharma* discourse on the topic of *Rajdharma* disclose that in the very early periods of civilization in this country

great importance was attached to *Dharma* and it was self imposed by inviduals. Consequently, everyone was acting according to *Dharma* and there was on necessity of any authority to compel obedience to the laws. The existence of such an ideal 'stateless society' is graphically described in the following verse :

> **There was neither kingdom nor the king, neither punishment nor the guity to be punished. People were acting according to *Dharma* and threby protecting one another.**[39]

The above verse gives a clear picture of an ideal stateless society, which appears to have been in existence in the hoary past. Such a socity was most ideal for the reason that every individual scrupulously acted according to the rules of right conduct by the force of his own culture and havit and not out of any fear of beang punished by a powerful superior authority like the State. Consuquently there was mutual cooperation and protection. The society was free from the evils arising from selfishness and exploition by individuals. The sanction which enforced such implicit obedience to *Dharma* was the faith of the people in it as also the fear of incrring divine displeasure if *Dharma* was disobeyed.

However, the ideal socity so beautifully described did not last long. White the faith in the efficacy and utility of *Dharma,* belief in God fearing atttude of people continued to dominate the socity, the actual state of affairs gradually deteriorated. A situation arose when some persons, out of selfish worldly desires, began to flout *Dharma,* and become immune to the fear of divine displeasure. They were infatuated by there desire for pleasure and, prompted by there own muscle power , began to exploit and torment the weaker section of socity for their selfish ends. Tyranny of the strong over the week regned unabated . The danger to peaceful co-existence and consequent uncertainty and anxiety about the sefety of life and property of individuals, was brought about by such individules. It was as though the rule of

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39. *Mahabharata Santiparva*, 59-14

'*Matsyanyaya*' (big fish devouring the small fish) governed the society. This situation forced the law abiding people to search for a remedy. This resulted in the discovery of the institution of king and establishment of his authority (kingship or the State).[40]

Kautilya, who was the Prime Minister to the powerful magadha Emperor, Chandragupta Maurya, in his celebrated work on policy (*Arthasastra*) explains the origin of the institution of kingship.

Kaut. p. 22 (p 24 S):

> **People suffering from anarchy, as illustrated by the proverbial tendency of bigger fish devouring the smaller ones, first elected *Manu*, the *Vaivasvata*, to be their king, and allotted one-sixth of grains grown and-tenth of merchandise as the responsibility of assuring and maintaining the safety and security of their subjects (*Yogakshemavahah*) and of being answerable for the sins of their subjects when the principle of levying just punishment and taxes has been violated.**

(i) Ideal and purpose of the State

There was no difference between the ideals kept before the State by *Rajadharma* and those enshrined in the hearts of individuals through the *Sharutis* and other works on *dharma*. The ideals placed before the individual, for purpose of the welfare and happiness of himself and all others in this world, were *Dharma, artha* and *Kama* and (material welth and desires) if they were in conflict with *Dharma*. The ultimate goal or ideal enshrined in the hearts of all undoubedly was *Moksha*, which every individule was enjoined to strive for i.e., libertion from the bondage of the cycle of birth and death and to

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40. Kaut. at 22; at 24.S, Manu VII - 3.

secure union with the creator or, in other words, to reach heavan, which idea is philosophical in nature and, therefore , not germane to this topic. The ideals of *Rajadharma* placed before the state were to assist and support the achievement by individuals of the threefold ideals (*Trivarga*).

Barhaspatya Sutra II 43:

> **The goal of policy (*Rajaniti*) is the fulfilment of *Dharma*, *Artha* and *Kama.***

Barhaspatya Sutra II 44 adds that *Artha* (the wealth) and *kama* (desire) mustand the test of Dharma. Kautilya declares that a king must strive for the achievement of *Trivarga. Kamandakiya,* after an elaborate discussion of the seven constituents of the State, concludes thus :

Kam. IV 77.

> **The State administered with the assitance of sagacious minister secures the three goals (*Trivarga*) in an enduring manner.**

After a through discussion of the topic *Mahamahopadhyaya* Dr. Panduranga Vamana Kane states:

> **"... The goal of the State was deemed to be to enable men to attain the four *Purusharthas*, particularly the first three, (as the last viz, *Moksha* depended only upon individual philosophical insight and mystrical experience and was attainable only by a microscopic number). Even the *Barhaspatya Sutra* (II 43) says that the fruit of polity was the attainment of *Dharma*, *Artha* and *Kama*. *Somadeva* begins his *Nitivakyamrita* in a characteristic way when he performs obeisance to Rajya (the state) which yeilds the three fruits of *Dharma*, *Artha* and *Kama*..... The *Dharmasastra***

authors held that *Dharma* was the supreme power in the state and was above the king, who was only the instrument to realize the goal of *Dharma*."[41]

The theory about the origin of kingship and its purpose as set out above it reiterated by all the works on *Rajadharma* which declare with one voice that the highest duty of a king is to afforad 'protection to his subjects *(praja)* and to dedicate himself for their welfare and happines.

(ii) Rajadharma is the Paramount Dharma

Simultaneously with the bringing into existence of Rajya and the institution of kingship was felt the necessity to define its structure, the powers and duties of the king and the liability of the people to contribute a part of their income by way of taxes, which should be placed at the hands of the king for purposes of the defence of the realm and for maintainig peace, safety and order in the society and also for undertaking various welfare measures for the benefit of the people. This necessity was met by making provisions regulating the constitution and organisation of the State, specifying the power and duties of the king and all other incidental provisions and treating these provisions also as part of *Dharma* under the title *Rajadharma* (law governing kings). In the *Dharmashastras* and *Smritis.*, *Rajadharma*, several eminent writers wrote independent treatises on it under various titles such as Rajanitisara, Dandaniti, *Arthasastra* is by Kautilyam, who was the Prime Minister of Magadha Empire which had its capital at Pataliputra (modern Patna, in the State of Bihar). P.V. Kane refers to other extensive literature available on the subject.[42] The important ones are Mahabharata - *Shanti Parva*, Manu Ch. VII and IX, Kamandak Nitisara, Monasollasa of Someswara, Yuktikalpataru of Bhoja, Ranajit Ratnakara of Chandeswara, *Rajaniti Prakasha* of *Mitramisra* and *Dandaniti* or Keshva Pandita. The system of government envisaged by all the works on *Rajadharma* was Rajya (the state) headed by a king. The provisions

41. *History of Dharmasastra* Vol. III, at 237-241 at 240.

42. *History of Dharmasastra.* Vol. III, at 13.

in the *Dharmasastras*, *Smritis* and other works on the topic mentioned above, covered varieties of subjects such as the constitution and organisation of Rajya, Kingship, manner of assuming office of the king (coronation), code of conduct for the king, succession of kingship, education of young princes, appointment of council of ministers, the chief justice and other judges of the highest court, administrative divisions and powers and duties of the king.

The propounders of *Dharmasastra* declared that the king (state) was absolutely necessary to maintain the society in a state of *Dharma* which was essential for the fulfilment of *Artha* and *Kama*. *Rajadharma*, which laid down the *Dharma* of the king, was paramount.

Mahabharata Shantiparva 63, 24-25.

> **All *Dharmas* are merged in *Rajadharma*, and it is therefore the supreme *Dharma*.**[43]

The next question that naturally arises is whether *Rajadharma*, in the absence of any authority like the judiciary for the enforcement of the provisions contained therein, be regarded as constitutional law ?

It is no doubt true that there was no forum before which any violation of the provisions of *Rajadharma* could be questioned. The king himself, who was expected to obey those laws, was the highest court, and the smritis provided no forum for challenging the action of the king on the ground that it was in violation of *Rajadharma*. Therefore the whole of *Rajadharma* was comparable to the directive principles of state policy as set out in Part IV of the Indian Constitution vide Article 37 which reads:

> "Application of the principles contained in this part: The provisions contained in this part shall ot be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

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43. *History of Dharmasastra.* Vol. III at 39.

It may be seen that though the provisions contained in Part IV are declared fundamental in the governance of the State, they are made unenforceable in a court of law. Consequently non-implementation or violation by the State of the provisions contained in Part IV could be questioned or challenged by any method other than legal action. Therefore, non-performance on the part of the government in implementing these directive principles, or any action on its part in contravention of them, unless it results in the violation of fundamental rights, can only be the subject matter of public criticism, both in the legislature and outside, resulting in adverse public opinion against the government, but could not be enforced throught courts. Such was also the nature of all the provisions of *Rajadharma*. They people could put pressure on the king to follow *Rajadharma* through advice by ministers, representation by corporations and guilds, or by giving expression to their disapproval publicly, but not through a court of law. However, it must be emphasised that the faith in *Dharma* was deep - rooted in the people, which included even the king, and this fulfilled in an abundant measure the requirements of *Rajadharma* which formed the written constitution adopted by consensus and convention. The mere fact that the provisions of *Rajadharma* were not enforceable in a court of law is no basis to hold that *Rajadharma* were not enforceable in a court of law in no basis to hold the *Rajadharma* did not correspond to constitutional law. The factor of enforcement throught courts is not an absolute ingredient of a constitutional law under any set up. The enforceability of constitutional provisions through courts is a special characteristic of democratic constitutions bringing into existence a limited government functioning within the framework of a written constitution with the inbuilt mechanism of an independent judiciary having the power to strike down any legislative or executive action of the State on the ground of violation of constitutional provisions. For instance, the provisions of the British constitution, which is not a written constitution but consists of constitutional conventions, are not enforceable in a court of law. In that system parliament is supreme and therefore the question of enforcing constitutional provisions through courts and declaring a law made by Parliament unconstitutional does not arise, as it does under the American Constitution as

also under the Constitution of India. Distinguishig the features of the American Constitution from that of Great Britain and explaining the meaning of constitutional law cooley observes:

> "A constitution is sometimes defined as the fundamental law of a state, containing the principles upon which the government if founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confined, and the manner in which it is to exercised. Perhaps an equally complete definition would be, that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."[44]

Rajadharma falls within the scope of the expression 'Constitutional law' as defined by Cooley. They were a body of rules according to which the sovereign power was habitually exercised by the kings. Thus the provisions of *Rajadharma* did form the constitutional or fundamental law of the states in ancient India and they covered every aspect or basis principle on which the government was founded. However like the provisions of the British Constitution, they were unenforceable in courts of law; but with this difference i.e., *Rajadharma* was much stronger because the king or the State had no power to abrogate or modify its provisions. The king enjoyed no legislative power to make other laws also. The laws on all these aspects were fixed and could be adapted to suit the changing needs only by the people by evolving usages and customs, or by eminent jurists, giving a new interpretation to the existing provisions. The efficacy of *Rajadharma* as contitutional law is evidenced by *Arthasatra*, the monumental work written by Kautilya, who was the Prime Minister of one of the vast and most powerful empires in this country around 300 B.C. Kautilya incorporated the whole of *Rajadharma* in his *Arthasastra*, laying down in the strictest terms the *Dharma* (law) according to which the sovereign should exercise his powers Dr. J. Jolly has expressed

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44. Cooley on *Constitutional Limitations*, at 2-4.

his view on Kaultiiya's *Arthasastra* thus :

> "I must say that this is one of the most interesting and valuable Sanskrit works ever procured. As a faithful and life-like representation of Indian institutions and modes of government, it is without a parallel. It throws a great deal of new light on Indian Constitutional history, and on the development of Indian Law"[45]

In the above observations Dr. Jolly has very rightly said that Kualityla's *Arthasastra* throws a great deal of ligt on the indian constitutional history. Therefore any study of Indian constitutional history without the study of Rajadharma would be incomplete.

