DEFINITION OF THE STATE AND THE ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION OF INDIA

THESIS SUBMITTED TO THE UNIVERSITY OF NORTH BENGAL FOR THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY IN LAW

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This is to certify that Miss Mita Poddar has pursued research work under my supervision for more than Four years and fulfils the requirement of the ordinances relating to Doctor of Philosophy of the University. She has completed her work and the thesis is ready for submission. To the best of my knowledge and belief, the thesis contains the original work done by the candidate and it has not been submitted by her or any other candidate to this or any other University for any degree previously. In habit and character the candidate is a fit and proper person for the Ph.D. Degree.

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CHAPTER -1

INTRODUCTION

> ..... *It is the business of the State ..... to maintain the conditions without which a free exercise of the human faculties is impossible.* ***T.H. Green***

The relationship between individuals and the state is of great importance since past to the present. Before mentioning to the constitutional definition of the State it is more important to know about the very concept of the State. The term "State" has been defined in different ways by various philosophers in different stages of the society. By studying the ideas and opinions of different classical, medieval and modern philosophers one can better understand the importance and significance of the relationship between the individual and the State.

Political theoreticians from ancient times through middle ages and modern times, have provided divergent and sometimes diametrically opposite ideas about the nature, purposes, functions and relationship with the individuals and the State. Opinions differ as to the connotation of the term 'State' since the concept emerged. The Greek used the word "Polis" which correspond most nearly to English term 'State'. The Greeks used the word "Polis" for "City States". The term was appropriate because at that time there were "City States" in Greece. The ancient Greek city-states exhibited distinct political patterns. Aristotle's 'Polis' was more a 'city community' than a 'state'. MacIver treats the Greek city communities as transitional forms rather than full-fledged states. As he observes:

> Perhaps they should not be included within the classification of states any more than the pithecanthropus is to be included among the reces of man.[1]

---

1. MacIver, *The Modern State,* at 338.

The term 'state' was non-existent in Greek and Roman thinking. The Greek common wealths put accent on the enjoyment of rights rather than on supremacy and obedience; while the Roman citizens formed a 'political guild' based on the exploitation of the slaves. The Romans used the term "Civitas" which also means the same but the term "Civitas" employed by Romans implied not nearly the idea of citizenship of a city but the notion of public welfare. The Teutons employed the terms "status" which forms only the part of the phrase. The modern term "State" has been derived from the word "status" earlier employed by the Teutons. It was Niccolo Machiavelli (1469-1527) who first of all seems to have employed the term "State" in Political Science. It was he, who first of all introduced this term in modern literature of Political Science. Thus, it becomes very clear that the term "State" did not become very popular untill 16th Century. The concept of modern "State" was not known to the people living in a greater part of the Medieval Europe. In the course of time, the word became popular and acquired the neutral scense of authority pure and simple or constitution whatever its principles or direction.

The function of the state is to make and enforce a legal framework. Its main purpose is the maintenance of law and order. As Barker observes, "organised legally, in the terms and under the rules of the one legal purpose, the members of a nation belong to one organisation only, the state", on the other hand " organised socially, in the terms and under the impulse of their many social purposes the members of a nation belong to many organisations."[2] G.D.H. Coles observes:

> "A state is nothing more or less than the political machinery of government in a community."[3]

The state is a political organisation. Easton defines:

> "Political science is the study of the authoritative allocation of values as it is influenced by the distribution and use of power."[4]

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2. Barker, *Principles of Social and Political Theory,* at 43.
3. *Self-Government in Industry,* at 119.
4. David Easton, *The Political system,* Alfred A. knopf, 1953 at 146.

Thomas Hobbes, who was a tutor to Charles II of England, sought to justify absolute power of the sovereign in his Leviathan . State absolutism in Hobbes' view , was the sure conditions of social solidarity.

There was absence of law and justice in the state of nature. Life in Hobbes's classic phrase, was "solitary, poor, nasty, brutish and short." Craving for a new refuge where security could be assured, men come out of the state of nature through a contract of each with all and of all with each, and set up the civil society. Only the right of self preservation was retained by every individual. Each man addressed every other person: " I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorise all his actions in like manner.[5]

The Divine Origin theory was a theocratic conception of the State, and justified the origin and legitimacy of political authority in terms of divine will. The social contract theory, on the other hand, sought to secularise the basis of the state. The contractualists argued that State and Government are human institutions deriving their authority from popular will.

The Divine Origin theory by holding that authority has a religious origin and sanction, undermined the principle of responsibility of the rulers to the ruled and advocated a dangerous theory of passive obedience. It sought to justify the claims of autocratic rulers. The people were mercilessly subjected to a reign of cruelty and oppression. It was necessary to find out the means of justifying resistance to such rule. As Laski said, "The doctrine of social contract provided exactly the weapon needed for this end."[6]. The theory of social contract traces the origin and emergence of the State through voluntary contract entered into by individuals of the state of nature. Historically the theory of social contract 'swept out of the way the endless deductive arguments based on subjective interpretations of the scriptures, and refounded the state on its true foundation the will of men and the common purpose which inspires that will to institutional life" [7]

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5. Hobbes, Thomas, *Leviathan*, Ch 17.
6. *"Social contract" in Encyclopaedia of the Social Sciences,* Vol. 14
7. MacIver, *The Modern State*, at 439.

Locke upheld the ultimate rights of the people to remove the monarch from his authority if he ever behaved in a despotic manner. He analysed human nature in terms of essential social virtues. In the state of nature peace and goodwill prevailled . As Locke wrote, The State of nature has a law of nature to govern it, which obliges everyone; and reason, which is that law, 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."[8]

. If the ideals of "constitutionalism" give expression to the need of a human society for limits on the power of government, the need for a society to pursue its collective goals through effective concentration of organised governmental power is encapsulated in the idea of "the State".[9] If this idea has been less influential in the British political tradition than in other Western countries, it is partly because the concentration of power has been symbolised instead by "the Crown". Nevertheless the idea of the State is fundamental.

A State will usually claim hegemony or predominance within a given territory over all other associations, organisations or groups within it. However this supremacy is legal - it is based on rules which have some degree of universal recognition within the territory. In other words, the rules are not just the whims of the ruler. Thus exclusive power to determine rights and duties within a territorial limit is both *de facto* and *de jure*. Such an idea runs up against a multitude of problems. Since the advent of international legal, political, economic, military and cultural organisations - for example, the existence of international law and courts, the United Nations, as well as multinational companies and so on - it is less easy to speak of the dominance of a State even within its own territory. Despite this point there is still a formal acknowledgement that States have legal supremacy within their territory and that they are independent of external powers.

In comparison to groups within the State, it is generally true that the

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8. *Two Treatises of Government*, Bk. 2, Ch 2.
9. Black Shield, Tony and Williams, George, *Australian Constitutional Law and Theory*, 4th Edn. 2006 at 9.

State has the maximal control over resources and force. At the same time it is not simply a power system. The forces of the State are regulated by rules, which of course can be distorted. However, the monopoly of force is tied to specific ends, namely the maintenance of internal order and external defence. The idea of legitimacy is important here since force exercised by the State is usually recognised by the population as distinct from other types of force. The State possesses authority to carry out actions. Its monopoly is recognised formally as necessary and *de jure*.

The State as supreme authority claims sole imperium within a territory. It is sovereign. The State is the source of law or at least its very nature is tied up with the existence of law. Law originates with the State. The most extreme version of this idea is the school of legal positivism. Austin says that only the positive law is the proper subject-matter of study for jurisprudence. "The matter of jurisprudence is positive law: law simply and strictly so called : or law set by political superiors to political inferiors."[10] Jurisprudence is the general science of positive law.

Law is command of the Sovereign. Command implies duty and sanction. Laws properly so called are species of commands. But being a command every law properly so called flows from a determined source or emanates from a determinate author. In other words, the author from whom it proceeds is a determinate rational being or a determinate body or aggregate of rational beings. For whenever a command is expressed or intimated, one party signifies a wish that another shall do or forbear; and the latter is obnoxious to an evil which the former intends to inflict in case the wish be disregarded. But every signification of a wish made by a single individual, or made by a body of individuals as a body or collective whole, supposes that the individual or body is certain or determinate. And every intention or purpose held by a single individual or body is certain or determinate. And every intention or purpose held by a single individual, or held by a body of individual as a body or

10. John Austin, "*The Province of Jurisprudence determined* " Universal Law Publishing Co. Reprint 2005 at 9.

collective whole, involves the same supposition. [11]. The power and purpose to inflict penalty for disobedience are the very essence of a command. The person liable to the evil or penalty is under a duty to obey it. The evil or penalty for disobedience is called sanction.

"A wish conceived by one and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded" are signified directly and indirectly by each of the three expressions. Each is the name of the same complex notion."[12] So every law is a command, imposing a duty, enforced by a sanction.

Only General commands are law. However all the commands are not law, it is only the general command, which obliges to a course of conduct, is law.

Positivism regards law as the expression of the will of the State through the medium of the legislature. Theories of legal realism [13] too, like positivism, look on law as the expression of the will of the State, but see this as made through the medium of the courts. Like Austin, the realist looks on law as the command of the sovereign, but his sovereign is not Parliament but the judges; for the realist the sovereign is the court.

One verion of realism was held by Salmond [14]. All law, he argued, is not made by the legislature. In England much of it is made by the law courts. But all law, howevermade, is recognised and administered by the courts and

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11. *Ibid.*, at 133.
12. *Ibid.*, at 18.
13. The term "American Realists" serves to describe a number of American legal theorists, who, though in no way constituting a formal school of jurisprudence, share the view that the law consists of the pronouncement of the courts. On this theory of law, *see* Holmes, "*the Path of the Law*" (1897) 10 H.L.R. 457-478, reprinted in *Collected Legal Papers*; Llewellyn, *The Bramble Bush* (2nd Ed.); Frank, *Law and the Modern Mind* and *Courts on Trial*; Gray, *The Nature and Sources of Law* (2nd Ed.). *See* also, Friedmann, *Legal Theory* (4th Ed.), Chap. 23.
14. Salmond, *Jurisprudence* (7th ed., 1924 by Sir John Salmond) , at 15.

no rules are recognised and administered by the courts which are not rules of law. Accordingly, he defined law as the body of principles recognised and applied by the state in the administration of justice, as the rules recognised and acted on by courts of justice.

The State is recognized as the only source of compulsory rules. There are other traditions, such as natural law and customary law, which do not identify the State as the source of law. The whole point of natural law approach is to argue that the State is subject to law or law pre-dates the State.

The really crucial formal feature of the State is that it is a continuous public power. This public power is formally distinct from both ruler and ruled. Its acts have legal authority and are distinct from the intentions of individual agents or groups. Thus the State, as public power, embodies offices and roles which carry the authority of the State. Since this appears to give the State an autonomy apart from private individuals many theorists have been led to accord the State a personality.[15]

The State is that order of human behaviour that we call the legal order, the order to which certain human actions are oriented, the idea to which the individuals adapt their behaviour. There is only a juristic concept of the State : the State as -centralized - legal order.

It is the juristic concept of the State that sociologists apply when they describe the relations of domination with the State. The properties they ascribe to the State are conceivable only as properties of a normative order or of a community constituted by such an order. Sociologists also consider an essential quality of the State to be an authority superior to the individuals, obligating the individuals. Only as a normative order can the State be an obligating authority, especially if that authority is considered to be sovereign. Sovereignty is conceivable only within the realm of the normative.

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15. Black Shield, Tony and Williams, George, *Australian Constitutional Law and Theory*, 4th Edn. 2006 at 9.

The State must be a normative order is obvious also from the 'Conflict" between the State and the individual is a specific problem. If the States were an actual fact, just as the individual is, then there could not exist any such conflict, since facts of nature never are in "conflict" with each other. But if the State is a system of norms, then the will and the behaviour of the individual can "conflict" with these norms and so can arise the antagonism between the "is" and the "ought" which is a fundamental problem of all social theory and practice.

The identity of State and legal order is apparent from the fact that even sociologists characterise the State as "politically" organized society. Since society - as a unit - is constituted by organisation, it is more correct to define the State as "political organization". An organization is an order. But in what does the "political" character of this order lie? In the fact that it is a coercive order. The State is a political organization because it is an order regulating the use of force, because it monopolizes the use of force. This however is one of the essential characters of law. The State is a politically organized society because it is a community constituted by a coercive order, and this coercive order is the law.[16]

The State is sometimes said to be a political organization on the ground that it has, or is, "power". The State is described as the power that lies back of law, that enforces law. In so far as such a power exists, it is nothing but the fact that law itself is effective, that the idea of legal norms providing for sanctions motivates the behaviour of individuals, exercises psychic compulsion upon individuals. The fact that an individual has social power over another individual manifests itself in that the former is able to induce the latter to the behaviour which the former desires.[17]

The State is not a visible or tangible body. But, then, how does the invisible and intangible State manifest itself in social life? Certain actions of

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16. *Ibid* at 11.
17. *Ibid.*

individual human beings are considered as actions of the State. Under what conditions do we attribute a human action to the State? Not every individual is capable of performing actions which have the character of acts of the State; and not every action of an individual capable of performing acts of the State has this character. How can we distinguish human actions from human actions which are not acts of the State? The judgment by which we refer a human action to the State, as to an invisible person, means an imputation of a human action to the State. The State is, so to speak, a common point into which various human actions are projected, a common point of imputation for different human actions. The individuals whose actions are considered to be acts of the States, whose actions are imputed to the State, are designated as "organs" of the State. Acts of State are not only human actions by which the legal order is executed but also human actions by which the legal order is created, not only executive but also legislative acts. To impute a human action to the State, as to an invisible person, is to relate a human action as the action of a State organ to the unity of the order which stipulates this action. The State as a person is nothing but the personification of this unity. An "organ of the State" is tantamount to an "organ of the law".

The fundamental Rights are mostly of individual character and are primarily meant to protect individuals against arbitrary State action. They are intended to foster the idea of a political democracy and are meant to prevent the establishment of authoritarian rule.

The fundamental Rights of the Constitution are, in general, those rights of citizens, or those negative obligations of the State not to encroach on individual liberty, that have become well-known since the late eighteenth century and since the drafting of the Bill of Rights of the American Constitution - for the Indians no less than other peoples, become heir to this liberal tradition. These rights in the Indian constitution are divided into seven parts : the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, cultural and educational rights, the right to property,[18]

18. The Sub-heading *"Right to Property"* omitted by the Constitution (Fortyforth Amendment) Act, 1978, S. 5 (w.e.f. 20.06.1979).

and the right to constitutional remedies. The rights lay down that the State is to deny no one equality before the law. All citizens are to have the right to freedom of religion, assembly, association, and movement. No person is to be deprived of his life, liberty, or property, except in accordance with the law. Minorities are allowed to protect and conserve their language, script and culture.

The Indian Constitution provides for the political regime in which certain basic rights are guaranteed to the people and the governing power is restrained from being so exercised as to interfere with enjoyment of these rights. Still the rights remain basically a guarantee against State action. It is another matter that "the State" is given a special definition in the Constitution for the purpose of fundamental rights. Article 12 of the Constitution of India defines the 'State' as : In this part unless the context otherwise requires "the state' includes (1) the Government and Parliament of India and (2) the Government and the Legislature of each of the states and (3) all local or other authorities within the territory of India or under the control of the Government of India.

Definition of the State in the Constitution other than Article 12 has been mentioned under Articles 1,3, 36 and Article 54. Article 1 of the Constitution declares that the sovereign democratic Republic of India 'Shall be the Union of States'. The Choice for a federation with a strong Centre was made both for political and administrative reasons although the move to describe the Constitution as federal failed. The Constituent Assembly accepted the view of the Drafting Committee that describing the Union as Federation was not necessary.[19] While submitting the Draft Constitution Dr. Ambedkar, the Chairman of the Drafting Committee stated that 'although the constitution may be federal in structure, the Committee had used the term "Union" because of certain advantages."[20] These advantages as explained in the Constituent

19. *See,* the Drafting Committee's footnote at 2 of the Draft to the following effect: "The Drafting Committee considers that following the language of the British North American Act, 1867, it would not be inappropriate to describe India a Union although its Constitu tion may be federal in structure CAD, VII, at 6, 399, 400.

20. Draft Constitution 21.2.1948, at 4.

Assembly[21] indicate two things, (a) that the Union of India is not result of an agreement among the units like the American Federation, and consequently, (b) the States have no rights to secede from the federation. Dr. Ambedkar explained the purpose of the word 'Union' thus" ..... though India was to be a federation, the Federation was not the result of an agreement by the States to join in a Federation and that the Federation not being the result of an agreement, no states to join in a Federation and the people can be divided into different States for convenience of administration the country is an integral whole, its people a single people living under single imperium derived from a single source. The Americans had to wage a civil war to establish that the States have no right to cession and that their Federation was indestructible. The Drafting Committee thought that it was better to make it clear at outset, rather than to leave it to speculation.

The name of the Union is India, that in Bharat. The members of the Union at present are the States specified in the First Schedule.

Further, Article 3 provides that a new state may be formed or established

(1) by separation of territory from any State; or

(2) by uniting two or more States; or

(3) by uniting any parts of States; or

(4) by uniting any territory to a part of any State.

Parliament under this article can also increase or decrease the area of any State of a new State out of the territories of the existing States. The power to form new States under Article 3 (a) includes the power to form a new State or Union territory. The word ' State' in Article 3, Clauses (a) to (c) includes a 'Union territory' also.

The Indian Constitution empowers the Parliament to alter the territory or names. etc. of the States without their consent or concurrence. It can form

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21. *Constituent Assembly Debates*, Vol. 7. at 43.

new States, and can alter the area, boundaries or names of the existing States by a law passed by simple majority. The conditions laid down for making of such a law are - First, no Bill for the formation of new States or the alteration of the boundaries or the names of the existing State shall be introduced in either House of Parliament except on the recommendation of the President. Secondly, if the Bill affects the area, boundaries or names of the States the President is required to refer the Bill to the Legislature of the State, so affected for expressing its views within the period specified by the President, the President may extend the period so specified. If the State Lagislature to which the Bill has been referred does not express its views within the period specified by the President. The president may extend the period so specified. If the State Lagislature expresses its views within the time so specified or extended, the parliament is not bound to accept or act upon the views of the State Legislature. [22] Further, it is not necessary to make fresh reference to State Legislature every time an amendment to the Bill is proposed and accepted. [23].

Now mentioning about Article 36[24]; since this Article adopts the definition of 'State' in Art. 12, it would include Courts and statutory tribunals,[25] so that they can not over-look the objectives of the Directives.

Hence, any statutory corporation which answers the tests of a State instrumentality or agency even though it may not be a 'public utility undertaking', is bound to act in consonance with the Directive Principles, e.g. Arts. 38, 39 (6), and thus to charge only fair and reasonable price for its products, having regard to the needs of the consumers.[26]

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22. *Babulal* v. *State of Bombay*, AIR 1960 SC 51.
23. In *re, Berubari*, AIR 1960 SC 858 at 860.
24. Art.36 says: In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part III.
25. *N.K.V. Bros. Pvt. Ltd.* v. *Karumi Ammal. M.*, AIR 1980 SC 1354; *U.P.S.E. Bd.* v. *Harishankar Jain*, AIR 1979 SC 65 (para 4 A).
26. *O.N.G.C.* v. *Assocn*, AIR 1990 SC 1851 (paras 15, 30).

Art. 54 provides that the President shall be elected by an electoral college consisting of :

(a) the elected members of both Houses of Parliament and

(b) the elected members of the Legislative Assemblies of the States.

The Constitution (70th Amendment) Act, 1992 has added a new explanation to Art. 54 which provides that the word "State" includes the National Capital Territory of Delhi and the Union Territory of Pondicherry. This means that the M.L.A's of the National Territory, Delhi and the Union territory will be included in the electoral college of the President.

As a general rule a writ lies against the "State" as defined under Article 12 of the Indian Constitution.[27] The term 'State" has been widely defined with a view to securing the guarantee of fundamental rights in respect of all possible institutions. The scope of this wide definition has been further expanded by judicial interpretation of the term "other authorities" occurring in Article 12. The ambit and scope of the expression "other authorities" under Article 12 is very wide and the development and growth of law shows the said phrase has been interpreted more and more liberally so as to include within its sweep more and more authorities with a view to giving protection to the aggrieved persons against the actions taken by these authorities.

In certain circumstances an act of a private party begins to resemble the act of a public authority and private right begins to look like public power. This may happen because of governmental nexus and assistance to the private act or concentration of economic power or the simple fact that the private party has control over something which is indispensable for the ordinary living of other individuals. The circumstances may be diverse, but the essence of the matter is that it is possible for a private party to exercise control over the lives

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27. The said Article reads as under : In this part, unless the context otherwise requires, "the state" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

and fortunes of other in vital matters and here it is only reasonable to suggest that in such circumstances the party should be required to observe the same norms as a public authority.

One of the important aspects of judicial activism has been the interpretation of Article -12. The Supreme Court has been expanding the meaning of the words "other authorities with a view to bringing even non-statutory organisations within the purview of the definition of the "State" so as to bring them under the control of the provisions of the fundamental rights.

Some of the fundamental rights, for example, the rights mentioned under Articles 15(2), 17,18,19, 20 (3), 21,23, 24, 25(1), 26, 28 (3) 29 and 30, are available against individuals also.

The law regarding what is State for the purpose of Article 12 has been settled since *Ajay Hasia's* [28]case. However, question as to what is an instrumentality or agency of the State keep on coming before the courts.

It must be remembered that Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32 in the Supreme Court. Whereas Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. Therefore, the term "authority" used in Article 226, must receive a liberal meaning unlike the terms in article 12. The words "any persons or authority" used in article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The only relevant factor is the nature of duty imposed on the body. The form of the body concerned is not relevant.

There is no particular idea given for the expression "*other authorities*" that means it may include any kind of authority or authorities irrespective of their nature and foundation basis. Whether the expression " *other authorities*" is bearing a clear picture which is free from any kind of ambiguity so that the

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28. AIR 1981 SC 487.

individual can seek the justice for enforcement of their fundamental rights against private bodies and private individuals also? Whether the rule of *ejusdem generis* is applicable to article 12? Whether an association or a society registered under the Societies Registration Act 1860 is the State? What is the relationship between the words 'Authority' or 'person' used in article 226 against whom the writ may be issued by the High Courts and the words 'other authorities' used under article 12? Whether the words 'any person or authority' used in article 226 are confined only to statutory authorities ? Whether the judicial interpretation of article 12 of the Indian constitution has become really successful for securing justice to the individual against the State? In the present work a modest attempt has been made to answer the aforesaid issues. These issues and related matters have been examined in the present work.

In order to study the Definition of the State for the purpose of Fundamental Rights in the Constitution of India. It becomes necessary to understand the rights of the people and their relationship with the State prior to the commencement of the Constitution during the British period and beyond. The nature of the State as well as of the fundamental rights changed from the British period after independence. No study can be complete without tracing the historical Development. Therefore the present thesis traces out that development and makes observation how far the present status of the State is based upon the foundation of the past.

The State has been defined separately for the purposes of fundamental rights in our constitution which enumerates various categories of the Institutions and associations since the fundamental rights are enforceable against the State, the scope of the State for this purpose is very significant. Some of the terms used under the definition were subjected to the judicial interpretation at times. The expression "other authorities" has been expanded so as to include even the Institution and the associations less having the nature of the State and more like private bodies. The matter becomes more complex when the judicial creation of instrumentality test was again and again subjected to varied test for determination. The aforesaid issues have been critically analysed in the present work.

Coming to the framework of the study, the present work is divided into eight Chapters. Chapter 1 introduces the subject and the issues involved therein. The concept of the definition of the State and the constitutional provisions, as well as some other Constitutions and international instruments in the historical context have been discussed in chapter 2. Chapter 3 concentrates upon the scope of the definition of the State and discussion has been made for different aspects of the interpretations regarding the term 'state'. Chapter 4 deals with the judicial interpretation of the expression other authorities. It has been made clear in this Chapter that how the Supreme Court has given a wide scope to article 12 by interpreting the word "other authorities" in different cases. Special emphasis has been given to the vital role of the Supreme Court for the interpretation of the word "other authorities".

Chapter 5 deals with the enforcement of fundamental rights of the individuals against the State and private bodies. This chapter discusses about the remedies available for the individuals for the effective enforcement of their fundamental rights. Chapter 6 deals with the test for determining agency or instrumentality of the State. It has been discussed in this chapter that on which points any institution or company can be held to be the agency or instrumentality of the State so that the fundamental rights of the individuals can be enforced against them. Chapter 7 deals with the role of judiciary and the recent developments regarding article 12. The discussion has been made on the vital role of the judiciary for the recent judgments given which has some current issues and developments regarding article 12. At the end, the work closes with conclusion in chapter 8. The present study takes stock of the judicial decisions in India and some of the important American and English cases, available academic writings and relevant statutory provisions.

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.*

CHAPTER - 3

THE SCOPE OF DEFINITION OF THE STATE

The main concern of Political Science is the State, the greatest of all human associations. The word has often been erroneously employed as a synonym for "nation", "country", "society" and "the government." There is so great a diversity of the uses of the word "State" that it creates confusion. There are diverse notions about the word "State" in Political Science. The word has often been used indiscriminately to express a general tendency or an idea. While in common usage we speak of the 'State' of a man's health, of his mind or of his economic conditions. In political science also it has been used in different shades. It has commonly been employed to express the idea of the collective action of community as distinguished from individual action . The term has also been erroneously employed as a synonym of the word 'government'.

In Political science by the word "State" we mean a "politically organised people of a definite territory." If we closely analyse, we shall find that the United State of America or India possesses all the four essential elements of the "State" i.e population, territory, government, and sovereignty. But the constituent units of these countries possess population, government but not sovereignty. Therefore, they cannot be called States.

I. Definitions by Political Thinkers

It is very much important to know about the ideas given by the Political thinkers about the word State. The term "State" has been defined by a number of political thinkers who tried their best to let us know what they meant by the term "State". A few popular definitions are given below:

Aristotle defined the State as :

> "a union of families and villages having for its end a perfect and self-sufficing life by which we mean a happy and honourable life".[1]

Cicero defined the States as:

> "a numerous society united by a common sense of right and a mutual participation in advantages."[2]

In 1576 Bodin defined the State as:

> "an association of families and their common possessions, governed by supreme power and by reason."[3]

The English writer Holland defines the "State" as :

> "a numerous assemblage of human beings generally occupying a certain territory amongst whom the will of the majority or class made to prevail against any of their number who oppose it."[4]

Burges defines the State as:

> "a particular portion of mankind viewed as an organised unit"[5]

According to Bluntschli,:

> "The State is politically organised people of a definite territory." [6]

Phillimore goes to the extent of saying that a State for all purposes of international laws is :

> "a people prominently occupying a fixed territory, bound

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1. Aristotle : "*Politics*", Jowell's Translation.
2. Cicero: "*De Republica*", Bk I. at 25
3. Bodin : "*Six liner de la repubhque*", Bk. I. Ch. I
4. Holland : "*Elements of Jurisprudence*" (6th ed.), at 40
5. Burgess : "*Political Science and Constitutional Law*", Vol I, at 24.
6. Bluntschli : "*Allegemcine Staatslchve*", Vol. I, at 24

> together by common laws , habits and customs into one body politic, exercising through the medium of an organised government, independent sovereignty and through the medium of an organised government, indepdent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into all international relations with the communities of the globe."[7]

According to Woodrow Wilson, :

> "The State is people organised for law within a definite territory."

Professor Laski defined State as :

> "a territorial society devided into government and subjects claiming within its allotted physical area, a supremacy over all other institutions."

Hall, viewing the State primarily as :

> "a concept of international law says, "the marks of an independent state are that the community constituting it, is permanently established for a political end, that it possesses a defined territory and that it is independent of external control."[8]

Professor Gilchrist defines the State as :

> "The State is a concept of Political Science and a moral reality which exists where a number of people living on a definite territory, are unified under a Government which in internal matters is the organ for expressing their sovereignty and in external matters is independent of other Governments".[9]

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7. Phillimore: "*International Law*", 3rd ed. at 81.
8. Hall: "*International Law*", 3rd ed. at 18.
9. Prof. Gilchrist : "*Principles of political science*". at 17, 1957.

Modern Conception of the State, Views of Gabriel Almond and Robert Dahl :

Gabriel Almond used the term "Political System" instead of the State. According to him Political System is the system of interactions to be found in all independent societies which perform the functions of integration and adaptation [10] (both internally and vis-a-vis other societies) by means of the employment, or threat of employment of more or less legitimate physical compulsion". "The political System", he explains "is the legitimate, order maintaining or transforming system in the society".[11]

Pennock and Smith define the State as a political system comprising all the people in a defined territory and possessing an organisation (government) with the power and authority to enforce its will upon its members, by resort, if necessary, to physical sanctions, and not subject in the like manner to the power and authority of another polity. [12]

Robert A. Dahl defines the State as:

> "the political system made up of the residents of the territorial area is a state".[13]

Aristotle's definition of the State is incomplete. There are four essential elements of the modern state. But Aristotle regarded the state as " a union of families and villages, which aims at doing good to human being and making human life happy". It does not include the two essential elements, i.e territory and sovereignty. Indirectly, it gives hint to the political organisation and deals with population in detail. It is clear that his definition is incomplete and fails to give an idea of the modern State. Therefore, Cicero's definition fails to include the three essential elements of the State, i.e government, territory and sovereignty. Bodin's definition also fails to include the two essential elements

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10. Gabriel, A. Almond and James S. Coleman : "*The Politics of Developing Areas*", at7.
11. *Ibid.*, at 7
12. J. Donald Pennock and David G. Smith : "*Political Science*", at 126.
13. Robert A. Dahl : "*Modern Political Analysis*", at 12.

of the state i.e territory and sovereignty. It refers to the government and population only. Holland's definition refers to the territory and population but it does not include the other two essential elements of the modern State, i.e the government and sovereignty. The definition given by Burgess deals in detail with population and the political organisation and does not make any reference to territory and sovereignty. Therefore, this definition also remains incomplete and fails to give us the idea of the modern state. Likewise the definition given by Bluntschli is also incomplete and unsatisfactory as it does not refer to sovereignty. It deals only with territory and politically organised people.