V. Background of the Constitution of India

The seeds of British arrival in India were sown in 1600 which grew into a grand tree until it perished in 1947and led to the adoption of the present constitution on 26 November 1949. Let us have a brief overview of the period. For the convenience of exposition, we divide the period into five parts - 1600 to 1772; 1773 to 1832; 1833 to 1856; 1857 to 1918 and 1919 to 1949.

(i) The East India company

The British authority in India was established through the agency of a trading corporation - The East India Company - formed in England in 1600 under a Charter of Queen Elizabeth I which gave it the exclusive right of trading in all parts of Asia, Africa and America beyond the cape of Good Hope, eastward to the Straits of Magellan. The company established its trading centres or factories at several places in the country and in the course of time the factories at Bombay, Madras and Calcutta became the chief settlements or

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45. Kautilya's Arthasastra, at 494.

presidencies, as they were called, and exercised supervision and control over subordinate depots and places in their vicinity.

During the period, except Bombay[46] whose sovereignty had been ceded to the British Crown, wherever the English settled, they did so with the licence of the Indian Government. Lord Brougham, in *Mayor of Lyons* v. *East India Co.*[47] described the general character of their possession of the settlement of Calcutta thus:

> "The settlement of the company in Bengal was effected by leave of a regularly established government, in possession of the country, invested with the rights of sovereignty, and exercising its powers: that by permission of that government, Calcutta was founded, and the factory fortified, in a district purchased from the owners of the soil, by permission of that government, and held under, by the Company, as subjects owing obedience as tenants rendering rent, and even as officers exercising, by delegation a part of its administrative authority. At what precise time, and by what steps, they exchanged the character of subjects for that of sovereign, or rather, acquired by themselves, or with the help of the Crown and for the crown the rights of sovereignty cannot be ascertained: the sovereignty has long since been vested in the Crown ....."[48]

The natural consequence of this position would have bee their submission to the *lex loci*. But in general it was not what happened. The personal character of the law of India and the nature of many of its principles and penalties made it impossible for men of a different religion and habits of thought to adopt it for their own use and they were allowed by "the indulgence or

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46. The Island of Bombay was ceded to Charles II by the king of Portugal as part of the marriage dowry of Infanta. Charles II had transferred it to the East India Company in 1669.
47. 1 MIA 175.
48. *Ibid.* at 273-74.

weakness of potentates of those countries" to retain own laws and government within the settlement.[49]

In these circumstances it became necessary, even before the Company had become a sovereign power in India, that the Crown should grant to them certain legislative and judicial powers to be exercised by them over the English servants of the Company and such Indian settlers who placed themselves under their protection. With regard to the early legislative authority, Queen Elizabeth's Charter of 1601 granted permission to the Governor and Companyu "from time to time to assemble themselves .... within our dominions or elsewhere, and there to hold court for the said company, and affairs thereof: and that also it shall and may be lawful to and for them, or the more part of them, being so assembled and to make ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances, and other officers, employed or to be employed in any of their masters mariners, and other officers, employed or to be employed in any of their voyages, and for the better advancement and continuance of the said trade and traffic ..... and at at their pleasure to revoke or alter the same or any of them".[50] The company had also the power to execute its laws by providing such pains, punishments and penalties by imprisonment or fine as might seem to them necessary. But the legislative power of the company was subject to an important limitation : the laws made by it were not be contrary to the laws, statutes or customs of England.

Similar powers were affirmed by the Charters granted by James I and Charles II in 1609 and 1661 respectively. These laws were required to be published, but of them now not a trace remains. Probably they were concerned with the Company's monopoly of trade and the repression of interference.[51]

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49. The judgement of the Privy Council in *Advocate-General of Bengal* v. *Ranee Surnomoye Dossee* 9 MIA 391, 429, which quotes with approval the explanation given by Lord Stowell in "*The Indian Chief*', 3 Rob Adm Rep 28.

50. *East India Company's Charters, Treaties and Grants,* (1774), at 14-15.

51. Cowell, at 11

The Charter granted by William III in 1698 makes no mention of legislative powers. It may be held that they were withdrawn.[52]

In George I's Charter of 1726 men on the spot, the Governors in Council of the three persidencies, were given the power to make, constitute and ordain bye-laws, rules and ordinances for the good government and regulation of the several corporations thereby created and of the inhabitants of the several towns, places and factories, and to impose pains and penalties upon all persons offending against the same.

As before, the condition was that such laws or penalties were not to be repugnant to English law. A new provision, which did not appear in earlier Charters, was imposed. They were not to have the force of law unless "approved and confirmed by order in writing of the court of Directors".[53]

The Charter of 1726 also introduced in all the three presidencies a Mayor's Court which was not the company's Court but the Court of the King of England, "though exercising its authority in a land to which the kind of England had no claim to severeignty".[54] The charter of George II granted in the year 1753 is exactly similar to that of George I.

The government of each presidency vested in a Governor and a Council consisting of senior servants of the Company. The Governor and the Council jointly exercised their powers. Nothing could be transacted except by a majority. The three presidences, in exercising their legislative and executive powers, were independent of each other, and each government subject to the control of the Board of Directors at home, was absolute within its limits.[55]

The areas under the Company's government during this period were so small that by now the early Charters would have been forgotten, had not their grantees subsequently become the sovereign of India. The only point worth

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52. MC Report, at 47.

53. *East India Company's Charters etc.*, 1774, at 394-95.

54. Rankin : *Background to Indian Law*, (1946), at 1.

55. Ilbert, at 42-43.

emphasising in the early Charters is that the governmental functions are classified as executive, legislative and judicial, though they are exercisable for the most part by one and the same body.

It was not till middle of the 18th century that the English had departed from the Character of merchants and factors, but then event occured - victories of Plassey (1957) and Buxar (1764) - which made them virtual masters of Bengal. The Company's career as a territorial power may be treated as having begun from 1765, when it obtained the grant of *Diwani* from Shah Alam who it accepted as the rightful claimant to the throne of the Moghul Emperors. This grant was expressed to cover the provinces of Bengal, Bihar and Orissa. The company did not undertake the administration of *Diwani* - revenue and civil justice - by its own servants until 1772, but when in that year it "stood forth as *Diwani* the President in Council promulgated a body of laws, what is commonly known as the plan of Warren Hastings"[56] It consisted of 37 rules or sections dealing with civil and criminal justice. This legislation was made not in exercise of any parliamentary grant of power, but in the exercise of Diwani of Bengal.[57]

(ii) Regulating Act, 1773

The Act set up a government in Bengal consisting of a Governor-General and four Councillors, in whom the whole civil and military government of the Presidency of Bengal, and also the government and the territorial acquisitions and revenues in the kingdoms of Bengal, Bihar and Orissa (Diwani lands) was vested. The government of the Presidencies of Bombay and Madras were subordinated to the Governor -General and Council, who constituted the supreme Government in India. Another important provision of the Act empowered the Crown to establish by Charter a Supreme Court in Bengal with jurisdiction to hear criminal complaints against the British subjects and

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56. *Harrington's Bengal Regulations*, (1815-17).
57. *Imperial Gazetteer of India*, Vol. IV, at 129.

their servants residing in Bengal, Bihar and Orissa. The civil jurisdiction of the Court was to extend to all British subjects residing in the three provinces and the employees of the company or of the British subjects. As regards legislation, the Governor - General and Council were empowered to make and issue such "rules, ordinances and regulations for the good order and civil government of the said United Company's settlement at Fort William and factories and the places subordinate thereto, as shall be deemed just and reasonable ... and to set and impose reasonable, fines and forfeiture for the breach and non-observance thereof".

The act subjected the legislative authority of the Governor - General and Council to certain conditions. Firstly, the rules and regulations made by them were not to be repugnant to the laws of England . Secondly, they required, as a condition to their validity, registration by the Supreme Court. The registration was not intended to be only a method of the promulgation of laws but the Supreme Court had the power to veto the laws submitted to it for registration. Thirdly, an appeal from regulation so registered and approved lay to the king-in-council in England, but the pendency of such an regulations to England and the power was reserved to the king in-council to disapprove them at any time within two years.[58]

Provision was also made to give publicity to the regulations made by the Governor- General and Council. The Supreme Court could make registration only after the expiration of a period of twenty days from the open publication and display of a copy of the regulations in some conspicuous part of the supreme court.[59]

(iii) The Act of 1781

By another Act of Parliament passed in 1781[60], the Governor - General and Council were empowered to frame regulations for the "provincial courts

58. *Ibid.*, S. 36.
59. *Ibid.*
60. 21 Geo III C. 70.

and councils". Copies of these regulations were required to be sent to the Court of Directors and the Secretary of State, who might disallow them within two years. Thus from 1781 the legislative powers of the Governor - General and Council were derived from two Parliamentary Acts, the Regulating Act of 1773 and the Act of 1781. But the powers under the two Acts differed in respect of their territorial extent, the ambit of subject matter of legislation, and the mode of their exercise. The power under the Regulating Act was intended to apply to the Company's settlement at Fort William (Calcutta) and other places subordinate thereto, while the Act of 1781 authorised the making of regulations for the "territorial acquisitions of Bengal, Bihar and Orissa" i.e, *Diwani Kingdoms*.[61] Although the Regulating Act clearly delimited the territorial extent of the legislative powers granted in it, it was for some time interpreted to include even the area under the Diwani grant.[62] In respect of the subject matters, the powers of the Supreme Court under the Regulation Act were of wide amplitude. It enabled them to make laws for "the good order and civil government of the settlement and all factories and places subordinate thereto".