The definition given by Phillimore seems to be complete and it is satisfactory to a very great extent. His definition deals with all the four essential constituents of the modern state i.e., population, territory, government and sovereignty. Woodrow Wilson's definition deals with population and territory and gives indirect hints to peaceful political organisation but does not make any reference to sovereignty. Therefore, it also remains incomplete. Laski's definition deals with almost all the four essential elements of the state, i.e population, territory , government and sovereignty. But it refers to the internal sovereignty and does not make any mention of external sovereignty. Therefore it is also not complete. Hall's definition deals with territory, population and sovereignty and indirectly refers in brief to all the four constitutent elements of the modern state, i.e territory, population, government and sovereignty. In his definition Maclaver makes reference to sovereignty. Among all the definitions of the State given above, the definition of Professor Gilchrist and Dr. Garner seem to be complete and satisfactory as they deal in detail with all the four constituent elements of the modern state. They deal with population, territory, government and sovereignty.

The definitions given by Phillimore and Oppenheim also serve the purpose but the definitions given by Professor Gilchrist and Dr. Garner seem to be better.

The modern State is constituted of the following four constituent elements :

(1) Population or the number of people.

(2) Fixed territory or a definite place of residence

(3) Government or an organisation for uniting the people.

(4) Sovereignty or supremacy in internal matters and independence of exter nal control.

Of these four constituent elements of the modern state, the first two are physical elements, the third is political and the fourth is spiritual.

There is no denying the fact that the state is a human institution and is the highest of all human associations. Obviously, there can be no state without human beings. A population of some kind is necessary for the existence of the State. No state can exist in an uninhabited land nor can a definite piece of land without human habitations be called a state. The State, being a human institution, can never exist without human beings. Nor can living beings other than human constitute the State.

Indeed, there cannot be a lower or upper limit for the number of citizens of a state, nor can a dozen of people or so living in definite place form a state. Their number should neither be too small to be self - sufficient nor too large to be well-governed. What should be the desirable number of the people and what should be the suitable size of population for an ideal state are the problems with which a number of political thinkers attempted to deal. For example, Plato, the famous Greek Philosopher fixed the number at 5,050 citizens, whereas his disciple - Aristotle - was not willing to be bound by any set figur. He was clearly of the opinion that there ought to be a limit and he laid down the general principle that "the number should be neither too small nor too large; it should be large enough to be self-sufficient and small enough to be well -governed."[14] He believed that ten persons would be too small a figure but a hundred thousand would be too large a figure to be well-governed. Both were the extremes. He stuck a via media between too small a figure and too large a number. While giving his opinion in this regard Aristotle had in his view the city-states of Greece which according to him, were self-sufficient

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14. Aristotle : "*Politics*". Bk. VII 4 (Jowett's ed., at. 267), "Laws" V. 737.

and well-governed. These city-states of Greece had a very small size of population and direct democracy was popular in these city-states. The voters or the citizens used to go to the Assembly Hall and pass the laws . In a populous city state direct democracy could not function. This is the reason why Aristotle had not recommended too large a number of people to be well - governed.

Many centuries after Aristotle, Rousseau the French Philosopher who belonged to eighteenth century when the populous states existed wrote his famous book "Social contract", published in 1762, that ten thousand should be the ideal figure of population for an ideal state. According to modern scholars, it is well-nigh impossible to fix a definite figure of population of a modern state. These days there are many states, the figures of which can be counted in crores.

On the other hand, there are small states like San Marino. The population of San Marino was twentythree thousand only in 1985. It does not go beyond five figures. This it is quite clear that the states of today vary greatly in respect of population.

The modern state gives preference to the big size of population because bigger the size of population, greater will be its manpower. They can fight for a big longer period of time during the war period.

The second essential constituent of the State is territory which is an important and essential constituent of the State as many other. The word territory "covers the surface of the land within well -defined boundaries, the sub-soil, lakes and rivers and also air space above the land. Jellinck believes that none of the definitions of the state given prior to nineteenth century mentioned territory as an essential element. He remarks that lever in 1817 was the first writer to define the state as a society of citizens "having a determinate territory".[15]

All the modern thinkers and writers are of the opinion that territory

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15. Jellink : "*Richt des Modernen States*", (1905) , Bk III Ch. III, at 19

forms an essential element of the State. Bluntschi believes that "as the state has its personal basis in the people, so it has its material basis in theland. The people do not become state until they have acquired a territory."[16] Owing to this reason, the State is different from other human Institutions.

The third essential constituent of the State is the government. Like other essential constituent of the State the government is also indispensable element of the State because no state can exist in the absence of the government. For the existence of a State, Government is indispensable.

Government is the political organisation throught which the collective will of the people is formulated, expressed and executed. As a matter of fact, the states operates through the governmental machinery. It is the agency through which society is politically organised, common policies are determined and by which common affairs are regulated and common interests are promoted.

The 4th essential constituent of the State is sovereignty which is regarded as the life and soul of the State. There can be no state in absence of sovereignty. The term sovereignty has been derived from the Latin workd "Superanus" which means supreme, sovereignty, therefore is the supreme element of statehood. It is the power which differentiates the state from all other social organisation. Other existing social organisations can claim a number of people with separate territory and a governmental organisation that the state is the only human institution that has all the essential elements including sovereignty.

Sovereignty means supremacy of the State. The State rules supreme in the internal and external matters. The sovereignty of the state is expressed through the government which rules supreme in internal and external matters. Since the State is supreme in internal and external sovereignty. Sovereignty means the authority of some other country ruling supreme in the country.

The terms State and Governments have indiscriminately and erroneously used for each other. They have often been inter-changeably employed as if there is no difference between the two. The Stuart in England never

16. Bluntschli : "*Theory of the State*", at 231.

differentiated the State from the government. They did so in order to justify their absolute authority. King Louis XIV used to say, " I am the State". Some political thinkers have also gone to the extent of using these two terms inter-changeably. Hobbes employed the terms the State and the government as if they meant the same thing. It was John Locke who first of all attempted to differentiate the State from the government in nineteenth century.

Political thinkers like Harold J. K Laski and G.D.H Cole also find little or no difference between the two. According to Cole, the State "is nothing more or less than the political machinery of government in a community".[17] Laski also observes, "for the state is for the purposes of practical administration, the government". This indentification of the State and government misses an important fact. "While the government is a body of some citizens, the State consists of all the citizens, however, inactive and inarticulate their will may be in the governance of the country."[18] In this connection Professor W.w. Willoughby Organisation of the State - the machinery through which its purpose are formulated and executed".[19]

The term society and State have often been inter-changeably used. For example, Aristotle saw no difference between the State and society. That is why the Greek City-states were said to be co-existensive with society. These two terms-society and State are usually employed as synonyms but they differ from each other in several respects. Society is a social organisation whereas the State is a political organisation. "By society", says Laski, "I mean a group of human beings living together for the satisfaction of their mutual wants".[20] Society deals with the social order whereas the State deals with the political order. In this connection Maclver has very aptly remarked. "To identify the social with the political is to be guilty of the grossest of all confusions which completely bars any understanding of either society or State".[21] "Social relations

17. G.D.H. Cole : "*Self Government and Industry*", revised ed. Londo 1919, at 119.
18. C.C. Field : "*Guild Socialism - A critical Examination*", at 106.
19. W.W. Willoughby : "*The Nature of the State*", at 8.
20. Laski : "*The State in Theory and Practice*", (1967), at 20.
21. Maclver: "*The Modern State*".

an threads of life" and social institutions "form the loom on which the threads are woven into a cloth or garment". Leacock has pointed out that the term "Society" suggests "not only the political relations by which men are bound together but the whole range of human relations and collective activities G.D.H. Cole has defined Society as "the complex organised association and institutions within the community".[22] Maclver believes that, "Society exists for a number of purpose", some great and some small but all in their aggregate deep as well as broad, "The State is not a social organisation". Maclver has pointed out that "the ends for which the state stands are not all the ends which humanity seeks and quite obviously the ways in which the state pursues its objects are only some of the ways in which within society, men strive for the objects of their desires".[23] Thus, it is quite clear that society and States are different organisations. They are different in their modes and structure.

Ancient political thinkers like Aristotle and Plato, did not see any disctinction between the State and society. The reason is that when they dealt with the term "State" they had the idea of city-states in mind. But now the city-states do not exist. Like Plato and Aristotle, Hegel, Hitler and Mussolini also saw no difference between the State and society. They considered the State all powerful with its sovereignty over its population living in a fixed territory. But gone are the days of Hegel, Hitler and Mussolini. Maclver, an eminent American political thinker, fails to accept the opinion of Hegal, Hitler and Mussolini. He says "In this first place we must distinguish the State from Society. To identify the social with the political is to be guilty of the grossest of all confusions which completely bars any understanding of either society or the State".[24]

Though the State is regarded as the highest of all human associations, yet there is a marked distinction between the State and other associations. An associations is defined by Maclver, an eminent political thinker of America,

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22. G.D.H. Cole : "*Social Theory*", III ed. London, 1923, at 29.
23. Maclver : "*The Modern State*".
24. Maclver : "*Modern State*", at 5-6.

as "A group of persons or members who are associated and organised into unity of will or a common end".[25] Cole defines it like this, any group of person pursuing a common purpose or system or aggregation of purposes by a course or cooperative action extended beyond a single act and for the purpose agreeing together upon certain methods of procedure and laying down in, however rudimentary a form, rules for common action".[26] State is also a group of human beings. Like other groups it also exists to satisfy human needs through the concerted action of the government. Despite this close affinity between the State and other associations, there are marked differences between the State and other associations.

II. The State in Part III of the Constitution of India

The guarantee of Fundamental Rights is sought to be made as complete and certain as possible by a very comprehensive definition of the term "State" in Art 12 for the purposes of Part III of the Constitution. Article 12 says :-

In this part, unless the context otherwise requires " the state" includes

i) The Government and Parliament of India and
ii) The Government and the Legislature of each of the States and
iii) All local authorities or
iv) Other authorities within the territory of India or under the control of the Government of India.

Article 12 gives an extended meaning to the words ' the state' wherever they occur in Part III of the constitution. Unless the context otherwise requires, "the state" will include not only the Executive and Legislative[27] organs of the Union and the States, but also local bodies [28](such as municipal authorities) as well as 'other authorities'[29], which include the 'instrumentalities' or agencies'

25. *Ibid.*, at 6
26. Cole : "*Social Theory*", at 37.
27. *Kochunni K.K* v. *state of Madras*, AIR 1959 SC 725.
28. *Railway Boards* v. *observer Publications*, A.I.R. 1972 S.C. 1792.
29. *Basheshar Nath* v. *I.T. Commr.*, AIR 1959 SC 149 (158).

of the State, or bodies or institutions which discharge public functions of the governmental character.[30]

(i) The Scope of Article 12

The term 'State' has been very widely defined with a view to securing the guarantee of fundamental rights in respect of all possible institutions. The scope of this wide definition has been further expanded by judicial interpretation of the term 'other authorities' occuring in Art. 12. This expansive interpretation promotes the expansion of administrative law as more bodies are covered under its scope. It helps in the expansion of judicial review as many more bodies become subject to the writ jurisdiction, and it also makes bodies amenable to the restrictions of fundamental rights.

This definition is only for the purpose of the provisions contained in Part III[31] Hence, even though a body of persons may not constitute ' the state' within the instant definition, a writ under Article 226 may lie against it on non-constitutional grounds or on the ground of contravention of some provision of the Constitution outside Part III e.g., where such body has a public duty to perform or where its acts are supported by the State or Public Officials.[32]

Under Article 12 the word 'includes' indicates that the definition of 'the State' is not confined to a Government Department and the legislature but extends to any administrative[33] action (whether statutory or non-statutory), judcial or quasi-judicial, which can be brought within the fold of the 'State action',[34] which violates a fundamental right.[35] Therefore, the scope of the word 'the state' has been widened through interpreting each and every words

30. *Ramana Dayaram Shetty* v. *I.A.A.I.,* AIR 1979 SC 1628 (1638); *State of Punjab* v. *Raja Ram,* AIR 1981 SC 1694.
31. *Rama Rao Gazula Dasaratha* v. *State of A.P.,* AIR 1961 SC 564 (570).
32. *Kartik Chandra Nandi* v. *W.B.S.I. corpn.,* AIR 1967 Cal, 231 (234).
33. *Gulam Abbas* v. *State of U.P,* AIR 1981 SC 2198.
34. *Ramana Dayaram Shetty* v. *I.A.A.I.,* AIR 1979 SC 1628 (1638); *State of Punjab* v. *Raja Ram,* AIR 1981 SC 1694.
35. *Som Prakash Rekhi* v. *Union of India,* AIR 1981 SC 212.

used in Article 12. The Supreme court has shown the vital role for widening the scope of this Article 50 that the Fundamental Rights of the citizen can be better protected against the arbitrary practices of the Government Departments, legislature as well as administrative actions.

(ii) Local Authorities

The expression Local Authorities includes a 'Panchayat; [36] a Port Trust'[37] or other bodies coming within the definition of 'local authority' in s. 3 (31) of the General Clauses Act, 1897.[38]

A local authority is a representative body. Merely because the Housing Board, constituted under S. 3 of Haryana Housing Board Act, 1971, is authority under Art. 12, it cannot be treated as a local authority; [39] so also are Calcutta State Transport Corporation [40] and U.P Forest Corporation. [41]

(iii) Other Authorities

The expression "authoritt" has a definite cannotation. It has different dimensions and, thus, must receive a liberal interpretation. To arrive at a conclusion, as to which "other authorities" could come within the purview of Article 12, we may notice the meaning of the word "authority".

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36. *Ajit Singh* v. *State of Pubjab*, AIR 1967 SC 856 (866): *Bhagat Ram* v. *State of Punjab*, AIR 1967 SC 927.
37. *Madras Pinjrapole Management* v. *Labour Court*, AIR 1961 Mad, 234 (239).
38. *Madras Pinjrapole Management* v. *labour Court*, AIR 1961 Mad, 234 (239); *Dinesh (Dr.) Kumar* v. *M.N.M College* AIR 1986 SC 1877 (a Municipal Corpn. and educational institution run by it)
39. *Housing Board of Haryana* v. *Haryana Housing Board Employees Union,* AIR 1996 SC 434.
40. *Calcutta State Transport Corporation* v. *Commissioner of Income Tax, W.B.* (1996) 8 SSC 758.
41. *Commissioner of Income Tax, Lucknow* v. *U.P Forest Corportation*, AIR 1998 SC 1125.

In Concise Oxford English Dictionary[42] the word 'authority has been defined as under :

> "1, the power or right to give orders and enforce obedience. 2, a person or organization exerting control in a particular political or ad ministrative sphere. 3, the power to influence others based on recognized knowledge or expertise."

Broadly, there are three different concepts which exist for determining the question which fall within the expression 'other authorities":

(i) The Corporations and the Societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution wherefor the capital infrastucture, initial investment and financial aid etc. are provided by the State and it also exercises regulation and control thereover.

(ii) Bodies created for research and other developmental works which is otherwise a governmental function but may or may not be a part of the sovereign function.

(iii) A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the government.

The rule of *ejusdem generis* cannot be applied to interpret this expression in as much as there is no common feature running through the named bodies.[43].

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42. Concise Oxford English Dictionary, 10th Edition.
43. *Rajasthan State Electricity Bd.* v. *Mohan Lal,* AIR 1967 SC 1857 (1861-63); *Railway Board* v. *Observer Publications Pvt. Ltd.*, AIR 1972 SC 1792;

The expression 'other authorities' refers to -

i) Instrumentalities[44] or agencies,[45] of the Government and Government Departments.[46]But every instrumentality of the Government is not necessarily a 'Government Department,[47] The instrumentalities or agencies, even though perfoming some of the functions of the State, cannot be equated with a government department, if they have an independent status distinct from the State e.g. goverment companies and public undertakings though for the purpose of enforcing fundamental rights, they could be held to be State.[48]

ii) Every type of public authority, exercising statutory powers,[49] whether such powers are governmental or quasi-governmental [50] or non-governmental[51] and whether such authority is under the control of the Government or not,[52] and even thought it may be engaged in carrying on some activities in the nature of trade or commerce [53] e.g.,

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44. *Ramana Deyaram Shetty* v. *I.A.A.I.,* AIR 1979 SC 1628 (1638); *State of Punjab* v. *Raja Ram* , AIR 1981 SC 1694.
45. *Ramana Dayaram Shetty* v. *I.A.A.I.,* AIR 1979 SC 1628 (1638,); *State of Pubjab* v. *Raja Ram,* AIR 1981 SC 1694; *Som Prakash Rekhi* v. *Union of India,* AIR 1981 SC 212; *Tejender Singh* v. *B.P.C.* , AIR 1987 SC 51; *Dwarkadas Marfatia and Sons* v. *Board of Trustee of the Port of Bombay,* AIR 1989 SC 1642.
46. *Bidi Supply Co.* v. *Union of India,* AIR 1956 SC 479.
47. *State of Punjab* v. *Raja Ram,* AIR 1981 SC 1694, *Not a Govt. Department, Steel Authority of India Ltd.* v. *Shri Ambica Mills Ltd,* AIR 1998 SC 418, *following SL. Agarwal (Dr.)* v. *G.M. Hindustan Steel Ltd.,* AIR 1970 SC 1150 and *Western Coalfields Ltd. Special Area Development Authority,* AIR 1982 SC 697.
48. *Mohd. Hadi Raza* v. *State of Bihar,* (1998) 5 SCC 91.
49. *Rajasthan State Electricity Bd.* v. *Mohan Lal,* AIR 1967 SC 1857 (1861-63); *Railway Board* v. *Observer Publications Pvt. Ltd.*, AIR 1972 SC 1792; *Bidi Supply Co.* v. *Union of India,* AIR 1956 SC 479; *Sukhdev Singh* v. *Bhagatram Sardar Raghuvanshi,* AIR 1975 SC 1331 (1342).
50. *Rajasthan State Electricity Bd.* v. *Mohan Lal,* AIR 1967 SC 1857 (1861-63); *Railway Board Observer Publications Pvt. Ltd,* AIR 1972 SC 1792.
51. *Rajasthan State Electricity Bd.* v. *Mohan Lal,* AIR 1967 SC 1857 (1861-63); *Railway Board* v. *Observer Publications Pvt. Ltd,* AIR 1972 SC 1792.
52. *Ramamurthy Reddiar, K.S.* v. *Chief Commr. Pondicherry,* AIR 1963 SC 1464.
53. *Rajasthan State Electricity Bd.* v. *Mohan Lal,* AIR 1967 SC 1857 (1861-63); *Railway Board Observer Publications Pvt Ltd.*, AIR 1972 SC 1792.

A Board,[54] a University,[55] the Chief Justice of High Court,[56] having the power to issue rules, bye laws or regulations having the force of law [57] or the power to make statutory appointments[58] i.e The High court on the administrative side,[59] a public corporation[60].

(iii) An authority set up under a statute [61] for the purpose of adninstering a law enacted by the Legislature, including those vested with the duty to make decisions in order toimplement them.[62] U.P State Cooperative Land Development Bank Ltd. is an authority[63].

A non-statutory body, exercising no statutory powers [64] is not 'State', e.g.,

(i) A company. [65]

(ii) Private bodies, having no statutory power, [66]not being supported by a State act. [67]

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54. *Rajasthan State Electricity Bd.* v. *Mohan Lal,* AIR 1967 SC 1857 (1861-63); *Railway Board* v. *Observer Publications Pvt. Ltd.,* AIR 1972 SC 1792.
55. *Umesh* v. *Singh,* AIR 1967 Pat. 3 (9) F.B.
56. *Paramatma Sharan* v. *Chief Justice Rajasthan High Court,* AIR 1964 Raj 13.
57. *Rajasthan State Electricity Bd.* v. *Mohan Lal,* AIR 1967 SC 1857 (1861-63); *Railway Board.* v. *Observer Publications Pvt. Ltd.,* AIR 1972 SC 1792.
58. *Paramatma Sharan* v. *Chief Justice Rajasthan High Court,* AIR 1964 Raj. 13.
59. *State of Bihar* v. *Bal Mukund Sah,* (2000) 4 SCC 640.
60. *D.T.C.* v. *Mazdoor Congress, D.T.C.,* AIR 1991 SC 101.
61. *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi,* AIR 1975 SC 1331 (1342); *Sabhajit Tewary* v. *Union of India,* AIR 1975 SC 1329; *Premji Bhai Parmar* v. *D.D.A.,* AIR 1980 SC 738.
62. *Ujjam Bai* v. *State of U.P.,* AIR 1962 SC 1621; *Masthan Sahib* v. *Chief Commr. Pondicherry,* AIR 1963 SC 533; *Ramamurthy Reddiar K.S.* v. *Chief Commr. Pondichery,* AIR 1963 SC 1464.
63. *U.P State Cooperative Land Development Bank Ltd.* v. *Chandra Bhan Dubey,* AIR 1999 SC 753.
64. *Devdas* v. *K.E. College,* AIR 1964 Raj. 6 (11).
65. *S.K. Mukherjee* v. *Chemicals Allied Products,* AIR 1962 Cal. 10 (12); *M.C. Mehta* v. *U.O.I.,* AIR 1987 SC 1086.
66. *Naresh Shridhar Mirajkar* v. *State of Maharashtra,* AIR 1967 SC 1 (11); *Parbhani T.C.S.* v. *R.T..,* AIR 1960 (3) SCR 177; *Tekraj Vasandi* v. *Union of India,* AIR 1988 SC 469.
67. *Kochunni K.K.* v. *State of Madras,* AIR 1959 SC 725 (730).

(iii)A society, registered under the Societies Registration Act, [68] unless it can be held that the Society was an instrumentality or agency of the State [69] or exercised statutory power to make rules, bye-laws or regulations having statutory force. [70]

(iv) An autonomous body which is controlled by the Government only as to the proper utilisation of its financial grant. [71].

Even a private body or a corporation [72] or an aided private school [73] may, however, be included within the definition of 'State' if it acts as an 'agency' of the Government.[74].

In determining whether a corporation or a Government company [75]or a

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68. *Tiwari J. (Smt)* v. *Jwala Devi (Smt),* AIR 1981 SC 122; *Dhanoa S.S.* v. *Municipal Corpn.,* AIR 1981 SC 1395; *Sheela Barse* v. *Children's Aid Society,* AIR 1987 SC 656.
69. *Som Prakash Rekhi* v. *Union of India,* AIR 1981 SC 212; *Sabhajit Tewary* v. *Union of India,* AIR 1975 SC 1329; *Minhas B.S.* v. *Indian Statistical Inst.* AIR 1984 SC 363; *Ramchand Iyer, P.K.* v. *Union of India, AIR* 1984 SC 541; *Sheela Barse* v. *Secy., Children's Aid Society,* AIR 1987 SC 656.
70. *Ramana Dayaram Shetty.* v. *I.A.A.I,* AIR 1979 SC 1628 (1638); *State of Pubjab* v. *Raja Ram,* AIR 1981 SC 1694.
71. *Chander Mohan Khanna* v. *N.C.E.R.T.,* AIR 1992 SC 76.
72. *Central Inland water Corpn.* v. *Brojo Nath Ganguly,* AIR 1986, SC 1571; *Bhandari O.P.* v. *I.T.D.C.,* AIR 1987 SC 111; *Ajay Hasia* v. *Khalid Mujib Sehravardi,* AIR 1981 SC 487 (496); *LIC* v. *Escorts,* AIR 1986 SC 1370; Gujarat State Financial Coprn.*v. Lotus Hotels Pvt. Ltd.,* AIR 1983 SC 848; *Kalra A.L. V. P & E Corpn.,AIR 1984 SC 1361; Food Corpn. of India Worker's Union* v. *Food corporation of India,* AIR 1996 SC 2412.
73. *Monmohan Singh* v. *Commr. U.T. Chandigarh,* AIR 1985 SC 364 ; *Workmen Food Corpn.* v. *Food Corpn.of India,* AIR 1985 SC 670.
74. *Sukhdev Singh* v. *Bhagatram Sardar Singh,* AIR 1975 SC 1331 (1335, 1359-60) ; *A.I. Sainik Schools Employees* v., *Sainik Schools Society,* AIR 1989 SC 88; *Star Enterprises* v. *C.I.D.C. Maharashtra Ltd.* (1990) 3 SCC 280; *Mahabir Auto Stores* v. *Indian Oil,* AIR 1990 SC 1031.
75. *Central Inland Water Corpn.* v. *Brojo Nath Ganguly,* AIR 1986 SC 1571, 24, 69; *Bhandari O.P* v. *I.T.D.C.,* AIR 1987 SC 111.

private body is an instrumentality or agency of the state, the following tests would be applicable:[76].

(i) Whether the entire share capital is held by the Government.

(ii) Whether the corporation enjoys monopoly status conferred by the State.

(iii) Whether the functions of the corporation are governmental functions or functions closely related thereto.

(iv) If a department of the Government has been transferred to the corporation.

(v) The volume of financial assistance received from the State.[77]

(vi) The quantum of State control.[78]

(vii) Whether any statutory duties are imposed upon the corporation.[79].

(viii) The character of the corporation may change with respect to its dif ferent functions.[80]

A private educational institution does not become an instrumentality of the State because of the mere fact that it has received recognition or affiliation from the State.[81]

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76. *Central Inland Water Corpn.* v. *Brojo Nath Ganguly*, AIR 1986 SC 1571; *Bhandari O.P.* v. *I.T.D.C.*, AIR 1987 SC 111; *Ajay Hasia* v. *Khalid Mujib Sehravardi*, AIR 1981 SC 487 (496); *LIC* v, *Escorts*, AIR 1986 SC 1370; *Gujarat State Financial Corpn. v. Lotus Hotels Pvt. Ltd.*, AIR 1983 SC 848; *Kalra A.L.*v. *P & E Corpn*, AIR 1984 SC 1361.

77. *Manmohan Singh* v. *Commr. U.T. Chandigarh*, AIR 1985 SC 364 *workmen Food Corpn.* v. *Food Corpn. of India*, AIR 1985 SC 670 *Ganapathi National Middle School* v. *M. Durai Kannan*, AIR 1996 SC 2803.

78. *Manmohan Singh* v. *Commr. U.T. Chandigarh*, AIR 1985 SC 364;*Workmen Food Corpn.* v. *Food Corpn. of India* AIR 1985 SC 670.

79. *Ajay Hasia* v. *Kalid Mujib Sehravardi*, AIR 1981 SC 487 (496); *LIC* v. *Escorts*, AIR 1986 SC 1370; *Gujarat State Financial Corpn.* v. *Lotus Hotels Pvt. Ltd*, AIR 1983 SC 848; *Kalra A.L.* v. *P & E. Corpn.* AIR 1984 SC 1361.

80. *Mehta M.C.* v. *Union of India*, AIR 1987 SC 1086; *L.I.C.* v. *Escorts*, AIR 1986 SC 1370.

81. *Unnikrishnan J.P.* v. *State of A.P*, AIR 1993 SC 2178.

Haryana State Electricity Board awarded a contract to a contractor who was found to be only a name lender, there being no genuine contract with him. he employed Safai Karamcharis whose services he terminated after they had worked for more than 240 days. The High Court lifted the veil and held that the Safai Karmacharis were employees of the said Electricity Board, an agency of the Govt. and hence they were entitled to be reinstated.[82] *The District Rural Development Agencies* [83] and *U.P State Cooperative Land Development Bank Ltd.*[84] held to be instrumentalities of the State.

In *Zee Tele Films Ltd. v. Union of India*[85]. The question for consideration in this petition is whether the Board falls within the definition of 'the State' as contemplated under Article 12 of the Constitution.

It was the argument of the Board that it did not come under the term "other authorities", hence was not a State for the purpose of Article 12. While the petitioner contended to the contrary on the ground that the various activities of the Board were in the nature of public duties. A literal reading of the definition of State under Article 12 would not bring the Board under the Term "other authorities " for the purpose of Article 12. However, the process of judicial interpretation has expanded the scope of the term "other authorities" in its various judgments. It is on this basis that the petitioners contended that the Board would come under the expanded meaning of the term "other authorities" in Article 12 because of its activities which was that of a public body discharging public function.

Therefore, to understand the expanded meaning of the term "other authorities" in Article 12, it is necessary to trace the origin and scop of Article 12 in the Indian Constitution. Present Article 12 was introduced in the Draft Constitution as Article 7. The Court quoted with approval the observation of

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82. *Secretary, H.S.E.B.* v. *Suresh,* AIR 1999 SC 1160.
83. *Rajendra* v. *State of Rajasthan,* AIR 1999 SC 923.
84. *U.P State Cooperative Land Development Bank Ltd.* v. *Chandra Bhan Dubey,* AIR 1999 SC 753.
85. AIR 2005 SC 2677.

Dr. Ambedkar in the Constituent Assembly. While initiating a debate on this Artcle in the Draft Constitution in the Constituent Assembly, Dr. Ambedkar described the scope of this Article and the reasons why this Article was placed in the Chapter on fundamental rights as follows:

> "The object of the fundamental rights is twofold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority. I shall presently explain what the word 'authority' means- upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the fundamental rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding upon the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards Municipalities, even village panchayats and taluk boards, in fact, every authority which has been created by law and which has got certain power to make laws, to make rules or make bye-laws.
>
> ..... there are two ways of doing it. One way is to use a composite phrase such as 'the State', as we have done in Article 7; or, to keep on repeating every time, the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Port Trust, or any other authority. It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a referecne to some authority. The wisest course is to have this comprehensive phrase and to economise in words."[86]

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86. *Constituent Assembly Debates,* Vol. VII 1948 at 610, Quoted in *Zee Tele Films Ltd. v. Union of India,* AIR 2005 SC 2677 at 2685.

Till about the year 1967 the courts in India had taken the view that even statutory bodies like Universities, Selection Committee for admission to Government Colleges were not "other authorities" for the purpose of Article 12[87]. In the year 1967 the case of *Rajasthan State Electricity Board V. Mohan Lal & Ors.*[88], the Court held that the expression "other authorities" is wide enough to include within it every authority created by a Statute on which powers are conferred to carry out governmental or quasi-governmental functions and functioning within the territoy of India or under the control of the Government of India. Even while holding so Shah, J. in a separate but concurring judgement observed that every constitutional or statutory authority on whome powers are conferred by law was not "other authority" within the meaning of Artcle 12. He also observed further that it is only those authorities which are invested with sovereign powers, that is power to make rules or regulations and to administer or enforce them to the detriment of citizens and others that fall within the definition of 'State' in Article 12: if constitutional or statutory bodies invested with power but not sharing the sovereign power of the State are not "State" within the meaning of the Article.

Almost a decade later another Constitution Bench of this Court somewhat expanded this concept of "other authority" in the case of *Sukhdev Singh & Ors, V. Bhagatram Sardar Singh Raghuvanshi & Anr.*[89] In this case the Court held, the bodies like Oil and Natural Gas Commission, Industrial Finance Corporation and Life Insurance Corporation which were created by statutes because of the nature of their activities do come within the term 'other authorities ' in Article 12. Even though in reality they were realy constituted for commercial purposes while so holding Mathew J. gave the following reasons for necessitating to expand the definition of the term "other authorities"

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87. See *The University of Madras V. Shantha Bai & Anr.* (AIR 1954 Madras 67) : *B.W.Devadas V. The Selection Committee for Admission of Students to the Karnataka Enginneering College and Ors.* AIR 1964 Mysore 6.