The act of 1781, on the other hand, gave power only to legislate for the provincial courts and councils. Literally interpreted, the power (and in the context in which the enabling sections occur)[63] was meant only to make rules prescribing procedure and practice of the courts. But in fact the Supreme Court had made most of the Bengal Regulations, many of which affected the rights and property of the subject, under the power conferred by the latter Act. After several years of excercise of the power, Parliament itself seems to have acquiesced in the extended interpretation put on the Act. In an Act passed in 1797[64], Parliament refers to the power under the Act of 1781 as if it were one of making a regular code to affect the personal and proprietary rights of the

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61. Harrington : *Analysis of the law and Regulations of Bengal*, at. 8, Note 2; Keith : *A Constitutional History of India*, (1936), at 90.
62. Cowell, at 67.
63. See Sc. 21,22 and 23 of 21 Geo.
64. 37 Geo III C 142, S. 8

Indian subjects and other amenable to the Company's court. Finally, as regards the mode of exercise of the two powers, we have already noted that registration by the Supreme Court was a condition precedent for laws made under the Regulating Act to come into operation. No such stipulation attached to the power granted under the Act of 1781. Further, there was no provision in the 1781 Act corresponding to the provision in the Regulating Act that the laws made by the Governor-General and Council must not be repugnant to English laws.

The only material difference betwen the two powers, which continued until the Act of 1833, was that the Supreme Court did not consider itself bound by a law made by the Governor General and Council unless it was registered as provided in the Regulating Act.[65]

The mode of exercise of legislative power prescribed - In 1793 the Bengal Government issued a revised and amended code of regulations, a body of forty enactment commonly called the Cornwallis Code. Regulation XLI of the Code entitled 'A' Regulation for forming into a regular code all regulations that may be enacted for the internal government of the British territories in Bengal', laid down the moder of exercise of legislative powers which was subsequently approved by Parliament. The main provisions of the Regulation may be summarised as below .[66]

(a) All regulations affecting in any respect the rights, person or prop provincial courts of judicature, shall be recorded in the judical depart ment, and there framed into regulations, and printed and published in prescribed form, with translations in the current languages of the country.

(b) The regulations passed shall be annually numbered and divided into sections and clauses so as to constitute a regular code.

(c) Every regulations shall have a title expressing the subject of it, and a preamble stating the reasons for the enactment of if.

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65 13 Geo III C 63.

66. Harrington's Analysis, Vol I.

(d) If any regulation shall repeal or modify a former regulation, the reasons for such repeal or modification shall be stated in the preamble.

(e) The civil and criminal courts of justice shall be guided in their proceedings and decisions by the above regulations and by no other.

(iv) The Charter Act of 1797

The Charter Act of 1797 [67], approving the Regulations XLI, declared that "so wise and salutary provision be strictly observed, and that it should not be in the power of the Governor - General in Council to neglect or dispence with the same".

Madras and Bombay - Subsequently the local government of Madras and Bombay, in 1800 [68] and 1807 respectively, were invested within the territories subject to their government with the same legislative powers and exercisable in the same manner as had previously been given to and exercised by the Bengal Government. [69] As the Acts of 1800 and 1807 came after the Act of 1797, it might reasonably be considered that the local Governors and Councils had legislative powers conferred on them, not as defined by the Acts of 1773 and 1781, but as recognised and confirmed by the Act of 1797. [70]

(v) The Charter Act of 1813

By the Charter Act of 1813[71] the powers of all three councils were enlarged and at the same time subjected to greater to greater control by Parliament. Their regulations became applicable to all persons who should proceed to India within the limits of their government.[72] They were empowered

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67. 37 Geo II C 142, S. 8.
68. 39 Goe III C 79, S 11.
69. 47 Geo III C 68, S. 3.
70. Cowell, at 71.
71. 53 Geo III C 155.
72. *Ibid*, S. 35.

to make articles of war [73] and to impose custom duties and other taxes.[74] Copies of regulations made by the three councils were required to be annually laid before Parliament.[75] In this way for another twenty years the three councils continued to make regulations each independently of the other. Copies of all regulations passed in Madras and Bombay were sent to Calcutta, but it does not appear that they were submitted for approval before being passed. The legislative powers of the Governor - General and Council were confined both by its constitution and in practice to the presidency of Bengal.

To summarise, we can say that from the early period of British rule in India certain principles had become operative in the administration of the country; that legislation was the privilege of a duly constituted authority; that the exercise of legislative authority needed publicity and that arbitariness and oppression on the part of the administration could be checked by prescribing by law the rights and duties of officials and public authorities.

(vi) The Charter Act of 1833

The Charter Act of 1833[76] introduced important changes in the system of legislation of India. In the first place, it vested the sole legislative power in India in the Governor - General in Council, which considered of the Governor General and four ordinary members. Three of the ordinary members were to be appointed from persons in the covenanted services of the East India Company, and the fourth from persons who had never been in the service[77]. The duty of ordinary member (usually referred to as 'law member') was confined entirely to the subject of legislation. He had no power to sit or vote except at meetings for the purpose of making rules and regulations, and it was only by courtesy, and not by right, that he was allowed to see the papers and

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73. *Ibid*, S. 96.
74. *Ibid*, Ss, 98 and 99.
75. *Ibid*, S. 66.
76. 3 and 4 Wills IV C. 85.
77. *Ibid.*, S. 40.

correspondence, or to be made acquainted with the deliberations of the Government upon any subject not immediately connected with legislation.[78]

The existing powers of the councils of Madras and Bombay were superseded. They were merely authorised to submit to the Governor - General in Council drafts or projects of any laws which they thought expedient, and the Governor - General in Council was required to take these draft and projects into consideration and to communicate his decision thereon to the local government proposing them.[79]

The exclusive legislative authority of the Governor - General in Council extended to the making of laws all persons, places, things and courts whatever within and throughout the whole and every part of the Company's possession in India. But this power did not extend to the enactment of laws with respect to certain specified matters.[80] There was also an express saving of the right of Parliament to make laws for India. No registration or publication in any court was required to give them validity.[81]

The executive authority of the Governor - General in Council extended to the superintendence, direction and control of the whole civil and military government of the Company's possession in India.

The laws made under the previou Acts were called Regulations but the laws made under the Act of 1833 were known as Acts. Law made by the Governor - General in Council were subject to disallowance by the Court of Directors, but when made were to have "the same force and effect" within and without the said territories as any Act of Parliament.

(vii) The Act of 1853

The Act of 1853[82], renewing the Charter of 1833, took a dicisive step in differentiating the legislative machinery from the executive. Under the new

78. See Minutes of Sir Barnes Peacock, dated 3rd November, 1859.
79. 3 and 3 Will IV C. 85, S. 66.
80. *Ibid.*, S. 43
81. *Ibid.*, S. 45
82. 16 and 17 Vic. C. 95.

Act the Governor - General's council, when acting in its legislative capacity, was enlarged by the addition of six new members called 'legislative members'. These were : the Chief Justice of Bengal; a puisne Judge of the Supreme Court; and four officials severally appointed by the provincial Government of Madras, Bombay,

Bengal and north-western provinces.[83] The fourth ordinary member (the 'law member') who had been hitherto merely a member of the council for legislative business, became a full member with right to participate in legislative as well as executive business.[84] Six members, in addition to the Governor-General or the Vice-President, were necessary to form the quorum, and the presence of oe of the Judges or the fourth ordinary member was made necessary for transacting legislative business.[85]

But no law by the council could be promulgated until the same had been assented to by the Governor-General, whether he had been present or not at the meeting of the council. The Governor-General thus got the right of veto which he did not possess under the Act of 1833.

For the first time, after the Act of 1853[86], the legislative business of India came to be transacted in public. Formerly all discussions upon the subject of a proposed legislation were conducted in private like any other executive business. Consequently, if a law were rejected after having been published for general information the public had no means of knowing the cause of its rejection. Likewise, if a law was published for general information, and alterations or modifications were suggested which were not embodied in the Act when passed, the public had no means of ascertaining whether the suggestions had been duly considered, whether due weight had been given to them, or whether they had been rejected without sufficient reason.[87] Under the new system the press reporters were always present and the reports of the

83. *Ibid.* S. 22
84. *Ibid.*, S. 21
85. *Ibid*, S23
86. 16 and 17 Vic C 85, S. 24
87. Minutes of Sir Barne Peacock, dated 3rd November, 1859.

proceedings of the council came to be published and were made available to the public.[88]

The two other changes made in the legislative procedure were : (i) referring of Bills to select committees instead a single member; and (ii) the discussion in council became oral instead of in writing.[89]

Lord Dalhousie started the new Legislative Council "with some flourish" [90]. It was to be conducted with considerable formality on the lines of the English House of Lords, with a hundred and thirty-six standing orders and a Hansard to itself.[91] The new council conceived its duties extending beyond legislation. It very soon began to question the policies of the Executive Government and claimed to be a Legislature having jurisdiction to procure redress of grievances committed by the Executive. No such authority was contemplated by the farmers of the Act.[92] As we shall see, it was made quite clear in the subsequent Act that it had no jurisdiction in the nature of grand inquest of the nation.[93]

The first war of Indian Independence in 1857 brougth the career to the East India Company to an end. In 1858[94] the Government of India was placed directly under the Crown through the Secretary of State for India. No change was made in the constitution of the Government of India until 1861 when, by the Councils Act [95] of the year, the legislative system was remodelled. For purposes of legislation the Governor-General's council was reinforced by additional members, not less then six, not more than twelve in number, nominated for two years, of whom not less than half were to be non-officials.[96]

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88. *Ibid.*
89. Cowell, at 80.
90. Lee Warner's *Life of Dalhousie*, Vol II, at 239.
91. Rankin : "*Background to Indian Law*". at 64.
92. Martineau's *Life of Sir Bartle Frere*, Vol II, at. 336 (letter from Sir Charles Wood to Frere) : quoted in Rankin : *Back ground to Indian Law*, at 65.
93. Speech of Sir Charles Wood in the House of Commons, quoted in MC Report, at 52.
94. 21 and 22 Vict C. 106.
95. 24 and 25 Vict,. G 67.
96. *Ibid*, S. 10.

The legislative power of the Governor - General in Council was extended over all persons, whether British or Indian, foreigners or others, within the Indian dominions of Her Majesty, and over all courts of justice and over all places and things within the said territories, and also over all British subjects within the dominions of Indian State.[97]

The Act restored to the governments of Madras and Bombay the powers of legislation which had been withdrawn by the Charter Act of 1833. But their law-making powers were exercisable in legislative councils formed by expanding the Governor's council on the same lines as the Governor - General's.[98] Authority was given to the Governor - General in Council to establish similar legislative councils was given to the Governor - General in Council to establish similar legislative council for Bengal, the North - Western Provinces and the Punjab.[99] Immediate action was taken in Bengal (1862), but legislative councils were not established in the North Western Provinces and the punjab, until 1866 ad 1897 respectively. The legislative relations between the Centre and the provinces under the Act of 1861 differed from those existing between the Supreme Government and Madras or Bombay under the 1833 Act in two important respects.