88. AIR 1967 SC 1857.

89. AIR 1975 SC 1331.

in the following words:

> "The concept of State has undergone drastic changes in recent years. ..... It can only act through the instrumentality or agency or natural or juridical persons. There is nothing strange in the notion of the state acting through a Corporation and making it an agency or instrumentality of the State. With the advent of a welfare State the frame work of civil service administration became increasingly insufficient for handling the new tasks which were often of a specialised and highly technical character. ..... The Public Corporation, therefore, became a third arm of the Government. The employees of public Corporation are not civil servents. In so far as public Corporations fulfil public tasks on behalf of Government they are public authorities and as such subject to control by Government. The public Corporation being a creation of the State is subject to the constitutional limitation as the State itself.[90]

In *Sabhajit Tewary v. U.O.I & Ors.*[91] the judgment was delivered by the very same Constitution Bench which delivered the judgment in *Sukhdev Singh* case. In this judgment the court noticing its judgment in *Sukhdev Singh & Ors.*[92], rejected the contention of the petitioner therein that Council for Scientific and Industrial Research the respondent body in the said writ petition which was only registered under the Societies Registration Act would come under the term "other authorities" in Article 12.

This distinction to be noticed between the two judgments referred to hereinabove namely *Sukhdev Singh & Ors*, and *Sabhajit Tewary*[93], is that, in

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90. *Sukhdev Sing v. Bhagatram,* AIR 1975 SC 1331, Quoted in *Zee Tele Films Ltd., v Union of India,* AIR 2005 SC 2677 at 2686.

91. AIR 1975 SC 1329.

92. AIR 1975 SC 1331.

93. AIR 1975 SC 1329.

the former the Court held that bodies which were creatures of the statutes having important State functions and where State had pervasive control of activities of those bodies would be State for the purpose of Article 12. While in *Sabhajit Tewary's* case the Court held, a body which was registered under a statute and not performing important State functions and not functioning under the pervasive control of the Government would not be a State for the purpose of Article 12.

Subsequent to the above judgments of the Constitution Bench a three-Judges Bench of this Court in the case of *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.*[94] placing reliance on the judgment of this Court in *Sukhdev Singh*[95] held that the International Airport Authority which was an authority created by the International Airport Authority Act, 1971 was an instrumentality of the State, hence, came within the term "other authorities" in Article 12. While doing so this Court held :

> To-day the Government, in a welfare State, is the regulator and dispenser of special services and provider of a large number on benefits. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of which. These valuables which derive from relationships to Government are of many kinds :leases, licenses, contracts and so forth. With the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, it cannot be said that they do not enjoy any legal protection nor can they be regarded as that they do not enjoy any legal protection nor can they be

94. AIR 1979 SC 1628.

95. AIR 1975 SC 1331.

regard as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure[96].

The law has not been slow to recognize the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interest in Government larges, formerly regarded as privileges, have been recognized as rights while others have been given legal protection not only by forging procedural safeguards but also by confining or structuring and checking Government discretion in the matter of grant of such larges. The discretion of the government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitary discretion or its sweet will.

It is in the above context that the Bench in *Ramana Dayaram Shetty's*[97] case laid down the parameters or the guidelines for identifying a body as coming within the definition of "other authorities" in Article 12, they are as follows:

1) One thing is clear that if the entire share capital of the corporation is held by Goverment it would go a long way towards indicating that the corporation is an instrumentality of Goverment[98].

(2) Where the financial assistance of the State is so much as to meet.. almost entire expenditure of the corporation. It would afford some indication of the corporation being impregnated with governmental character[99].

3) It may also be a relevant factor whether the corporation enjoys monopoly status which is State-conferred or State-protected[100].

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96. *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.*, AIR 1979 SC 1628, quoted in *Zee Tele Films Ltd. v. Union of India*, AIR 2005 SC 2677 at 2687.

97. AIR 1979 SC 1628.

98. *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.*, AIR 1979 SC 1628, quoted in *Zee Tele Films Ltd. v. Union of India*, AIR 2005 SC 2677 at 2688.

99. *Ibid.*

100. *Ibid.*

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a state agency or instrumentality[101].

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor classifying the corporation as an instrumentality or agency of Government[102].

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government[103].

The above tests propounded for determining as to when Corporation can be said to be an instrumentality or agency of the Government was subsequently accepted by a Constitution Bench of this Court in the case of *Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors*[104]. But in the said case of *Ajay Hasia*[105] the court went one step further and held that a society registered under the Societies Registration Act could also be an instrument of State for the purpose of the term "other authorities" in Article 12. This part of the judgment of the Constitution Bench *Ajay Hasia*[106] was in direct conflict or was seen as being in direct conflict with the earlier Constitution Bench of this court in *Subhajit Tewary's*[107] case which had held that a body registered under a statute and which was not performing important State function or which was not under the pervasive control of the State cannot be considered as an instrumentality of the State for the purpose of Article 12.

The above conflict in the judgments of *Sabhajit Tewary*[108] and *Ajay Hasia*[109] of two co-ordinate Benches was noticed by this Court in the case of

101. *Ibid.*
102. *Ibid.*
103. *Ibid.*
104. AIR 1981 SC 487.
105. *Ibid.*
106. *Ibid.*
107. AIR 1975 SC 1329.
108. *Ibid*
109. AIR 1981 SC 487

Pradeep Kumar Biswas and hence the said case of *Pradeep Kumar Biswas*[110] came to be referred to a larger Bench of seven Judges and the said Bench, speaker through Ruma Pal, J. held that the judgment in *Sabhajit Tewary*[111] was delivered on the facts of that case, hence could not be considered as having laid down any principle in Law. The said larger Bench while accepting the ratio laid down in *Ajay Hasia's*[112] case though cautiously had to say the following in regard to the said judgment of this Court in *Ajay Hasia*:

> "perhaps this rather overenthusiastic application of the broad limits set by *Ajay Hasia* may have persuaded this Court to curb the tendency in *Chander Mohan Khanna v. National Council of Educational Reserch and Training*[113]. The court referred to the tests formulated in *Sukhdev Singh*[114], *Ramana*[115], *Ajay Hasia*[116] and *Som Prakash Rekhi*[117] but striking a note of caution said that "these are merely indicative indicia and are by no means conclusive or clinching in any case". In that case, the question arose whether the National Council of Educational Reserch (NCERT) was a "State" as defined under Article 12 of the Constitution. NCERT is a society registered under the Societies Registration Act. After considering the provisions of its memorandum of association as well as the rules of NCERT, this Court came to the conclusion that NCERT was largely an autonomous body and the activities of NCERT were not wholly related to governmental functions and that the governmental control was confined only to the proper utilisation of the grant and since

110. (2002) 5 SCC 111.
111. AIR 1975 SC 1329.
112. AIR 1981 SC 487.
113. AIR 1992 SC 76
114. AIR 1975 SC 1331
115. AIR 1997 SC 1628
116. AIR 1981 SC 487
117. AIR 1981 SC 212

> its funding was not entirely from government resource, the case did not satisfy the requirements of the State under Article 12 of the Constitution. The Court relied principally on the decision in *Tekraj Vasandi v. Union of india*[118]. However, as far as the decision in *Sabhajit Tewary v. Union of India*[119] was concerned. It was noted that the "decision has been distinguished and watered down in the subsequent decisions'[120]

Thereafter the larger Bench of this Court in *Pradeep Kumar Biswas*[121] after discussing the various case laws laid down the following parameters for gauging whether a particular body could be termed as State for the purpose of Artcle 12:

> The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, exhypothesi, be considered to be a State within the meaning of Artcle 12. The question in each case would be — whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.[122]

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118. AIR 1988 SC 469.

119. AIR 1975 SC 1329.

120. *Ajay Hasia v. Khalid Mujib,* AIR 1981 SC 487, quoted in *Zee Tele Films Ltd. v. Union of India,* AIR 2005 SC 2677 at 2688.

121. (2002) 5 SCC 111.

122. *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology,* (2002) 5 SCC 111, quoted in *Zee Tele Films Ltd. v. Union of India,* AIR 2005 SC 2677 at 2689.

Above is the *ratio decidendi* laid down by a seven Judges Bench of this Court which is binding on this Bench. The facts of the touchstone of the parameters laid down in *Pradeep Kumar Biswas's*[123] case. Before doing so it would be worthwhile once again to recapitulate what are the guidlines laid down in *Pradeep Kumar Biswas's*[124] case for a body to be a state under Article 12. They are:

1) Principles laid down in *Ajay Hasia*[125] are not a rigid set of principles so that if a body falls within any one of them it must ex hypothesi, be considered to be a State within the meaning of Article 12.

2) The question in each case will have to be considered on the bases of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by or under the control of the Government.

3) Such control must be particular to the body in question and must be pervasive.

4) Mere regulatory control whether under statute or otherwise would not serve to make a body a State.

The facts established in this case shows the following:

1) Board is not created by a statute.

2) No part of the share capital of the Board is held by the Government

3) Practically no financial assistance is given by the Government to meet the whole or entire expenditure of the Board.

4) The Board does enjoy a monopoly status in the field of Cricket but such Status is not State conferred or State protected.

5) There is no existence of a deep and pervasive State control. The control if

123. (2002) 5 SCC 111.

124. *Ibid.*

125. AIR 1981 SC 487.

any is only regulatory in nature as applicable to other similar bodies. This control is not specifically exercised under any special statute applicable to the Board. All functions of the Board are not public functions nor are they closely related to governmental functions.

6) The Board is not created by transfer of a Government owned corporation. It is an autonomous body.

In Article12, the 'State' has not been defined, it is merely an inclusive definition. It includes all other authorities within the territory of India or under the control of the Government of India. It does not say that such other authorities must be under the control of the Government of India. The word or is disjunctive and not conjunctive.

What is necessary is to notice the functions of the Body concerned. A 'State' has different meaning in different context. In a trditional sense. It can be a body politic but in modern international practice a State is an organization which receives the general recognition accorded to it by the existing group of other States. Union of India recognizes the Board as its representative. The expression "other authorities in Article 12 of the Constitution of India is State within the territory of India as contradistinguished from a State within the control of the Government of India. The concept of State under Article 12 is in relation to the fundamental rights guaranteed by part III of the Constitution and Directive Principles of the State Policy contained in part IV thereof. The contents of these two parts mainfest that Article 12 is not confined to its ordinary or constitutional sense of an independent or sovereign meaning so as to include within its fold whatever comes within the purview thereof so as to instill the public confidence in it.

Article 12 must receive a purposive interpretation as by reason of Part III of the Constitution a Charter of Liberties against oppression and arbitrariness of all kinds of repositories of power have been conferred the object being to limit and control power wherever it is found. A body exercising significant functions of public importance would be an authority in respect of these functions. In those respects it would be same as is executive government

established under the Constitution and the establishments of organizations funded or controlled by the Government. A trafic constable remains an authority even if his salary is paid from the parking charges in as much as he still would have the right to control the trafic and anybody violating the trafic rules may be prosecuted at his instance.

Criticism of too broad a view taken of the scope of the State under Article 12 in *Ramana case*[126] invited some criticism which was noticed in *Som Prakash Rekhi case*[127] . It was pointed out that the observations in *Ramana case*[128] spill over beyond the requirments of the case and must be dismissed as obiter; that International Airport Authority is a corporation created by a statute and there was no occasion to go beyond the narrow needs of the situation and expand the theme of the State in Article12 vis-a-vis government companies, registered society, and what not; and that there was contradiction between *Sukhdev Singh case*[120] and *Ramana case*[130].

(iv) Authorities under the control of the Government of India

These words extend the application of the fundamental rights to areas outside the territory of India, which may be under the control of the Government of India for the time being, e.g. mandatory and trust territories which might be placed by international organisations under the control of the Government of India. This article explains that India would not discriminate, so far as the fundamental rights of individuals are concerned, between its own nationals and the people of other countries, which might come under the administration

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126. *Ramana Dayaram Shetty* v. *International Airport Authority of India,* AIR 1979 SC 1628.

127. *Som Prakash Rekhi* v. *Union of India,* AIR 1981 SC 212.

128. *Ramana Dayaram Shetty* v. *International Airport Authority of India,* AIR 1979 SC 1628.

129. *Sukhdev Singh* v. *Bhagatram,* AIR 1975 SC 1331.

130. *Ramana Dayaram Shetty* v. *International Airport Authority of India,* AIR 1979 SC 1628.

of India under some international arrangement, agreement or the like.[131]

The Supreme Court[132] has, however, given to the above words a meaning different from that given in the Constituent Assembly. According to the Supreme Court the words under the control of the Government of India control the word authorities and not the word territory, so that the expression would read thus:

> "all local or other authorities within the territory of India or all local or other authorities under the control of the Government of India".

The result of this interpretations is that in respect of an authority situated outside India, an additional test has to be satisfied before it can be brought within Art. 12 namely, whether it is under the control of the Government of India'. According to this interpretation, Art. 12 will apply to two categories of 'authorities' :

(a) Authorities situate within the territory of India; these need not be un der the control of India in order to be deemed 'State' under Art. 12.

(b) Authorities situate outside the territory of India (e.g., territories ad ministered by India under the Foreign Jurisdiction Act, 1947); these will come within the purview of Art. 12 only if they are under the control of India.

Proceeding from the view, it has been held[133] that since a judicial or quasi-judicial authority cannot be said to be under the control of the Government, in respect of its function, the superior Courts in India will have no power of judicial review over the decisions of a judicial or quasi-judicial authority if it is situated in a territory outside India, even though such territory is under the control of the Government of India.

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131. Dr. Ambedkar, *constituent Assembly Debates,* Vol VI at. 607.
132. *Ramamurthy* v. *Chief Commr.,* AIR. 1963 S.C. 1464 (1467-8); *Masthan Sahib* v. *Chief Commr.,* AIR. 1963 S.C. 533 (537)
133. *Masthan Sahib* v. *Chief Commr.,* AIR. 1963 S.C. 533 (537).

It is conceded by the Supreme Court in both the cases[134] that where the control of the Government of India extends over a territory which is outside India, the superior courts in India can exercise their constitutional jurisdiction over the acts of the administrative authorities situated in such territory by 'passing suitable orders' against the Government of India. Does it make any difference if such administrative authority is endowed with quasi-judicial authority by the law? So far as quasi-judicial bodies located in India are concerned, there is no doubt that their decisions may, in proper circumstances, be quashed by certiorari. In such cases, it is the decision which is struck down and the Supreme Court does not compel the inferior tribunal to exercise its functions in any particular manner. Where the quas-judicial authority violates the-decision of the Court, the Supreme Court cannot directly enforce its decision against such authority and will be obliged to take the aid of the Government of India; but then the Government of India shall be competent to see that the quasi-judicial body complies with the orders of the Supreme Court in the same manner as it can do in the case of a purely administrative body. In so doing, the Government would not be compelling the quasi-judicial tribunal to decide a question in a particular manner, but only enforcing the decision of the highest Court of India against the inferior tribunal.

It is submitted that much anomally will be created if the word 'control' is interpreted in the sense of 'functional'[135] as distinguished from 'administrative' control.

'Under the control of the Government of India' means An authority which is located outside India may still come under the definition of 'State under Art 12 if it is under the control of the Government of India.