Firstly, certain provincial Acts had to receive the previous assent of the Governor-General, and in all cases they had to receive his subsequent assent.[100] Secondly, jurisdiction of two legislatures was not exclusive but concurrent. The functions of the central legislative council, as of the provincial councils, were strictly limited to legislation. Section 19 of the Act enacted :

> " No Business shall be transacted at any meeting ..... other than the Consideration and Enactment of Measures introduced into the Council for the purpose of such enactment...."

Thus by strict delimitation of functions Parliament made it clear that

97. *Ibid*, S. 22
98. *Ibid*, S. 29
99. *Ibid*, . 44
100. *Ibid*, Ss. 40 and 43.

the councils were not deliberative bodies with respect to any subject but that of immediate legislation before them. They could not inquire into grievances, call for information, or examine the conduct of the Executive. The acts of administration could not be impugned, nor could they properly be defended in such assemblies except with reference to the particular measure under discussion.[101]

The Act of 1861 was amended by the Indian Councils Act of 1892.[102] The Act increased the number of additional members in the central as well as provincial councils. But the official majority was maintained. The powers of the legislative councils were also increased. By rules made under the Act the members were allowed, subject to certain restrictions, to ask questions. In addition, they were allowed to take part in the annual discussion of the budget to draw attention to any financial matter they pleased.[103]

By the Minto-Morley Reforms of 1909[104] the membership of the councils was increased. The number of additional members in the Central Legislative Council was fixed at sixty, of whom not more than 24 were to be non-officials; and thus the official majority was continued in the Central Council as before. Their functions were also widened . Under the Act of 1892, the budget could be discussed but no resolution could be demanded. Under the new Act, the right to ask for division on the budget was conceded. The right of interpolation

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101. Cowell, at 96.

102. 55 & 56 Vict C. 14

103. The Act made a limited and indirect provision for the use of election in filling up some of the non-official seats both in the provincial councils and in the Central legislative Coun cils. The word 'election' was, however, not used in the Act. The process was described as nomination made on teh recommendation of certain bodies. In the case of the Indian Legislative Council, five additional members were thus brought in, one being recommended by the non-official members were thus brought in, one being recommended by the non official members of each of the four provincial councils and one by the Calcutta Chamber of Commerce (*Report of the India Statutory Commission*, Vol. I, at 116)

104. 9 Edn., VII, C4.

was likewise extended so as to allow a member to ask a supplementary. [105]

Executive and Legislative Relations - Down to the year 1919 legislation was primarily the prerogative of the Executive. No doubt legislative councils had been established and their size and functions enlarged under successive Parliamentary Acts, but at no time during this period were they considered as parliamentary bodies to which the Executive owed any responsibility for its administrative or legislative acts. On the contrary, legislative councils were conceived to be only government in their legislative capacity. The nucleus of the law-making body was the Governor - General in Council to which "additional members" were summoned for discussing and passing enactments. The Viceroy presided over legislative discussions, no less than over executive consultations. The discharge of the responsibility discussions, no less than over executive consultations. The discharge of the responsibility of the Executive for legislation in the Central Legislature was ensured by maintaining an official majority. Lord Morley, the then Secretary of State for India, in justification for keeping an official majority in the central legislature laid down:

> "The Governor-General in Council in its legislative as well as its executive character should continue to be so constituted as to ensure its constant and uninterrupted power to fulfil the constitutional obligations that it owes and must always owe to His Majesty's Government and to the Imperial Parliament.[106] The particular matter. In describing the role of the official in the council, the Report on the Indian Constitutional Reforms (1918) said : 'The proceedings in Council has been controlled by the Government. Generally speaking government officials are not expected to ask questions or move resolutions .... when

105. The Act of 1909 gave direct approval to the principle of election for the return of repre sentatives to the councils from recognised corporate bodies, associations, classes and interests but except in the cases of newly created landholders', Mohammedans' and (in the Punjab) Sikhs' constituencies, the method of election, as before, remained indirect.

106. Quoted in MC Report, at 66.

a division is taken the official members nearly always vote by order in support of the government'."[107]

It may be emphasised here that there could hardly be any comparison between the government's mandate directing the official members of the Indian Legislative Council to support its view and the rigidity of the party discipline in a parliamentary system of government. No doubt a member of Parliament ordinarily acquiesces to the party whip's bidding and votes as directed to in any particular matter. But here what induces his acquiescence is the knowledge that the defeat of the government would mean change in the Ministry and, therefore he conceives it his duty to sacrifice his personal opinion on a particular matter in the interest of the greater principles for which his party stands. Moreover, there is a limit to the party loyalty. There are occasions when a member asserts his own judgement and the government falls, because some of its supporters refused to uphold its decisions. The ultimate responsibility of the members is to the people. In the Indian Legislature, as constitured then, the obligation of official members to support the government was continuting and was not motivated by any necesity for keeping a government in office, which by law was irremovable on an adverse vote of the legislature.

(viii) The Government of India Act, 1919

On August 20, 1917, an important announcement defining goverment policy was made by the Secretary of State for India in the House of Commons. "The policy of His Majesy's Government", said the Secretary of State, "with which the Government of India are in complete accord is that of the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions, with a view to the progressive realisation of responsible government in India as an integral part of the British Empire". The declaration was of great significance; for hitherto there was no intention of introducing any measure of responsible government in India. In 1909, the then Secretary of State for India, Lord Morley, expressly disclaimed

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107. MC Report 81.

any desire to advance towards responsible government. He stated : "if it could be said that the chapter of reforms led directly or indirectly to the establishment of a parliamentary system in India. I, for one, would have nothing at all to do with it." But events are stronger than reformers, and the goal which was emphatically disclaimed in 1908, was emphatically and authoritatively announced in August 1917.

The *Montagu-Chelmsford Reforms* which were the proposals put forward by Mr Montagu, the then Secretary of State, and Lord Chelmford were embodied in the Government of India Act, 1919. The preamble to teh Act adopted Mr Montagu's declaration of August 1917.

The Statutory commission (Simon commission) - The system of Provincial dyarchy embodied in the reforms of 1919 failed to fulfil the hopes build upon it. The ministerial responsibility in respect of transferred matters worked inefficiently.

In large measure, the Governor came to dominate the ministerial policy, partly because finance was mainly under his control and partly because the official bloc was so large that it could not sustain in office a ministry unfriendly to it. There was a president demand for further reforms. The Government of India Act, 1919, had provided for the appointment of a statutory commission, after the expiry of ten years from the passing of the Act, to inquire and report on the condition of India under its new Constitution. The commission contemplated in the Act, was appointed in 1927. The commission reported in 1930. The Report declared that dyarchy had outlived its usefulness, and recommended a large extension of responsible government in the Provinces. It recommended that until this ideal could be realised, problems affecting British India and the States should be discussed between the parties in a consultative but not legislative Council of Greater India, consisting of representatives drawn from the States and the British India Legislature. At that time it was not anticipated that the States would be willing to enter an all - India federation in the very immediate future. But in 1930 a new factor became active. The Indian Princes manifested an unexpected readiness to accede to a federal system. It

became necessary to reconsider the whole position. The British Government thereupon convened a 'Round Table Conference' of the representatives of the British Government, the Princes and British India. On the basis of its results Government White paper[108] was prepared embodying the outline of the reforms. The white paper was submitted to a joint Select Committee of Parliament.[109] The Committee was assisted by an Indian delagation. After prolonged sittings, the joint select Committee submitted an elaborate Report.

The Government of India Bill was introduced embodying, with certain modifications, the proposals put forward in the Report. The Bill was extensively amended during its passage. On August 2, 1935, the Bill received the Royal assent.

(ix) Government of India Act, 1935

The main provisions of the Act are stated below :

A. Statutory Division of Power

The Act made a division of powers between the Centre and the Provinces. Certain subjects were exclusively assigned to the Central or Federal Legislature, others to the Provincial Legislatures. Over yet another field the two had concurrent powers of legislation. Residuary powers of legislation could by assigned by the Governor-General to the Provinces or the Centre. The respective spheres of government of the Centre and the Provinces followed the delimitation of legislative powers.

B. The proposed All-India Federation

The Act proposed to substitute a federal for what was in substance a unitary system of government. The consitutent units of the Federation were to be the Governor's Provinces and the Indian States. The accession of the States

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108. (1933) Cmd 4268.

109. Lord Linlithgow (Later,Governor-General) was the Chairman of the Joint select Committee.

to the Federation was optional. The federation could not be established until the States entitled to one-half of the States' seats in the Upper House of the Federal Legislature and having one-half of the States' seats in the Upper House of the Federal Legislature and having one-half of the total States' population had signified their assent to join the Federation. The terms on which a State joined the Federation were to be set out in an *Instrument of Accession.* The Federal Legislatuer could make laws for the States only in relation to the matters specified in the *Instrument of Accession.*

The Federal Executive was to be composed of the Governor - General and a council of Ministers. The ministers were to be chosen and appointed by the Governor - General. From the ministerial control were to be reserved external affairs, defence, ecclesiastical administration and trial areas. In other matters the Governor-General was normally to act on ministerial advice, but could act independently in matters entrusted to his special responsibility. The Governor - General had full powers to legislate in respect of a reserved subject or a special responsibility, either by a temporary ordinance or a parmenent Act. He was also authorised to issue temporary ordinances on advice of his ministers. In the event of a breakdown of the constitutional machinery the Governor-General could assume all or any of the powers vested in Federal authorities. In relation to the matters entrusted to the Governor-General's discretion - external affairs, defence, ecclesiastical affairs and tribal areas - he was to be assisted by three councillors who were ex officio members of both Houses without the right to vote. But the ministers could be invited to deliberate with the councillors.

In the Governor's Provinces the executive authority of the Centre extended to all matters with respect to which the Federal or Central Legislature could make laws but in the acceding States it extended only to the matters over which the Instrument of Accession conceded federal control. The Crown's right of paramountey over the States was not to be exercised by or through the Federal Government, but continued to be exercisable directly by the Crown through the new office created by the Act of the Crown's Representative. The

Act permitted the combination of the offices of the Governor - General and the Crown Representative.

The Federal Legislature was to consist of the king, represented by the Governor-General and two Houses. The Legislative Assembly (Lower House) was to consist fo 375 members, 125 representing the Indian States. The representatives of British India were to be elected not directly but indirectly by Provincial Assemblies, various communities voting separately for their own representatives in accordance with the system of proportional representation with single transferable vote.

The members from the States were to be nominated by the Rulers. The Legislative Assembly, unless sooner dissolved by the Governor - General, endured for 5 years.

The council of States (Upper House) was to consist of 260 members, of these 104 were to represent the Indian States, and six were to be nominated by the Governor - General. Of the remaining 150 members, 128 were to be directly elected by territorial communal constituencies and twenty - two seats were to be set apart for smaller minorities, women and depressed classes. The two Houses were to have in general equal power but demand for supply of votes and financial Bills were to originate in the Lowere House. The Act contained detailed provisions for solving deadlocks by means of joint sessions.