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134. *Ramamurthy* v. *Chief Commr.*, AIR. 1963 S.C. 1464 (1467-8); *Masthan Sahib* v. *Chief Commr.*, AIR. 1963 S.C. 533 (537).

135. *Ramamurthy* v. *Chief Commr.*, AIR. 1963 S.C. 1464 (1467-8).

(v) Fundamental Rights - a guarantee against State action

The rights which are guaranteed by Arts. 19,[136] 21 and 3[137] are guaranteed against State action as distinguished from violation of such rights by private individuals. In case of violation of such rights by private individuals, the person aggrieved must seek his remedies under the general law.

But where the claim of a private person is supported by a State act, executive or legislative,[138] the person aggrieved may challenge the constitutionally of the State act which supports the private claim.[139]

While a right created by statute may be taken away by another statute, a fundamental right guaranteed by the Constitution cannot be taken away by a statute.[140]

(vi) Judiciary

While the inclusive definition of 'State' in Art. 12 includes the Judiciary,[141] in some earlier cases, it was observed that (i) a judicial order could not possibly violate fundamental right;[142] and (ii) no remedy under Art. 32 was available on the ground that a judicial order violated a fundamental right.[143]

(vii) Industry

The State while discharging a public welfare function is not an "industry" under the Industrial Disputes Act.[144]

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136. *Samdasani P.D.* v. *Central Bank,* AIR 1952SC 59.
137. *Vidya Verma* v. *Shivnarain (Dr.),* 1956 (2) SCR 108.
138. *Kochunni K.K. v. State of Madras* (1), AIR 1959 SC 725 (730).
139. *Ibid.*
140. *Pannalal Binj Raj v. Union of India,* AIR 1956 SC 397.
141. *Budhan Choudhury* v. *State of Bihar,* AIR 1955 SC 191.
142. *Amirabbas Abbasi Sehabzada Saiyed Muhammed* v. *State of M.B.,* AIR 1960 SC 768; *Parbhani Transport Co-operative Society* v. *R.T.A..,* AIR 1960 SC 801 ; *Naresh Shridhar Mirajkar* v. *State of Maharashtra,* AIR 1967 SC 1.
143. *Ujjam Bia* v. *State of U.P* AIR 1962 SC 1621; *Antulay A.R.* v. *Nayak R.S.* AIR 1988 SC 1531.
144. *Executive Engineer (State of Karnataka)* v. *K. Somaselty,* (1997) 5 SCC 434.

There has however, been a change of judicial climate since th minority opinion of Hidayatullah, J., in Naresh's case[145]. The propositions so far asserted in these subsequent cases are -

(a) A judicial decision or order which violates a fundamental right is void,[146] even though it will be binding on the parties so long as it is not set aside in appropriate proceedings.[147]

(b) Though the remedy under Art. 32 is not available where teh offending Court is the Supreme Court itself, the court in the exercise of its inherent jurisdiction (para 105)[148] would review and set aside a previous direction given by the court which offended against a fundamental right, e.g. the natural justice, an ingredient of Art. 14 or 21 (paras 60-61, 77, 80-82).[149]

The literatures available on the definition of the State are not sufficient. The subject has been discussed in the constitutional law commentaries and articles published in the law journals. Over and above one has to depend mainly on the judicial decisions.

Seervai has pointed out that "our constitution should exist on the exercise of power by the State; but the essential problem of liberty and equality was freedom from aributary restrictions. The constitution should be so interpreted that the governing power, wherever located, must be subjected to fundamental constitutional limitations". He raises a question "when can a corporation be looked upon as an agency of the State for subjecting it to constitutional limitation ? No easy answer is possible".[150]

In the *Airport*[151] Case the doctrine of agency and State instrumentality

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145. *Budhan Choudhury* v. *State of Bihar,* AIR 1955 SC 191.
146. *Ujjam Bia* v. *State of U.P* AIR 1962 SC 1621; *Antulay A.R.* v. *Nayak R.S.,* AIR 1988 SC 1531; *Nawabkhan Abbas Khan* v. *State of Gujarat,* AIR 1974 SC 1471.
147. *Antulay A.R.* v. *Nayak R.S.* AIR 1988 SC 1531.
148. *Antulay A.R. v. Nayak R.S.,* AIR 1988 SC 1531.
149. *Ibid.*
150. *Seervai, H.M., Constitutional law of India* (1991).
151. AIR 1979 SC 1628.

was adopted by Bhagwati J. The problem to be solved in that case was thus stated by Bhagwati J.:

> This appeal by special leave raises interesting questions of law in the area of public law. What are the constitutional obligations on the State when it takes action in exercise of its statutory or executive power? Is the State entitled to deal with its property in any manner it likes or award a contract to any person it chooses without any constitutional limitations upon it? What are the paramaters of the statutory or executive power in the matter of awarding a contract ordealing with its property? These questions fall in the sphere of both Administrative Law and Constitutional law and they assume special significance in a modern welfare state which is committed to egalitarian values and dedicated to the rule of law. But these questions cannot be decided in the abstract. They can be determined only against the background of facts and hence we shall proceed to state the facts giving rise to the appeal.

In *Hasia's*[152]Case the question for determination arose out of writ petitions filed under Article 32 challenging the validity of admissions to the Regional Engineering College, Srinagar ("the College") which was one of 15 Engineering Colleges in India sponsored by the Govt. of India. The college was run by a Society ("The society") registered under the Jammu and Kashmir Registration of Societies Act 1893. The question was whether the society was "the State" under Article 12, for only if it was the State could the admissions to the college be challenged as violating Article 14, Bhagwati J. delivering the unanimous judgements of a constitution Bench scrutinized the Memorandum of Association and the Rules of the Society and held that the Society was an instrumentality or agency of the State and Central Governments and the Society was an authority under Article 12.

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152. AIR 1981 SC 487

Bhagwati J. formulated that relevent tests for determining whether a corporation was an agency or instumentality of govt. as follows:[153]

(a) One thing is clear that if the entire share capital of the corporation is held by Govt., it would go a long way towards indicating that the corporation is an instrumentality or agency of Govt;

(b) Where the financial assistance of the State is so much as to meet almost (the) entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with goverment character,

(c) It may also be a relevant factor ..... whether the corporation enjoys monopoly status which is the (sic) State conferred or state protected;

(d) Existence of 'deep and pervasive State control may afforde an indication that the Corporation is a State agency or instrumentality;

(e) if the functions of the Corporation are of public importance and closely related to government functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

The fundamental rights may be violated by the State as much directly as indirectly. While in the former case its officials or agencies violate them, in the latter it may let them be violated by others either through its inaction or active connivance. The latter violation may be as injorious as the former. In such cases State cannot escape its responsibility or liablity towards the protection of fundamental rights on the plea that they are the actions of private individuals and not of the State.[154]

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153. *Ibid.*

154. Shukla, V.N. *The Constitution of India* (2001)

The 'judiciary', though an organ of the State like the executive and legislature, is not specifically mentioned in Article 12. Does it mean that the 'judiciary' is not meant to be included in the concept of 'the state'? The answer depends on the distinction between the judicial and non-judicial functions of the courts. In the exercise of non-judicial functions the courts fall within the definition of 'the State'.

Article 12, while defining the word 'State' used in the Constitution,. points to fact that the word 'State' includes the Government and Parliament of India, the Government and legislature of each of the State and all local and other authorities within the territory of India or under the Control of the Government of India. With regard to scope of this article. Dr. Ambedkar said that it encompasses within its ambit "every authority which has been created by law and which has got certain powers to make laws, to make rules and to make by laws"[155]

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 privilege, the State cannot impose conditions which require the 'relinquishment of constitutional rights'. 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.[156]

Where a body exercises power, conferred by a statute, it is obvious that it is exercising governmental power in its ordinary sense. There is the authority of the State behind its acts (assuming them to be intra vires). This is why even a Board of Trustees constituted by a Statute has been, in the U.S.A. taken to be an agency of the State.

An instance of judicial creativity is to be found in the expanding connotation being given to the term 'authority' in Article 12.[157] After the famous

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155. Sengupta, P.K., *India : Constitutional Dynamics in a Changing Polity* (1991).
156. Basu, D.D., *Commentary on the Constitution of India* (1973)
157. Jain, MP. *Indian Constitutional Law (*1987)

cases of International Airport Authority[158] and Ajay Hasia[159], it has now become well-established that a body is an 'authority' under Article 12 if it can be characterised as an 'instrumentality' of the Government . To be so, the concerned body has to fulfil two basic tests, viz. : funding and control. Does the Government foot a substantial part of the bill for the operations of the body in questions? Does the Government exercise effective and pervasive control over the body concerned? It does not matter what is the structure of the body in question : it may be statutory or non-statutory : it may be set up by or under an Act of the Legislature or even administratively; it may be a registered society, a co-operative society, or a Government company. It does not also matter whether the body in question has been set up initially by the Government or private enterprise. It does not matter what functions does the body discharge : governmental, semi-governmental, non-governmental, educational, commercial, banking, social service. So long as a body is characterised as an 'instrumentality' of the Government, if falls within the purview of Article 12 as an 'authority'.

Once a body is characterised as an 'authority', three important incidents invariably follow : (1) It becomes subject to the discipline of fundamental rights (2) It becomes subject to the discipline of Administrative law; (3) It falls within writ jurisdiction of the Supreme Court under Article 32 and of the High Courts under Article 226. Thus, as the range of Article 12 expands, so does the ambit of judicial review.

When granting a remedy against State action for infraction of fundamental rights, the Supreme Court is being guided by the definition of the 'State' in Article 12 of the Constitution.[160]

From the definition of the State in Article 12 it is clear that executive action can be complained of where it infringes fundamental rights.

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158. AIR 1979 SC 1628.
159. AIR 1981 SC 487.
160. G.C.V. Subba Rao, *Indian Constitutional Law* (1998)

It must be remembered that the Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by narrow and constricted judicial interpretation. The court should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the government or through the corporate personality of which an instrumentality or agency of the government or through the corporate personality of which the government is acting, so as to subject the government in all its myriad activies, whether through natural persons or through corporate entities, to the basic obligation of the fundamental Rights.[161]

Expansion of the Definition of the 'State' to include the Judiciary for greater judicial accountability. The judiciary which imparts justice is not accountable to the people of India. Some exercise has to be done to consider the question of naming "judiciary" as part of state under Article 12 of the Constitution.[162]

There is no reason why the expression 'other authorities' in Article 12 should be confined only to statutory or constitutional bodies.[163] Political parties, for example, even though they are not statutory organisations, and are in form private clubs, are to be with in this category. So also are labour unions on which statutes confer the right of collective bargaining. It is hoped that in the years to come the courts will go a step forward and interpret the expression 'other authorities' in Article 12 should be confined only to statutory or constitutional bodies. Political parties, for example, even though they are not

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161. C.K. Takwani, *"other authorities" within the meaning of Article 12 of the Constitution*, (1986) 4 SCC (J).
162. G.B Reddy, *Fifty years of Indian Constitution - A Constitutional imperative to Review its working*, IBR 2000.
163. Y.R. Haragopal Reddy, *Article 12 of the Constitution and the new Horizons of funda mental rights*, IBR 1984.

statutory organisations, and are in form private clubs, are to be within this category. So also are labour unions on which statutes confer the right of collective bargaining. It is hoped that in the years to come the courts will go a step forward and interpret the expression 'other authorities' in Article 12 in such a way that it will include within its fold bodies private in character but dealing with public rights to make them accountable to part III of the Constitution as is being done in the United States of America. The Courts can fully utilise the new trend set by *Airports Authority*[164] to expand the constituency of fundamental rights to a greater extent so as to prohibit arbitrariness and discrimination and to extent so as to prohibit arbitrariness and discrimination and to extend the blessings of liberty and equality proclaimed in the preamble to the constitution and transformed into the body of the Constitution in terms of Fundamental rights and directive principles to one and all.

Fundamental Rights are enforceable against the State and writ jurisdiction of the superior courts is also available mainly against the State. The definition of the word "State" has been given in Article 12 and usually the threshold objection to the maintainability of a writ petition is that the respondent is not State within the meaning of Article 12.[165]

The Supreme Court by an imaginative and innovative interpretation has given an expansive meaning to the term "other authority" and has held that it included corporations, government companies and even registered societies which functioned as mere surrogates of the government, even though in law they might have a separate and independent existence. The logic applied has been that the directive principles visualised a welfare state with increased and manifold functions and the State could perform these additional functions either departmentally or by creating independent entities and the government could not be allowed to cheat the people of their fundamental rights by merely transferring its functions to other bodies. These other bodies were merely agencies or instrumentalities of the government and as such they were subject

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164. AIR 1979 SC 1628.

165. S.P Sathe, *Constitutional Law - I (Fundamental Rights)*, ASIL (1992).

to the fundamental rights to the same extent and in the same manner as the government.[166]

In the recent past a number of decisions have come up at the Supreme Court as well as at the High Courts level which shall be thoroughly surveyed and analysed in the present research work. There are some of the articles which appeared in the law Journals and the reports dealing with the various aspects of the matter. The subject has been dealth with in the Constitutional law commentaries by the authors. However, there is a research gap in evolving the clear picture so as to make a constitutional lawyer to understand about the clear test of instrumentality and the enforcement of Fundamental Rights. There is need of research in this area. The present work will make an attempt to fill up this gap.

In the present study it may be noted that the expression "other authorities" under Article 12 of the Indian Constitution is not free from ambiguity. And because of this ambiguous nature of expression the investigation is needed to find out the clear picture of the said term. This investigation leads to the finding of new facts by searching and analysing the existing facts which may be collected from various books, first rate law journals, opinions of the academicians and judicial decisions delivered by the Supreme Court and High Courts.

A good number of decisions have come up since the last quarter of the 20th Century. The issue of interpretation of the expression "other authorities specifically started from its interpretation by the Supreme Court in *Sukhdev Singh's* [167] case. This interpretation was further developed and institutionalized in *Ajay Hasia's* [168] case by evolving the test for determining the agency or instrumentality of the State. The issue however, has been subjected to further scrutiny by the Apex Court as to the evolution of the parameters of the agency

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166. Udai Raj Rai, *Reach of Fundamental Rights*, Vol. 36 JILI (1994) at 292.
167. AIR 1975 SC 1331.
168. AIR 1981 SC 487.

or instrumentality test. A significant question arose in the *MC Mehta* [169] case as to the inclusion of the private corporation into the expression other authorities within the definition of the State under Article 12. This question although not finally decided by the Supreme Court and left for future occasion to be determined, gave ample scope for academicians to infer a positive assertion. Another significant question in this respect is whether it is necessary to include any authority within the expression "other authorities" so as to make it amenable to the limitation of the Fundamental Rights. This was subject to further elaboration by the Supreme Court in *Unni Krishnan's* [170] Case. Further in the matter of public interest litigation the Supreme Court has extensively interpreted the definition of the State for the enforcement of Fundamental Rights.

169. AIR 1987 SC 1086.
170. AIR 1993 SC 2178.

CHAPTER - 4

JUDICIAL INTERPRETATION OF THE EXPRESSION "OTHER AUTHORITIES"

The definition of "State" is not confined to a Government Department and the Legislature, but extends to any action - administrative (whether statutory or non-statutory), judicial or quasi-judicial, which can be brought within the fold of 'State action' being action which violates a fundamental right.

Judicial decisions have given a wide scope to the expression "other authorities" in article 12. The main theory evolved is that of "instrumentality or agency" of Government. This is a concept wider than a "department of the Government". It embraces every public authority exercising statutory powers, every authority created under statute and even a non-statutory authority exercising public functions.

The ambit and scope of the expression "other authorities" under Article 12 is very wide and the development and growth of law shows that the said phrase has been interpreted more and more liberally so as to include within its sweep more and more authorities with a view to giving protection to the aggrieved persons against the actions taken by those authorities.

I. Rule of *ejusdem generis*

Article 12 winds up the list of authorities falling within the definition of the State by refering to 'other authorities' within the territory of India or under the control of the Government of India. What are those 'other authorities'? To begin with, some High Courts held that since the expression 'other authorities' is used after mentioning a few of them, namely, the government and Parliament of India, the Government and the Legislature of each of the States, and local authorities, it would be reasonable to construe

this expression *ejusdem generis* with Government or Legislature.[1] So construed, it could only mean authorities exercising governmental or sovereign powers and functions. On this interpretation, the expression, 'other authorities' would only include such bodies as are functioning for or on behalf of the Central or State Governments. This restricted interpretation of the expression 'other authorities' was however, rejected by the Supreme Court. It held that the doctrine of *ejusdem generis* was inapplicable to the interpretation of the expression 'other authorities'.To invoke the application of *ejusdem generis* rule, the court said, there must be a distinct genus or category running through these named boides nor could these bodies be placed in one single category on any rational basis.[2] Laying down these propositions in *Electricity Board, Rajasthan* v. *Mohan Lal*[3], the Supreme Court held that 'other authorities' would include all authorities created by the Constitution or statute on whom powers are conferred by law. It was not necessary that the statutory authority should be engaged in performing government or sovereign functions. In support the Court cited, Articles 19 (1) (g) and 298 which contemplate trade or business by the State and Articles 46 which requires the State to promote educational and economic interests. In these cases 'other authorities' would cover bodies created for the purpose of performing commercial activities or for promoting the educational and economic interests of the people. The court also noted that in the instant case the Rajasthan Electricity Board had power to give directions, the disobedience of which was punishable as an offence. This decision in effect overruled earlier cases holding 'university' not to be 'the State' within the meaning of Article 12.[4] Accordingly the universities have been, later, held to be 'the State'.[5]

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1. *University of Madras* v. *Shantha Bai,* AIR 1954 Mad 67; *B.W. Devdas* v. *Selection Committee,* AIR 1964 Mys 6; *Krishna Gopal* v. *Punjab University,* AIR 1966, Punj 34.
2. *Electricity Board, Rajasthan* v. *Mohan Lal,* AIR 1967 SC 1857, 1862, see also, *Ujjam Bai (Smt.)* v. *State of U.P.,* AIR 1962 SC 1857.
3. AIR 1967 SC 1857.
4. *University of Madras* v. *Shantha Bai,* AIR 1954 Mad 67; *Krishna Gopal* v. *Punjab University,* AIR 1966 Punj 34.
5. *Umesh* v. *V.N. Singh,* AIR 1968 Pat 3.

In the next important case on the subject, *Sukhdev Singh* v. *Bhagatram*[6] question arose whether statutory corporations such as the ONGC, IFC and LIC created respectively by the Oil and Natural Gas Commission Act, 1959, the Industrial

Finance Act, 1948, the Life Insurance Act, 1956, came within the definition of 'the state' under Article 12. By a majority of 4 to 1, the court held that the three corporations were State. Following the Rajasthan Electricity case, majority led by Ray, C.J., held that the three corporations were created by statutes, had the statutory power to make binding rules and regulations, and were subject to pervasive governmental control. They were, therefore, 'other authorities' within the meaning of Article 12. Mathew, J. concurring, held that the public corporation is a new type of institution which sprang from the new social and economic functions of government and instead of classifying it into old legal category, it should be adapted to the changing times and conditions. The State, being an abstract entity, could undertake trade or business as envisaged under Article 298 through an agency, instrumentality or a juristic person. Statutory corporations are agencies or instrumentalities of the State for carrying on trade or business which otherwise would have been carried out by the State departmentally. Therefore, it has to be seen whether a body is acting as an agency or instrumentality of the State. Whether it is so acting or not could be determined on the sole criterion of existence of sovereign power to pass laws or regulations having the force of law. Nor could it be determined exclusively on the basis of the extent of State control or the amount of financial support. State financial support plus an unusual degree of control over the management and policies could be one indicator of the character of the body. The other indicator was the kind of function the body was performing. 'The combination of State aid and the furnishing of an important public service', he said, "may result in a conclusion that the operation should be classified as a State agency".

In Article 12 the expression 'other authorities' is used after mentioning

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6. AIR 1975 SC 1331.

a few of them, such as, the Government and Parliament of India, the Government and Legislature of each of the States and all local authorities. In *University of Madras* v. *Santa Bai*,[7] the Madras High Court held that 'other authorities' could only indicate authorities of a like nature, i.e *ejusdem generis*. So construed, it could only mean authorities exercising governmental or sovereign functions. It cannot include persons, natural or juristic, such as a University unless it is maintained by the State' But in *Ujjamm Bai* v. *State of U.P.*,[8] the Court rejected this restrictive interpretation of the expression 'other authorities' given by the Madras High Court and held that the *ejusdem generis* rule could not be resorted to in interpreting this expression.

In Article 12 the bodies specially named are the Government, of the Union and the States, the Legislature of the Union and the States and local Authorities. There is no common genus running through these named bodies nor can these bodies so placed in one single category on any rational basis.

II. Statutory Corporations

In *Electricity Board, Rajasthan* v. *Mohan Lal*,[9] the Supreme Court held that the expression 'other authorities' is wide enough to include all authorities created by the Constitution or Statute on whom powers are conferred by law. It is not necessary that the statutory authority should be engaged in performing governmental or sovereign function. On this interpretation the expression 'other authorities' will include *Rajasthan Electricity Board,* [10] *Cochin Devasom Board* [11], *Co-operative Society*[12], Which have power to make bye-laws under Co-operative Societies Act, 1911. The Chief Justice of High Court is also included in the expression 'other authorities' as he has power to appoint officials

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7. AIR 1954 Mad. 67.
8. AIR 1962 SC 1621
9. AIR 1967 SC 1857, followed in *Umesh* v. *V.N. Singh,* AIR 1968 Pat. 3
10. *Electricity Board, Rajasthan,* v. *Mohan Lal,* AIR 1967 SC 1857
11. *P.B.M. Namboodripad* v. *Cochin Devasom Board,* AIR 1956 TC 19
12. *Dukhoram* v. *Co-operative Agricultural Association,* AIR 1961 MP 219.

of the *Court.*[13] The President[14] when making order under Article 359 of the Constitution comes within the ambit of the expression 'other authorities'. In effect, the *Rajasthan Electricity Board's* decision[15] has overruled the decision of the Madras High Court in *Santa Bai's* case, holding a University not to be "the State". And finally, the Patna High Court, following the decision of the Supreme Court, has held that the Patna University is a "State"[16].

In the above mentioned case[17], the court was of the opinion that the dictionary meaning of the word "authority was a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue producing public enterprise. This dictionary meaning of the word "authority" was clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out government or quasi-governmental functions. The expression "other authorities" was thus wide enough to include within it every authority created by a statute and functioning within the territory if India, or under the control of the Government of India, and there was no reasons to narrow down this meaning in the context in which the words "other authorities" were used in Article 12 of the Constitution[18].

The expression "other authorities ' in Article 12 will thus include all constitutional or statutory authorities on whom powers are conferred by law. It was not at all material that some of the powers conferred on the authority may be for the purpose of carrying on commercial activities for under the Constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Article 19(1) (g). In Part IV, the word "State' has been given the same meaning as in Article 12 and one of Directive Principles laid down in Article 46 is that the State shall promote with special care the educational and economic interest of the weaker sections of the people. The

13. *Parmatma Saran* v. *Chief Justice,* AIR 1964 Raj. 13.
14. *Harroobhai* v. *State,* AIR 1964 Guj. 229.
15. AIR 1967 SC 1857
16. *Umesh* v. *V.N. Singh,* AIR 1968 Pat. 3
17. AIR 1967 SC 1857.
18. *Ibid*

State as defined in Article 12, was thus comprehended to include bodies created for the purpose of promoting the educational and economic interest of the people. The State, as constituted by our constitution, was further specifically empowered under Article 298 to carry on any trade or business. The circumstance that the Board under the Electricity Supply Act was required to carry on some activities of the nature of trade or commerce does not, therefore, give any indication that the Board must be executive from the scope the word 'State' as used in Article 12. On the other hand, there are provisions in the Electricity Supply Act which clearly show that the powers conferred on the Board include power to give direction, the disobedience of which is punishable as a criminal offence. *The Rajasthan Electricity Board* was clearly an authority to which the provisions of Part III of the Constitution were applicable[19].

In Article 12 of the Constitution, the bodies specifically named are the Executive Governments of the Union and the States, the Legislatures of the Union and the States and local authorities. There was not any common genus running through these named bodies nor can these bodies be placed in one single category on any rational basis. The doctrine of *ejusdem generis* could not, therefore, be applied to the interpretation of the expression other authorities in this Article[20].

The Board was invested by statutes with extensive power of control over electricity undertakings. The power to make rules and regulations and to administer the Act was in substance the sovereign power of the State delegated to the Board. The Board was thus an "other authority" within the meaning of Article 12 of the Constitution[21].

Every constitutional or statutory authority on whom powers are conferred by law is however not "other authority" within the meaning of Article 12. The expression "authority" in its etymological sense means a body invested with power to commmand or give an ultimate decision, or enforce obedience, or having a legal right to command and be obeyed[22].

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19. *Ibid*
20. *Ibid.*
21. *Ibid* at 1858,
22. *Ibid*

In determining what the expression "other authority" in Article 12 connotes, regard must be had not only to the sweep of fundamental rights over the power of the authority, but also to the restriction which may be imposed upon the exercise of certain fundamental rights (e.g. those declared by article 19) by the authority. Fundamental rights within their allotted fields transcend the legislative and executive power of the sovereign authority. But some of the important fundamental rights are liable to be circumscribed by the imposition of reasonable restrictions by the State. The true content of the expression "other authority" in Article 12 must be determined in the light of this dual phase of fundamental rights. In considering whether a statutory or constitutional body is an authority within the meaning of Article 12, it would be necessary to bear in mind not only whether against the authority, fundamental rights in terms absolute are intended to be enforced, but also whether it was intended by the Constitution-makers that the authority was invested with the sovereign power to impose restrictions on very important and basic fundamental freedoms[23].

Those authorities which are invested with sovereign power i.e. power to make rules or regulations and to administer or enforce them to the detriment of citizens and others, fall within the definition of 'State' in Article 12, and constitutional or statutory bodies which do not share that sovereign power of the State are not, 'State' within the meaning of Article 12 of the Constitution[24].

The fact of the case[25] was that the appellant was Electricity Board of Rajasthan, Jaipur, a body corporate constituted on 1st July 1957, under the Electricity (supply) Act, 1948 (No. 54 of 1948). Before the constitution of the Board, the supply of electricity in the State of Rajasthan was being controlled directly by a department of the State Government named as the Electrical and mechanical Department. Respondent No. 1, Mohan Lal, as well as respondents 4 to 14 were all permanent employees of the State Government holding posts of foremen in the Electrical and Mechanical Department[26].

23. *Ibid.*
24. *Ibid.*
25. *Ibid* at 1859.
26. *Ibid.*

On the constitution of the Board, the services of most of the employees, including all these respondents, were provisionally placed at the disposal of the Board by a notification issued by the government on 12th February 1958, purporting to exercise its power under S. 78-A of Act 54 of 1948. In this notification a direction was included that the Board was to frame its own new grades and service conditions under its regulations, and the employees, whose service, were transferred to the Board, were exercise option either to accept these new grades and service conditions, or to continue in their existing grades and service condition, except in regard to conduct and disciplinary rules, or to obtain relief from Government service by claiming pension or gratuity as might be admissible on ambition of posts under the Rajasthan Service Rules. The Board, however, did not frame any new grades and service conditions at least up to the time that the present litigation arose. Respondent No. 1 was, however, deputed by the State Government by its order, dated 27th January 1960, after having worked under the Board for a period of about two years, to the public works department of the Government. On 10th August 1960, an order was made by the Government addressed to the Secretary of the Board indicating that respondent No. 1 as well as respondent 4 to 14 were to be treated as on deputation to the Board. on 24th November 1962, the Public Works department passed an order reverting respondent No. 1 to his parent department with effect from 1st December 1962, but the period of deputation was later extended till 25th July 1963. On 11th July 1963, he was actually reverted to the Board from the Public Works Department and the Board issued orders posting respondent No 1 as a Foreman. In the interval, while respondent No. 1 was working in the public Works department, respondents 4 to 14 had been promoted by the Board as Assistant Engineers, while respondent No. 1 was promoted to work as Assistant Engineer in the Public Works Department. On his reversion, respondent No. 1 claimed that ha was also entitled to be promoted as Assistant Engineer under the Board, because some of the other respondents promoted were Junior to him, and, in the alternative, that, in any case, he was entitled to be considered for promotion. This request made by him to the Board as well as to the State Government was turned down and, thereupon, respondent No. 1

field a petition under articles 226 and 227 of the Constitution in the High Court of Rajasthan. Respondent no.1 claimed that he was entitled to equality of treatment with respondents 4 to 14, and, inasmuch as he had not been considered for promotion with them by the Board had acted in violation of Arts. 14 and 16 of the Constitution[27].

The Board contested the petition on two grounds. The first ground was that respondent No. 1 had never become a permanent servant of the Board and never held any substantive post under it, so that he could not claim to be considered for promotion with respondents 4 to 14. The second ground was that the Board could not be held to be 'State' as defined in Art. 12 of the Constitution and, consequently, no direction could be issued to the Board by the High Court under Art. 226 or Art. 227 of the Constitution on the basis that the actions of the Board had violated Arts. 14 to 16 of the Constitution. The High Court rejected both these grounds, accepted the plea of respondent No. 1 quashed the order of promotion of respondents 4 to 14 and issued a direction to the Board to consider promotions afresh after taking into account the claims of respondent No. 1. The Board has now come up in appeal to this court, by special leave, against this order of the High Court. Apart from the Board, the State of Rajasthan, and the Chief Engineer and Technical member of the Rajasthan State Electricity Board, Jaipur, were also impleaded as opposite parties in the writ petition and they are respondents 2 and 3 in this appeal[28].

On the first question, Mr. S.T.Desai on behalf of the appellant drew the attention to the notification, dated 12the February 1958, in which it was specifically laid down that the services of respondent No. 1 and respondents 4 to 14 were being placed at the disposal of the Board 'provisionally'. He has shown the various pleadings in the petition filed by respondent No.1 before the High Court was that he never became a permanent servant of the Board and was claiming that, after the winding up of the Electric and Mechanical Department of the Government, he was temporarily with the Board and, later,

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27. *Ibid* at 1860.
28. *Ibid.*

became a permanent servant of the State in the Public Works Department. The High Court, on the other hand, held that the pleadings of respondent No. 2 were obscure and that the correct position was that respondent No.1 had become an employee of the Board, so that he was entitled to claim promotion in the service of the Board[29].