C. Governor's Provinces

The executive government of the Provinces vested in the Governor. The Act provided for responsible government in the Provinces subject to two limitations : (i) Special responsibilities were given to the Governor on lines similar to those of the Governor - General save as regards finance. In regard to a matter falling under the Governor's special responsibility the ministers were entitled to tender advice but the Governor in the exercise of his individual judgement could override them, and (ii) certain matters were placed by the Act entirely outside ministerial control and relegated to the absolute discretion of the Governor. To give effect to his special responsibilities the Governor

had power to legislate by temporary ordinances or Acts. He could also make temporary ordinances at the request of the ministers and in the case of a breakdown of constitutional machinery, he could by proclamation assume all powers, vested in or exercisable by any provincial body or authority, except the High Court.

In Madras, Bombay, Bengal, the United Provinces, Bihar and Assasm the Legislatures were bicameral; in other five provinces unicameral. The composition of the Provinical Assembly varied from Province to Province. Territorial constituencies elected their representatives by separate communal electrorates. A substantial portion of the general seats was assigned to the scheduled castes. Seats were also provided for Mahomedans and Sikhs in the Punjab and the North - West Frontier Province, Europeans, Anglo-Indians, Indian Christians, representatives of commerce and industry, mining and planting, landholders, labour, universities and women. The normal duration of the Assembly was five years.

The Legislative Councils (Upper Chambers) were usually elected by the general constituencies, Mahomedans and Europeans, but in Bengal and Bihar twenty-seven and twelve seats respectively were filled by the Legislative Assemblies. The Governor filled by nomination ten seats in Madras, eight in Bengal and the United Provinces and four in the other Provinces. Deadlocks between the Houses were settled by the joint sittings. Grants were voted by the Legislative Assembly alone and all financial Bills organised in the lower House.

D. The Federal Court

The Act set up a Federal Court. It consisted of a Chief Justice and not more than six other judges. An increase over six needed the approval of the Federal Legislature. The judges were appointed by warrant under the Royal Sign Manual. A judge could be removed on the ground of misbehaviour and infirmity of mind or body, if the judicial committee, on reference by His Majesty, recommended his removal on that ground.

The Federal Court had exclusive original jurisdiction in any dispute between the Federation and the Units or the Units inter se insofar as the dispute involved any question (whether of fact or law) on which the existence or the extent of a legal right depended. But where a State was a party, the jurisdiction extended to a dispute which : (i) concerned the interpretation of the Government of India Act, 1935, or of an Order in Council made thereunder or the extent of the legislative or executive authority vested in the Federation by virtue of the *Instrument of Accession* of that State : or (ii) arose under an agreement relating to the administration of Federal Legislation in the State; or (iii) arose under an agreement made after the creation of Federation, between that State and the Federation or a Province which expressly provided for the exercise of jurisdiction by the Federal Court. In its original jurisdiction the Federal Court could only issue declaratory judgements.

Appeal lay to the Federal Court from any High Court in British India if the High Court certified that the case involved a substantial question of law as to the interpretation of the Government of India Act, 1935, or of an order in Council made under the Act. Where such a certificate was given, no direct appeal lay to the Privy Council, either with or without special leave. Power was given to the Federal Legislature to extend its jurisdiction in civil matters.

Appeal by way of special case stated could lie to the Federal Court from a high Court in a federated State on a questio of law concerning the interpretation of the Act of 1935, or an Order in Council made under it or the extent of the legislative or executive authority vested in the Federation by virtue fo the *Instrument of Accession* of that State, or arising under an agreement relating to the administration of Federal legislation in that State.

Under section 203, Government of India Act, 1935, an appeal lay to the Privy Council from the Original jurisdiction of the Federal Court in constitutional matters and by its leave or that of the Privy Council in all other cases.

The Federal Court also exercised advisory jurisdiction. The Governor

- General could, in his discretion, refer to the Court for consideration a question of law and obtain its opinion thereupon.

The Act provided that the law declared by the Federal Court and by any judgement of the Privy Council would be binding on all Courts in British India.

Subsequent events - The Act of 1935 came into force in regard to the Provinces in April , 1937. The Central Goernment of British India was continued to be carried on in accordance with the provisions of the Act of 1919, except that its powers- executive and legislative - were to be restricted to the matters assigned to it, under the Consitution Act of 1935. At the elections to the new Provincial Legislatures the Congress secured majorities in six Provinces. The Congress, after the Governor - General had publicity given an assurance that the Governor would not interfere in the day-to-day administration of the Province, formed ministries in seven out of eleven Provinces.[110]

In september 1939, World War II broke out in Europe. His Majesty's Government immediately declared India as a belligerent country at war with Germany. This was done without reference to the legislatures. The Congress resented the action of the British Govenment. It declared that the issue of war and peace for India could only be decided by the Indian people, and invited the British Government to declare forthwith in unequivocal terms what were their aims and how those aims would apply to India.[111] On October 18, 1939, Lord Linlithgow, on behalf of His Majesty's Government, made a declaration.[112] The Congress Ministries thereupon resigned and the Governors of seven Provinces[113] took over the entire control of the administration in their hadns, as authorised by Section 93 of the Government of India Act, 1935. Opposition to the Federation had in the meantime been growing and in October, 1940 the Viceroy announced that the coming into operation of the federal part of the Constitution would be indefinitely postponed.

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110. In 1938 the Congress joined a coalitio Ministry in Sind and Assam.
111. A.C. Banerjee, *The Making of Indian Constitution Document No.* 1 at 1
112. *Ibid*, at 4.
113. The Governor of Assam was able to form an alternative Ministry.

Since the coming of the Congress in office the communal tension had increased. The Muslim league started the demand for the partition of the country, so that the areas in which Muslims were in numerical majority should be grouped together to form Pakistan, involving recognition of Muslims as a separate nation. The resolution 70 of the Muslim league passed on March 23, 1940, at its Labore session declared that no constitutional scheme would be workable, 'unles it is designed on the following basic principles, viz., the geographically contiguous units are demarcated with such territorial readjustments as may be necessary that the areas in which the Muslims are numerically in majority, as in the north western and eastern zones of India, should be grouped to constitute independent States in which constituent units shall be autonomous and sovereign. The Muslim League never yielded in its demand for Pakistan and finally achieved its objective with the passing of the Independence Act of 1947.

VI. Framework of the Constitution

The Constituent Assembly which was set up in 1946 according to the Cabinet Mission Plan was not a sovereign body. Its authority was limited both in respect of the basic principles and procedure. The ndian Independence Act, 1947, established the sovereign character of the Constituent Assembly which became free of all limitations.

The method which the Constituent Assembly adopted in making the Constitution was first to lay down its objectives. This was done in the form of an Objective Resolution moved by Pandit Nehru.

It said :

1. This Constituent Assembly declares is firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution.
2. Wherein the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing

to be constitued into the Independent Sovereign India Shall be a Union of them all; and

3. Wherein the said territories, with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the Law of the Constitution, shall process and exercise all powers and retain the status of automonous units, together with residuary powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union resulting therefrom ; and
4. Wherein all power and authority of the Sovereign Independent India, Its constituent parts and organs of government, are derived from the people; and
5. Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political, equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and public morality; and
6. Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and
7. Whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea and air according to justice and the law of civilised nations; and
8. This ancient land attains its rightful and honoured place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of mankind.

The Constituent Assembly then proceeded to appoint a number of Committees[114] to deal with different aspects of the constitutional problems.

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114. The Union powers Committee, the Union Constitution Committee, the Provincial Constitution Committee, the Advisory Committee on Minorities and Fundamental Rights Committees on Chief Commissioners and financial relations between Union and the States and the Advisory Committee on Tribal Areas.

The reports of the various Committees were considered by the Assembly and their recommendations were adopted as basis on which the Draft of the Constitution had to be prepared. The Drafting Committee was appointed by a resolution passed by the Assembly on August 29, 1947.

It was charged with the duty of preparing a Constitution in accordance with decisions of the Constitutent Assembly on the reports made by the various Committees. The Draft Constitution as it emerged from the Drafting Committee, contained 315 articles and 8 schedules. It was considered at great length at the second reading stage, and a number of amendments were made to the Draft Constitution. The Assembly finalised the Constitution on November 26, 1949. It came into force on January 26, 1950.

(i) The Background of Fundamental Rights in India

The inclusion of a set of fundamental rights in India's Constitution had its genesis in the forces that operated in the national struggle during British rule. With the resort by the British executive to such arbitrary acts as internments and deportations without trial and curbs on the liberty of the press in the early decades of this century, it became an article of faith with teh leaders of the freedom movement. Some essential rights like personal freedom, protection of one's life and limb and of one's good name, derived from the common law and the principles of British jurisprudence, were well accepted and given at least in theory statutory recognition in India by various British Parliamentary enactments relating to the Government and the Constitution of India.[115]

In India, some fundamental rights had been conceded by the British Parliament or the Crown. Attention may be drawn in particular to section

115. For example, section 87 of the Charter Act of 1833 laid down that "no native of the said territories (i.e., British India) .... shall be reason only of his religion, place of birth, decent, colour, or any of them, be disabled from holding any place office, or employment under the Company." The substance of this provision was reproduced in section 96 of the Government of India Act. 1915. The Government of India Act 1935 while continuing this guarantee of non-discrimination, afforded protection in certain other respects also (see sections 275 and 298).

298(1) of the Government of India Act, 1935, under which a subject of his majesty could not be debarred from holding any office under the Crown on grounds only of religion, place of birty, descent, colour or any of them. Similarly, in the Proclamation of Queen Victoria it was stated:

> We declare it to be our royal will and pleasure that none be in anywise favoured, none molested or disquieted, by reason of their religious faith or observances; but that all shall alike enjoy the equal and impartial protection of the law; and we do strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with the religions belief or worship of any of our subjects on pain of our highest displeasure[116]

Nevertheless, in pre-Independence India there was no charter of fundamental rights of a justiciable nature, and even such safeguards as were contained in the various statute could be taken away by authority making that statute. Whether it was the British Parliament or a legislative authority in India. Moreover, there were in existence laws which, by the setting up of special courts or by curtailing a subject's rights and liberties, did violence to the basis principle of fundamental rights.

The position was summed up as follows by B.N. Rau in his report on Human Rights (December 1947) :

> With a few exceptions human rights in India today (December 31, 1947) are not guaranteed by the Constitution, but embodied in the ordinary law of the land. Legislative activity in this sphere received a great fillip at the end of World War I, when the league of Nations and the International labour Organisation came into being. India's membership of these bodies and her participation in their periodical conferences had an immense educative effect on the Indian public. So too had Mahatma

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116. See C.H. Philips, *Select Documents on the History of India and Pakistan*, Vol. IV. at II.

> Gandhi's powerful and persistent efforts to ameliorate the position of Harijans. Almost simultaneously came the introdunction of responsible government in the Provinces, at first partially under the Government of India Act, 1919 and later almost completely under the Act of 1935. The Legislatures became more and more responsive to public opinion and this had the effect of facilitating, if not compelling, the translation of the new ideals into law. The process was further accelerated by World War II and the establishment, upon it close, of the United Nation[117].

As the freedom struggle gathered momentum after the end of the first world war, clashes with British authorities in India became increasingly frequent and sharp, and the harshness of the executive in operating its various repressive measures strengthened the demand for a constitutional guarantee of fundamental rights. As early as 1985 the Constitution of India Bill - Mrs. Annie Besant described it as the Home Rule Bill - had envisaged for India a constitution guaranteeing to every one of her citizens freedom of expression, inviolability of one's house, right to property, equality before the law and in regard to admission to public offices, right to personal liberty[118]. Following the publication in 1918 of the Montagu -Chemsford Report, the Indian National Congress at its special session held in Bombay in August 1918 demanded that the new Government of Indi Act should include a "declaration of the rights of the people of India as British Citizens". The proposed declaration was to include, among other things, guarantees in regard to equality before the law, protecting in respect of association. In the same year, at its Delhi Session in December, the congress passed another resolutio, demanding "the immediate repeal of all laws, regulations and ordinances restricting the free discussion of political questions and conferring on the executive the power to arrest, intern, extern or imprison any British subject in India outside the processes of ordinary

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117. Year Book of Human Rights for 1947 (United Nations).

118. Clauses 16-21 and 23-4 of the Bill, *Select Documents* I, 2. at 7.

civil or criminal law and the assimilation of the law of sedition to that of England".[119]

The inclusion of a list of fundamental rights in the Constitution of the Irish Free State in 1921 also exercised a decisive influence on the Indian Leaders. The commonwealth of India Bill finalized by the National Convention in 1925 embodied a specific "declaration of rights" visualizing for every person, in terms practically identical with the relevant provisions of the Irish Constitution the following rights as fundamental :

(a) Liberty of person and security of his dwelling and property;

(b) Freedom of conscience and the free profession and practice of religion;

(c) free expression of opinion and the right of assembly peaceably and without arms and of forming associations or unions;

(d) free elementary education;

(e) use of roads, public places, courts of justice and the like;

(f) equality before the law, irrespective of considerations of nationality; and

(g) equality of the sexes.[120]

The problem of minorities in India further strengthened the general argument in favour of the inclusion of fundamental rights in the Indian Constitution. A resolution passed at the Madras session of the Indian National Congress in 1927 categorically laid down that the basis of the future Constitution of India must be a declaration of fundamental rights.[121]

The Nehru Committee appointed by the All-Parties Conference in its report (1928) incorporated a provision for the enumeration of such rights. Recommending their adoption as part of the future Constitution of India, the

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119. B. Pattabhi Sitaramayya, *The History of the Indian National Congress* (1885-1935), Vol. I. at. 153-4; Satya Pal and Prabodh Chandra, *Sixty Years of Congress*, at 213-4.

120. *Select Documents* I. 11, at 44

121. For text of the resolution, see *Nehru Report*, at 19.

committee referred to the constitution of the Irish Free State and observed that Ireland was the only country where the conditions obtaining before the treaty approximated broadly to those prevailing in India; and the first concern of the people of Ireland, as of the people of India, was to secure fundamental rights hitherto denied to them. The Committee added :

> "It is obvious that our first care should be have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances."

Some of the summed up as follows:

(i) Personal liberty and inviolability of dwelling place and property;

(ii) freedom of conscience and of profession and practice of religion subject to public order or morality;

(iii) right of the free expression of opinion and to assemble peacebly and without arms, and to form associations or unions, subject to public order or morality;

(iv) right to free elementary education without distiction of caste or creed in the matter of admission into any educational institutions, maintained or aided by the State;

(v) equality for all citizens before the law and in civic rights;

(vi) right of every citizen to writ of *habeas corpus*;

(vii) protection in respect of punishment under *ex post facto* laws;

(viii) non-discrimination against any person on grounds of religion, caste or creed in the matter of public employment, office of power or honour and in the exercise of any trade or calling;

(ix) equality of the right to all citizens in the matter of access to, and use of, public roads, public wells and all other places of public resort;

(x) freedom of combination and association for the maintenance and improvement of labour and economic conditions;

(xi) the right to keep and bear arms in accordance with regulations; and

(xii) equality of rights to men and women a citizen[122].

The Indian Statutory Commission (popularly known as the Simon Commission) did not support the general demand for the enumeration and guaranteeing of fundamental rights in a Contitution Act on the ground that abstract declarations of such rights were useless unless there existed "the will and the means to make them effective"[123] The Indian National Congress at its session at Karachi in March 1931 reiterated its resolve to regard a written guarantee of fundamental rights as essential in any future constitutional set-up in India[124]. The demand for a declaration of fundamental rights in a constitutional document was again emphasized by several Indian Leaders at the Round Table Conference held in London in the early thirties.

A memorandum circulated by Gandhi at the second session of the conference, *inter alia*, demanded that the new constitution should "include a guarantee to the communities concerned of the protection of their cultures, languages, scripts, education, profession and practice of religion and religious endowments" and protect personal laws, and that the protection of political and other rights of minority communities should be the concern of the Federal Government[125]. The Joint Select Committee of the British Parliament on the Government of India Bill of 1934 did not view with favour the demand for a constitutional guarantee of fundamental rights to British subjects in India. Expressing its agreement with the views of the Simon Commission the committee observed :

> .... there are also strong practical arguments against the proposal which may be put in the form of a dilemma : for

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122.*Nehru Report : Select Documents* I, 16, at 59-60.

123.*Report* (1930), Vol. II, para 36.

124.B. Pattabhi Sitaramayya, *The History of the Indian National Congress* (1885-1935), Vol . I, at 463-4

125. Another memorandum on the subject was put forward jointly by the representatives of the minorities. For the texts of the memoranda see the Proceedings of the Fedral Structure Committee and Minorities Committee, Indian Round Table Conference (Second Session), Vol. III, Appendices I and III.

> either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the courts as being inconsistent with one or other of the rights so declared ..... There is this further objection that the States have made it abundantly clear that no declaration of fundamental rights is to apply in State territories; and it would be altogether anomalous if such a declaration had legal force in part only of the area of the federation[126].

The Committee conceded that there were some legal principles which could appropriately be incorported in the new Constitution. Accordingly, sections 275 and 297 to 300 of the Government of India Act, 1935, conferred certain rights and forms of protection on British subjects in India. The sections *inter alia*, provided :

(1). No person shall be disqualified by sex for being appointed to any civil service of, or civil post under, the Crown in India except a service or post specified by order made by the Governor - General, Governor or Secretary of State (section 275)

(2). No British subject domiciled in India shall be ineligible for office under theCrown in India or be prohibited from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India on grounds only of religion, place of brith, descent, colour or any of them (section 298),

(3). No person shall be deprived of his property in British India save by the authority of law (section 299).

But it is worth noting that on the recommendation of the committee certain vested interests were also safeguarded : among these were grants of

126. *Report* (1934), para 366.

land or tenure of land free of land revenue or subject to remissions of land revenue like *talukdaris*, *inamdris* and *jagirdaris* [section 299 (3)]

The subject of fundamental rights figured prominently in the deliberations of the conciliation Committee (also known as the Sapru Committee) appointed by an All-parties' Conference (1944-45). The committee was of the opinion that however inconsistent with British law it might be, in the "peculiar circumstances of India" fundamental rights were necessary not only as "assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, governments and the courts". The committee felt that it was for the constitution - making body to settle first the list of fundamental rights and then to undertake their division into justiciable and non-justiciable rights and provide suitable machinery for their enforcement[127].

The British Cabinet Mission in 1946 recognized the need for a written guarantee of fundamental rights in the Constitution of India. In paragraphs 19 and 20 of its statement of May 16,1946, envisaging a Constituent Assembly for framing the Constitution for reporting *inter alia* on fundamental rights[128].

By the objectives Resolution adopted on January 22, 1947, the Constituent Assembly solemnly pledged itself to draw up for India's future governance a constitution wherein "shall be guaranteed and secured to all the people of India justice, social, economic and political, equality of status of opportunity and before the law: freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality" and wherein adequate safeguards would be provided for minorities, backward and tribal areas and depressed and other classes[129]. Two days after the adoption of the Resolution, the Assembly elected an Advisory Committee for reporting on minorities, fundamental rights and on the tribal and excluded areas.[130] The

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127. Constitutional Proposals of the Sapru Committee (Bombay, 1945), at 256-7.

128. *Select Documents* I, 48 (i), at 214-6

129. *Select Documents* II, I. at 4.

130. *Constituent Assembly Debates*, Vol.II, at 325-7

Advisory Committee in turn constituted on February 27, 1947, five sub-committees one of which was to deal with fundamental rights.[131]

The Sub-Committee on Fundamental Rights, at its first meetig on February 27, 1947, had before it the proposals drafted earlier by the Constitutional Adviser B.N.Rau, to divide fundamental rights into two classes, justiciable and non-justiciable. Although the initial reaction of several members of the sub-committee appeared to be adverse to B.N. Rau's proposal, eventaully the sub-committee accepted the scheme of embodying in the Constitution fundamental rights classified into justiciable and non-justiciable rights.

An important question that faced the sub-committee was that of the propriety of distributing such rights between the Provincial, the Group and the Union Constitutions. Such a possibility had been contemplated in paragraph 20 of the Cabinet Mission's statement. In the early stage of its deliberations the sub-committee also proceeded on the assumption of this distribution and adopted certain rights as having reference only to the Union and certain others as having reference both to the Union and the constituent units. However, the volume of opinion against such a distribution grew both outside and inside the sub-committee and proved decisive. If they differed from group to group or from unit to unit or were for that reason not uniformly enforceable, it was felt "the fundamental rights of the citizens of the Union would have no value".

Accordingly, while recognizing that certain basic human rights must be guaranteed to every resident and the rights incidental to citizenship limited in application to the citizens of the Union, the sub-committee recommended that all the rights incorporated, whether of the Union or the units". This was sought to be achieved by providing [132] by definition in the first clause on the

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131. The Sub-Committee on Fundamental Rights consisted of : J.B. Kripalani, M.R. Masani, K.T. Shah, Rajkumari Amrit Kaur, Alladi Krishnaswami Ayyar, Sardar Harman Singh, Maulana Abul Kalam Azad, B.R. Ambedkar, Jairamdas Daulatram and K.M. Munshi. The President of Constituent Assembly was authorized to nominate additional members.

132. The suggestion was made by B.N. Rau and accepted by the sub-committee.

subject of fundamental rights that unless the context otherwise required, the expressio "the State" included the Legislatures and the Governments of the Union and the units and all local or other authorities within the territories of the Union, that "the Union" meant the Union of India and that "the law of the Union" included any law made by the Union Legislature and any existing Indian Law as in force within the Union or any part thereof [133]. Clause 2 provided:

> All existing laws or usages in force within the territories of the Union inconsis tent with the rights guaranteed under this Constitution shall stand abrogated to the extent of such inconsistency, nor shall the Union or any unit make any law taking away or abridging any such right[134].

Before formulating its list of fundamental rights the sub-committee fully discussed the various drafts submitted by its members and others; the notes and memoranda - apart from those circulated by B.N. Rau [135] - that received particular attention were those submitted by Alladi Krishnaswami Ayyar, K.M. Munshi and B.R. Ambedkar[136]. Referring to the chapter on fundamental rights in his draft, Ambedkar observed that it required no justification in so far as the necessity for fundamental rights was recognised in all constitutions - old and new. The rights incorporated in his draft, he pointed out, were borrowed particularly from the constitution of countries where the conditions were more or less analogous to those existing in India[137].

The draft report of the sub-committee completed on April 3, 1947, was circulated to its members with the explanatory notes on the various clauses prepared by B.N. Rau.

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133. Sub-committee on Fundamental Rights : Minutes and Report. *Select Documents* II, 4 (vii) and (viii), at. 138, 163, 171. The annexure to the report contained the list of the proposed clauses - clause I dealing with definitions, clauses 2 to 32 under Part I covering justiciable rights and clauses 33 to 45 under Part II covering non-justiciable rights.
134. Clause 2 was based on article 1 (4) in Munshi's draft. *Select Documents* II,4 (ii) at 73.
135. *Select Documents* II, 2, at 21-36.
136. *Ibid.*, at 67-114.
137. *Select Documents* II, 2 at 97

The clauses contained in the draft report were thereafter discussed in the sub-committee in the light of the comments offered by the members and the final report was submitted to the Chairman of the Advisory Committee on April 16, 1947. Three days later the sub-committee on Minorities examined the draft clauses prepared by the Fundamental Rights Sub-committee and reported on the subject of such rights from the point of view of the minorities[138]. The Advisory Committee deliberated on the recommendations made by the two sub-committee and accepted the recommendations for (i) Classification of rights into justiciable and non-justiciable rights, (ii) certain rights being guaranteed to all persons and certain others only to citizens and (iii) all such rights being made uniformly applicable to the Union and the units. The committee also accepted the drafts of clauses 1 and 2 - the former providing for the definition of " the State", "the Union" and "the law of the Union" and the latter for laws or usages inconsistent with the fundamental rights being void - in the form recommended by the sub-committee. In clause 2, however, the words "notification, regulations, customs" were added between the words "existing laws" and "or usages" and the word "Constitution" was replaced by the words "this part of the Constitution". The Advisory committee incorporated these recommendations in its Interim Report to the Constituent Assembly submitted on April 23, 1947. The interim Report dealt only with justiciable rights i.e fundamental rights strictly so-called. Later on August 25, 1947. The Advisory Committee submitted a supplementary report mainly dealing with non-justiciable rights i.e., the Directive Principles of the State Policy or the "Fundamental Principles of Governance"[139].

The Advisory Committee's recommendations regarding justiciable fundamental rights were discussed by the Constituent Assembly at its meetings held in April, May and August 1947 and adopted with certain modifications; it was made clear that in the light of the decisions taken by the Assembly on principles, the necessary provisions would be drafted and included in the draft

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138. See Interim Report of the Sub-committee on Minorities, April 19, 1947. *Select Documents* II, 5, at 207-9.

139. For the texts reports see *Select Documents* II, 7, at 294-9, 304-6.

Constitution, which would again be placed before the Assembly for its consideration[140]. The various stages through which the clauses on fundamental rights passed thereafter were similar to those in regard to other parts of the Constitution. First, the Constitutional Adviser prepared a Draft embodying the decisions of the Constituent Assembly. This Draft was considered exhaustively and in details by the Drafting Committee, which prepared a revised Draft and published it in February 1948. The revised Draft was then widely circulated. The comments and suggestions received Draft was then widely circulated. The comments and suggestions received from all quarters were again considered by the Drafting Committee and in the light of these the committee proposed certain amendments.

Discussions in the Constituent Assembly of the draft provisions took place in November and December, 1948 and August, September and October 1949. During these meetings the Assembly considered the various suggestions for amendment made on behalf of the Drafting Committee as well as those proposed by individual members of the Assembly. The provisions as passed by the Assembly were again scrutinized by the Draft Committee and incorporated with drafting changes wherever necessary in the revised Draft Constitution. This revised Draft was again placed before the Assembly at its final session held in November 1949.

Clauses 1 and 2, as reported by the Advisory Committee, were considered and adopted by the Constituent Assembly on April 29, 1947[141], the only substantial change made therein by the Assembly being and addition at the end of clause 2 to the effect that no fundamental right could be taken away or abridged "except by an amendment of the Constitution"[142]. Although even thereafter the two clauses underwent some further revision and redrafting at the hands of the Constitutional Adviser and the Drafting Committee, the alterations were mainly verbal.

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140. *Constituent Assembly Debates*, Vol III, at. 379-421, 431-57, 465-530 and Vol. V, at 361-402.

141. *Ibid.*, at 391-9.

142. The amendment was moved by K. Santhanam and accepted by Vallabhbhai Patel.

In the Draft Constitution[143] prepared by the Drafting Committee and published in February 1948 the committee included a proviso to the effect that while the State was debarred from making any law which took away or abridged any of the fundamental rights, this would not prevent the "State from making any law for the removal of any inequlity, disparity or discrimination arising out of any existing law". The committee explained that this proviso had been added in order to enable the State to make laws of this character should not be prohibited. These provisions were discussed in the Constituent Assembly on November 25, 26 and 29, 1948. These discussions did not reveal any important difference of opinion. On an amendment moved by L.K. Maitra, the proviso mentioned above was deleted on November 29. Otherwise the articles were adopted by the Assembly and incorporated as articles 12 and 13 in substantially the same form in which they now stand part of the Constitution[144].

After discussing the subject of fundamental rights - described by Ambedkar as "the most criticized part" of the Constitution- for as many as thirty-eight days- eleven days in the sub-committee, two in the Advisory Committee and twenty five in the Constituent Assembly - the Assembly ultimately adopted the comprehensive and impressive array of fundamental rights spread over twenty - two articles and divided broadly into seven categories of right viz., (i) right to equality, (ii) right to freedom, (iii) right against exploitation, (iv) right to freedom of religion, (v) cultural and educational rights, (vi) right to property[145] and (vii) right to constitutional remedies.

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143. *Select Documents* III, 6, at 520-1; article 8(2), proviso.

144. *Constituent Assembly Debates*, Vol. VII. at 607-12, 640-2, 644-6.

145. The sub-heading "Right to property" omitted by the Constitution (Forty Forth Amendment) Act, 1978, S.5 (w.e.f. 20.6.1979).

(ii) Other Constitutions

A. United States of America

In the United States, an interpretation of the word 'state' has become necessary by reason of that word being used in the 14th Amendment as follows:

> " ..... nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The above prohibition being directed to the 'state', one of the primary problems before the courts has been to determine what constitutes 'state action' so as to come within the purview of the above prohibition.

Since First Ten Amendments and the Fourteenth Amendment are intended to protect the fundamental rights from arbitary invasion by the state, it has become necessary to interpret the word 'state' whenever an individual complains of such invasion by the state. In order to give adequate protection to the individual against all forms of arbitary action by governmental authority, the American Supreme Court has enlarged the concept of 'State Action' as far as possible. Thus, it has been held that the prohibition in the 14th Amendment extends to any state action, legislative[146], executive[147] or judicial[148] and against any agency exerting any of these powers of the State[149].

"The Amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments legislative, executive and judicial."[150]

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146. *Strauder* V. *West Virginia*, (1879) 100 U.S. 303.
147. *Sterling* V. *Constantin*, (1932) 287 U.S 378
148. *Norris* V. *Alabama*, (1935) 294 U.S. 587
149. *Minneapolis R.Co.* V. *Beckwith*, (1889) 129 U.S. 26 (29)
150 *Reid* V. *Covert*, (1958) 354 U.S. 1 (17).

Explaining this, the court observed in Exparte Virginia: [151]

> 'A state acts by its legislative, its executive, of its judicial authorities. It can act in no other way. The constitutional provision (14th Amendment), therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of a public position under a state government ..... denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state.'

Whenever there is an allegation of violation of a fundamental right by the state, any repository of state power is regarded as 'the state'[152].

Thus, a discriminatory action by the authorities of a State-owned[153], State-subsidised[154], or State-controlled[155] agency or corporation[156] would be hit by the guarantee of equal protection.

The concept has been extended to the functions of a committee of the Legislature while exercising the privileges of the House, e.g., the power to summon a witness and compel him to testify for the purpose of a legislative investigation, and a political party which performs a statutory function in connection with an election. A congressional committee, exercising its legitimate powers as part of the legislature, to make an inquiry, is subject to the relevant rights of individuals secured by the Bill of Rights and all relevant 'limitations placed by the constitution on government action:

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151. *Ex Parte Virginia*, (1880) 100 U.S. 339 (347).
152. *Home Telephone CO.* V. *Los Angeles* (1913) 227 U.S. 278 (286).
153. *Missouri* V. *Canada*, (1938) 305 U.S 337 (343).
154. *Kerr* V. *Enoch P.F. Library*, (1945) 326 U.S. 721.
155. *Public Utilities Commn.* V. *Pollak*, (1952) 343 U.S. 451 (461).
156. *Watkins* V. *U.S.*, (1956) U.S 178 (197).

It follows, on the other hand, that the constitutional prohibition does not extend to the action of a private individual[157] or corporation[158], unless such individual or corporation acts under the constraint of a law or other authority[159], or the state has lent its support to the private action, thus clothing the private act with the character of State action[160], or a State function has been delegated to such private body[161]. Even a labour union[162]. or a Board of Trustees[163], acting under statutory powers, has been regarded as a medium of State action.

The concept of 'state action' has thus been enlarged to comprehend acts done by private persons or bodies exercising statutory powers[164] or supported by the state[165], with or without legislative authority or in abuse of such authority.[166]

Any attempt of the State to abridge a fundamental right, directly or indirectly is unconstitutional, unless permitted by some provision of the constitution itself. Even in the granting of a privilege, the state cannot impose conditions which requires the relinguishment of constitutional rights'[167]. On the same principle, the right to continue the exercise of a privilege granted by the Government cannot be made to depend upon the grantee's submission to a condition, prescribed by the Government, which is hostile to the Constitution[168].

On the same principle, where the state directly or indirectly upholds the working of a private party organisation which results in racial discrimination

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157. *Civil Right Case*, (1883) 109U.S. 3.
158. *Dorsey* V. *Stuyvesant Corp.*, (1950) 339 U.S. 981.
159. *Nixon* V. *Herndon*, (1927) 273 U.S. 536.
160. *Marsh* V. *Alabama*, (1946) 326 U.S. 501.
161. *Smith* V. *Allwright*, (1944) 321 U.S. 649.
162. *Steele V. L. & N.R. Co.*, (1944) 323 U.S. 192.
163. *Pennsylvania* V. *Board of Trustees*, (1956) 353 U.S. 230.
164. *Steele V. L. & N.R. Co.*, (1944) 323 U.S. 192 ; *Pennsylvania* V. *Board of Trustees*, (1956) 353 U.S. 230.
165. *Smith* V. *Allwright*, (1944) 321 U.S. 649; *Marsh* V. *Alabama*, (1946) 326 U.S. 501
166. *U.S* V. *Classic*, (1941) 313 U.S. 299; *Screws* V. *U.S.*, (1945) 325 U.S 91.
167. *Frost* V. *Railroad Commn*,. (1927) 271 U.S. 583 (594).
168. *U.S.* V. *Chicago R.Co.*, (1930) 282 U.S. 311.

in the matter of election to public bodies, the court may interfere with the act as violative of equal protection[169], even though the primary election which is so discriminatory is held under the party rules and not under the provisions of a statute[170].

An appreciable expansion of the doctrine of 'State action' has been made by the American Supreme court in course of its endeavour to supress racial discrimination. It has afforded relief against the state, whenever the state " has become significantly involved in private discrimination"[171] either by commanding such unconstitutional act, or by placing its power property and prestige' behind the admitted discrimination[172] or by passing a law as will 'encourage discrimination by private persons.

(a) Whether 'State' includes the Judiciary

In the United States, a judicial decision is included in the concept of State action for the purpose of enforcement of the fundamental rights conferred by the 14th Amendment. In *Virginia* v. *Rives*,[173] the Supreme Court observed:

> "It is doubtless true that a State may act through different agencies - either byits legislative, its executive, or its judicial authorities; and the prohibitions of the Amendment extend to all actions of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.[174]
>
> "A State acts by its legislative, its executive, or its judical authorities. It can act in no other way.[175]

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169. *Rice* V. *Elmore*, (1948) 333 U.S. 875
170. *Smith* V. *Allwright*, (1967) 387 U.S. 369.
171. *Reitman* V. *Mulkey*, (1967) 387 U.S. 369.
172. *Burton* V. *Eilmington Parking Authority*, (1961) 365 U.S. 715.
173. *Virginia* v. *Rives*, (1880) 100 U.S 313 (318)
174. *Ibid.*
175. *Ex parte Virginia*, (1880) 100 U.S 339 (347).

Thus, where a trial or decision itself is vitiated by a violation of a constitutional guarantee, such as ' due process' or 'equal protection', the supreme Court would quash a conviction on this ground on a collateral and post conviction proceeding of certiorari[176] or release the prisoner in a proceeding for *habeas corpus*.[177]

The 'Due Process' guarantee has bee available against a judicial decision, both in its procedural and substantive aspects. From the procedural standpoint : Though a mere erroneous decision overruling the previous case-law cannot be challenged as violating due process, [178] a decision which deprives a person of his existing remedy for the enforcement of a right without offering him an opportunity to be heard, must be quashed on this ground, apart from any other consideration. A judgement which refuses, without a hearing, relief to prevent the seizure of property or deprives the plaintiff of his property, is in contravention of due process.[179] A conviction would be similarly vitiated if it is based on perjured testimony[180] or under the domination of a mob.[181]

From the substantive standpoint : It has been held that where a common-law rule is inconsistent with a fundamental right, the enforcement of such rule by the Court would itself be a State action inconsistent with a fundamental right.[182]

On this Principle, the Supreme Court has annulled —

A conviction which sought to enforce the common-law crime of breach of the peace, where it was found that the enforcement of the common law in the circumstances of the case would offend against the freedom of religion.[183]

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176. *Irvin* v. *Dowd* (1961) 366 U.S. 717 (7280; *N.A.A. C.P.* v. *State of Alabama*, (1958) 357 U.S. 449, *Griffin* v. *Illinois*, (1955) 351 U.S. 12.
177. *Fay* v. *Noia*, (1963) 372 U.S. 391.
178. *Brinkerhoff-Fairs Trust* V. *Hill*, (1930) 281 U.S. 673.
179. *American Fed, of Labour* v. *Swing*, (1941) 321.
180. *Mooney* v. *Holohan*, (1935) 294 U.S. 103; *Napue* v. *Illunois*, (1935) 360 U.S. 264.
181. *Moore* v. *Dempsey*, (1923) 211 U.S. 86.
182. *Cantwell'* v. *Connecticnt* (1940) 310 U.S. 296.
183. *Ibid.*

A conviction for contempt of court where it was inconsistent with the freedom of expression .[184]

A judicial restriant of peaceful picketing, in violation of the guarantee of freedom of discussion.,[185]

The guarantee of equal protection has, similarly, been applied against a judicial decision.

Violation of equal protection - This does not mean that the guarantee of equal protection assures 'uniformity of decisions or immunity from judical error'.[186] But the guarantee would be applied in annulling a judicial decision.-

Where a court enforces a discriminatory covenant between private individuals.[187]

Whether a restrictive covenant in a private contract is based on a discrimination against a party solely on the ground of his race or colour, the enforcement of such covenant by the Court would itself constitute a violation of the guarantee of Equal Protection.[188] The court refused to entertain the argument that in the case of a judicial enforcement of a private agreement " the participation of the State is so attenuated in character as not to amount to State action".[189] Whether the enforcement is made specifically[190] or by an action for damages for breach of the covenant or otherwise, is immaterial for this purpose. Even though the private contract itself does not constitute a State action and does not become invalid owing to contravention of a fundamental right, the enforcement of such contract by Court becomes unconstitutional.[191]

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184. *Bridges* v. *California* (1941) 314 U.S. 252.
185. *Amalgamated Food Employees* v. *Logan*, (1968) 391 U.S. 308.
186. *Beck* v. *Washington*, (1962) 8 L.Ed. (2d) 102 (110)
187. *Shelley* v. *Kraemer*, (1948) 334 U.S. 1.
188. *Ibid.*
189. *Ibid.*
190. *Ibid.*
191. *Burrows* v. *Jackson*, (1953) 346 U.S. 249.

The acts of Courts and judicial officers in their judicial capacity are equally acts of the State, to which the guarantee of equal protection extends.[192] Hence, the courts cannot uphold discrimination in enforcing the common law policy of the State,[193] or even in enforcing a private agreement.[194] Though the 'equal protection clause' erects no shield against the State so long. as a private agreement is enforced by voluntary adherence to the terms by the parties, [195] the constitutional inhibition would arise as soon as the terms by the parties,[196] the constitutional inhibition would arise as soon as the terms of the agreement are sough to be enforced by the Courts, [197] for, then, through the agency of the courts the State would be effectuating the discrimination.

It was held that the convenant excluded a class of persons simply on the ground of their race, and that being a violation of the equal protection clause, the covenant was unenforceable in the Courts, and that a judicial decision which enforces such a covenant would itself be violative of the guarantee of equal protection. It canot be suggested that - "Court action is immunised from the operation of those provisions (of the constitution) simply because the act is that of the judicial branch of the State Government."[198]

In such a case it cannot be contended that in refusing to enforce the covenant, the court was denying equal protection to the party who had lawfully secured rights by contract. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals.[199]

Where the procedure adopted by the Court is designedly [200]

192. *Brickerhoff-Fairs Trust Co.* v. *Hill* (1930) 281 U.S. 673.
193. *American Federation of Labour* v. *Swing* (1941) 312 U.S., 321.
194. *Shelley* v. *Kraemer*, (1948) 334 U.S. 1.
195. *Ibid.*
196. *Ibid.*
197. *Ibid.*
198. *Ibid.*
199. *Ibid.*
200. *Norris* v. *Alabam*, (1935) 294 U.S. 587; *Akins* v. *Texas*, (1945) 325 U.S 398; *Avery* v. *Georgia*, (1952) 354 U.S. 637; *Whitus* v. *Georgia*, (1967) 385 U.S. 545.

discriminatory, e.g., Where Negroes are excluded [201] from the Jury empannelled to try a Negro, [202] on racial ground, [203] or, otherwise , the Jury is so 'manipulated' that the accused would have little chance of a decision on the evidence.[204]

The 'systematic' exclusion [205] of any class of persons from the Jury service on the ground solely of race or colour denies equal protection not only to the class which is excluded but also to the accused, who has a right to be tried by a Jury from which members of his class are not systematically excluded. Apart from such systematic exclusion of a class, if the manner of selection of the Jury operates as a discrimination against the accused on the ground of his race, descent or colour, the conviction cannot stand.[206]

"No device whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and courts are organised to convict".[207] In short a conviction will be quashed if the accused succeed in establishing that " the method of their trial denied them equal protection of the law". [208] It should be noted, however, that the guarantee of equal protection, when applied to the Courts , does not require a uniformity of decisions from a judicial tribunal.

B. West Germany

The status of Government corporations or corporations exercising public functions require separate treatment. It may be stated at once that if these be regarded as agents of the State, they cannot be allowed to claim fundamental rights, by analogy. This is made clear by a decision of the *West German*

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201. *Ibid.*
202. *Strauder* v. *W. Virginia*, (1880) 100 U.S. 303; *Ex Parte Virginia*, (1880) 100 U.S 339; *Smith* v. *Texas*, (1940) 311 U.S. 128.
203. *Norris* v. *Alabam*,(1935) 294 U.S. 587.
204. *Fay* v. *N.Y.* , (1947) 332 U.S. 261.
205. *Ibid.*
206. *Hernandez* v. *Texas* (1954) 347 U.S. 475; *Cassel* v. *Texas*, (1950) 339 U.S. 282.
207. *Fay* v. *N.Y.* , (1947) 332 U.S. 261
208. *Ibid.*

Constitutional Court. Art. 19(3) of the West German Constitution expressly confers the basic rights upon 'corporations' "to the extent that the nature of such rights permits". But the Constitutional Court has held[209] that this provision would not extend to corporations which perform public functions and exercise State powers". The reason given[210] is illuminating :

> "The basic rights, according to their nature, was intended to protect the sphere of freedom of the individual against encroachments by State authority. Consequently, the state could not be at one and the same time the party against which the basic rights were invoked and the party entitled to exercise them."

209. (1967) Yearbook on Human Rights, at 109.

210. *Ibid.*