There was no doubt that the respondent No. 1 had put forward the case that he was originally a servant of the State of Rajasthan and continued to be such throughout and retained his lien on that Government Service. In Para 27 an alternative pleading was also put forward on his behalf that, if it be held that, on the abolition of the Electrical and Mechanical Department of the State, he had no lien with the Government and his services were permanently transferred to the Board, he was placed in identical circumstances as the other respondents 4 to 14 and continued to be governed by the service conditions which were applicable to him when he was in the service of State Government, so that he was entitled to be considered for promotion with respondents 4 to 14, It is also correct that, initially, when the services of the various respondents were placed at the disposal of the Board, the Government purported to do so provisionally, and at no later stage did the Government pass any order transferring their services to the Board, permanently. It, however, appears that both the Government and the Board, in dealing with respondent No.1 as well as the other respondents, treated them as if they had become employees of the Board.

The services of respondent No.1 were placed at the disposal of the Public Works Department where he remained for a period of a little over there years, but he was all the time treated there as on deputation. At that time, in the order posting him to the Public Works Department, it was laid down that he would retains his lien in the power Department. According to Mr, Desai, the Power Department mentioned in this order was meant to refer to the Electrical and Mechanical Department of the Government which used to be popularly known by that name. It was found in the judgment of the High Court that the

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29. *Ibid.*

High Court attempted to gather the meaning of the expression "Power Department" by questioning the counsel for the Board and the Officer-in charge of the Board who appeared before the High Court and was able to discover that there is no Power Department existing as such and that this was just another name for the State Electricity Board. On this view of the High Court, the order of the Government, dated 27th January 1960, would indicate that the lien of respondent No.1 was on a post under the Board. Further, when respondent No. 1 was relieved from the post of Assistant Engineer in the Public Works Department, the order which the Government passed specifically mentioned that he was taken on deputation from the Board and directed his reversion to his parent department[30].

In the order of reversion, respondent No. 1 was thus treated as an employee of the Board which was described as his parent department and from which he had been taken on deputation in the Public Works Department. Even the Board itself, in its order, dated 11th July 1963, proceeded on the basis that respondent No.1 had reverted from the Public Works Department and made a direction that, on reversion from that Department, he was posted as Foreman I. Chambel Grid Sub-Station, Udaipur, against a newly sanctioned post. Thus, the Board accepted the position that respondent No.1 was a servant of the Board and not an employee of the State Government in the Public Works Department. The 'reversion' used in the order clearly implied that, even according to the Board, Respondent No. 1 was being sent back to his parent department from a department where he had been sent on deputation or temporarily. A further consideration is that respondents Nos. 4 to 14 were treated by the Board as its permanent employees and were actually granted promotion to the posts of Assistant Engineers from the post of Foremen on that basis. In the cases of these respondents also, there is nothing to show that, after their services were provisionally placed at the disposal of the Board by the notification, dated 12th February 1958, any order was passed permanently transferring them to the Board and, yet they were treated as permanent

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30. *Ibid.*

employees of the Board. Respondent No. 1 was identically placed, and, in these circumstances, we are unable to hold that the High Court committed any error in holding that respondent No. 1 was in the service of the Board just as were respondents 4 to 14[31].

The notification, dated 12th February 1958, had specifically laid down that the Board was to frame its new grades and service conditions and one of the alternatives to be given to each employee, whose services were placed at the disposal of the Board, was either to be governed by these new grades and service conditions, or to continue to be governed by the grades and service conditions already applicable to them when they were in the Electrical and Mechanical Department. Since the Board did not frame any new grades or new service conditions, it is clear that respondent No. 1 as well as respondent 4 to 14 continued to be governed by the old grades and service conditions applicable to them when they were servants of the State Government in the Electrical and Mechanical Department where they were all serving as foreman. All of them being governed by identical rules, it is clear that respondent No. 1 was entitled to be considered for promotion under the Board on the basis of equality with respondents Nos. 4 to 14[32].

On the second point that the Board cannot be held to be 'State' within its meaning in Art. 12 of the Constitution, Mr. Desai urged that, on the face of it, the Board could not be held to be covered by the authorities named therein, viz, the Government and Parliament of India and the Government and the Legislature of each of the State and local authorities, and the expression "other authorities", if read *ejusdem generis* with those named, cannot cover the Board which is a body corporate having a separate existence and has been constituted primarily for the purpose of carrying on commercial activities. In support of his position that the expression "other authorities" should be interpreted *ejusdem generis*, he relied on a decision of the madras High Court in *University of Madras v. Shantha Bai*[33]. The High Court, considering the question whether a

31. *Ibid.*at 1861.

32. *Ibid*

33. AIR 1954 Mad 67.

University can be held to be local or other authority as defined in Art. 12, held:

> These words must be construed '*ejusdem generis*' with Government or legislature, and, so construed, can only mean authorities exercising governmental functions. They could not include persons natural or juristic who cannot be regarded as instrumentalities of the Government. The University of Madras is a body corporate created by Madras Act 7 of 1923. It is not charged with the execution of any governmental functions; its purpose is purely to promote education. Though S. 44 of the Act provides for financial contribution by the local government, the University is authorized to raise its own funds of income from fees, endowments and the like. It is a State-aided institution, but it is not maintained by the State[34].

In B.W.Devadas v. Selection Committee for Admission of Student to the Karnatak Engineering College[35], the High Court of Mysore held:

> The term 'authority" in the ordinary dictionary sense may comprise not merely a person or a group of persons exercising governmental power, but also any person or group of persons who, by virtue of their position in relation to other person or persons, may be able to impose their will upon that other person or persons. But there is an essential difference between a political association of persons called "the State" giving rise to political power connoted by the well known expression "imperative law" and a non-political association of persons for other purposes by contract, consent or similar type of natural understanding related to the common object of persons so associating themselves together giving rise to a power which operates not in the manner in which imperative law operates,

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34. *University of Madras v. Shantha Bai,* AIR 1954 Mad 67, quoted in *Electricity Board, Rajasthan v. Mohan Lal,* AIR 1967 SC 1857 at 1861.

35. AIR 1964 Mys 6.

> but by virtue of its acceptance by such associating persons based upon contract, consent or mutual understanding[36].

Proceeding further, the Court held :

> The term "authorities" occurring in Art. 12 could only mean a person or a group of persons who exercise the legislative or executive functions of a State or through whom or through the instrumentality or whome the State exercises its legislative or executive power[37].

In *Krishan Gopal Ram Chand Sharma v. Punjab University*[38], where the decision given in the case of *University of Madras*[39], was followed and the principle laid down therein was approved and applied. On the basis of these decisions, and the principles laid down therein, it was urged that an examination of the provisions of the Electricity Supply Act will show that the Board is an autonomous body which cannot be held to be functioning as an agent of the executive Government and, consequently, it should be held that it is not "State" within the meaning of Article 12 of the Constitution[40].

The High Courts fell into an error in applying the principle of *ejusdem generis* when interpreting the expression "other authorities" in Article 12 of the Constitution, as they overlooked the basic principle of interpretation that, to invoke the application of *ejusdem generis* rule, there must be a distinct genus or category running through the bodies already named. Craies on Statute Law Summarizes the principle as follows :

> The *ejusdem generis* rule is one to be applied with caution and not pushed too far ..... To invoke the application of

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36. *B.W.Devadas v. Selection Committee for Admission of Student to the Karnatak Engineering College*, AIR 1964 Mys 6, quoted in *Electricity Board, Rajasthan v. Mohan Lal*, AIR 1967 SC 1857 at 1861.
37. *Ibid.*
38. AIR 1966 Punj 34.
39. AIR 1954 Mad 67
40. *Krishan Gopal Ram Chand Sharma v. Punjab University*, AIR 1966 Punj 34, quoted in *Electricity Board, Rajasthan v. Mohan Lal*, AIR 1967 SC 1857 at 1862

> the *ejusdem generis* rule there must be a distinct genus or category. The specific word must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply, but the mention of a single species does not constitute a genus[41].

Maxwell in his book on Interpretation of Statutes' explained the principles by saying :

> But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words ..... Unless there is a genus or category, there is no room for the application of the *ejusdem generis* doctrine[42].

In *Smt. Ujjam Bai v. State of Uttar Pradesh*[43], .Ayyangar, J., interpreting the words "other authorities" in Art. 12, held :

> Again , Art. 12 winds up the list of authorities falling within the definition by referring to "other authorities" within the territory of India which cannot obviously be read as *ejusdem generis* with either the Government and the Legislatures or local authorities. The words are of wide amplitude and capable of comprehending every authority created under a statute and functioning within the territory of India or Under the control of the Government of India. There is no characterization of the nature of the "authority" in this residuary clause and consequently it must include every type of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those laws[44].

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41. Craies on *Statute Law*, 6th ed. at 181.
42. Maxwell on *"Interpretation of Statutes"*, 11th ed. at 236, 237.
43. AIR 1962 SC 1621
44. *Smt. Ujjam Bai v. State of Uttar Pradesh,* AIR 1962 SC 1621, quoted in *Electricity Board, Rajasthan v. Mohan Lal,* AIR 1967 SC 1857 at 1862

In *K.S Ramamurthy Reddiar v. The Chief Commissioner, Pondicherry*[45] the Court, dealing with Art, 12, held:

> Further, all local or other authorities within the territory of India include all authorities within the territory of India whether under the control of the Government of India or the Governments of various States and even autonomous authorities which may not be under the control of the Government at all[46].

These decisions of the Court support the view that the expression "other authorities" in Art, 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities. Under the Constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Art, 19(1) (g). In Part IV, the State has been given the same meaning as in Art. 12 and one of Directive Principals laid down in Art. 46 is that the State shall promote with special care educational and economic interests of the weaker sections of the people. The State, as defined in art. 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people. The State, as constituted by our Constitution, is further specifically empowered under Art. 298 to carry on any trade or business. The circumstance that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does not, therefore, give any indication that the Board must be excluded from the scope of the word "State" as used in Article 12. On the other hand, there are provisions in the Electricity Supply Act, which clearly show that the powers conferred on the Board include power to give directions, the disobedience of which is punishable as a criminal offence. The

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45. AIR 1963 SC 1464.
46. *K.S Ramamurthy Reddiar v. The Chief Commissioner, Pondicherry,* AIR 1963 SC 1464, quoted in *Electricity Board, Rajasthan v. Mohan Lal,* AIR 1967 SC 1857 at 1863.

Board was clearly an authority to which the provisions of part III of the Constitution were applicable[47].

The Court further held that the Board was an authority invested by statute with certain sovereign power of the State. It had the power of promoting co-ordinated development, generation, supply and distribution of electricity and for that purpose to make, alter, amend and carry out schemes under Chap. V of the Electricity (Supply) Act. 1948 to engage in certain incidental undertaking to organize and carry out power and hydraulic surveys to conduct investigation for the improvement of the methods of transmission to close down generating stations; to compulsory purchase generating stations, undertaking mains and transmission lines; to place wires, poles, brackets, appliances, apparatus, etc. to fix grid tariff; to issue directions for securing the maximum economy and efficiency in the operation of electricity undertakings; to make rules and regulations for carrying out the purpose of the Act ; and to issue directions under certain provisions of the Act and to enforce compliance with those directions. The Board was also invested by statute with extensive powers of control over electricity undertakings. The power to make rules and regulations and to administer the Act was in substance the sovereign power of the State delegated to the Board. The Board was, in the opinion of the Court, "other authority" within the meaning of Art. 12 of the Constitution[48].

The expression "authority" in its etymological sense means a body invested with power to command or give an ultimate decision, or enforce obedience, or having a legal right to command and be obeyed[49].

The expression 'State' is defined in Art. 12 for the purpose of Part III of the Constitution. Article 13 prohibits the State from making any legislative or executive direction, which takes away or abridges the rights conferred by Part III and declares any law or executive direction in contravention of the injunction void to the extent of such contravention. In determining what the

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46. *Electricity Board, Rajasthan v. Mohan Lal,* AIR 1967 SC 1857 at 1863.

48. *Ibid.*

49. *Ibid.*

expression "other authority" in Art. 12 connotes, regard must be had not only to the sweep of fundamental rights over the power of the authority, but also to the restrictions which may be imposed upon the exercise of certain fundamental rights (e.g., those declared by Art. 19) by the authority. Fundamental rights within their allotted fields transcend the legislative and executive power of the sovereign authority. But some of the important fundamental rights are to be circumscribed by the imposition of reasonable restrictions by the State[50].

In *Sukhdev Singh* v. *Bhagatram,*[51] the Supreme Court following the text laid down in *Electricity Board Rajasthan's*[52] case by 4:1 majority, (Alagiriswamy, J dessenting) held the Oil and Natural Gas Commission, Life Insurance Corporation and Industrial Finance Corporation, are authorities within the meaning of Article 12 of the Constitution and therefore, they are 'State'. All three statutory Corporations have power to make regulations under the statute for regulating conditions of service of their employees. The rules and regulations framed by the above bodies have the force of law. The terms of contract with a particular employer is prescribed by the statute itself. These regulations are binding on these bodies. The employees of these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. The employment when their dismissal or removal is in contravention of statutory provisions. The employees are entitled to claim protection of Articles 14 and 16 against the Corporation .

Mathew, J., in a separate but concurring judgement, preferred a broader test that if the functions of the Corporation are of public importance and closely related to government and hence a 'State' within the ambit of Article 12 of the Constitution. The effect of these decisions was that the 'authorities not created by the Constitution or by a statute could not be a 'State' within the meaning of Article 12 of the Constitution. This was a very restrictive interpretation of the expression 'other authorities' under Article 12 of the Constitution.

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50. *Ibid* at 1864.
51. AIR 1975 SC 1331.
52. AIR 1967 SC 1857.

III. Agency or Instrumentality of Government

The Supreme Court has given a broad and liberal interpretation to the expression 'other authorities' in Article 12, With the changing role of the State form merely being a police State to a Welfare state it was necessary to widen the scope of the expression "authorities" in Article 12 so as to include all those bodies which are, though not created by the Constitution or by a Statute, are acting as agencies or instrumentalities of the Government. In modern times a government has to perform manifold functions. For this purpose it has to employ various agencies to perform these functions. The court has, therefore, rightly taken the view that such juridicial persons acting as the instrumentality or agency of the government must be subject to the same restrictions as the state.

In *Airport Authority's* case,[53] Bhagawati, J. preferred, and rightly, observed the test as suggested by Mathew, J. , in *Sukhdev* v. *Bhagatram*[54] case. In this case the Court has held that if a body is an agency or instrumentality of government it may be an 'authority' within the meaning of Article 12 whether it is a statutory corporation, a government company or even a registered society. Accordingly, it was held that the International Airport Authority which had been created by an act of Parliament was the "State" within the meaning of Article 12 whether it is a statutory corporation, a government company or even a registered society. Accordingly, it was held that the International Airport Authority which had been created by an Act of Parliament was the 'State' within the meaning of Article 12 . The Central Government has power to appoint the Chairman and other members of the Airport Authority. It has power to terminate the appointment of any member form the board. The capital needed by it was provided only by the Central Government. But what is the test whether a body is an agency or instrumentality? The court laid down the following

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53. *Ramana Dayaram Shetty* v. *The International Airport Authority of India,* AIR 1979 SC 1628.

54. AIR 1975 SC 1331.

tests for determining whether a body is an agency or instrumentality of the Government:

(1) financial resources of the State is the Chief fundign source, i.e if the entire share capital of the corporation is held by Govenment,

(2) existence of deep and pervasive State Control,

(3) functional character being governmental in essence, i.e if the functions of the corporation are of public importance and closely related to governmental functions,

(4) if a department of Government is transferred to a corporation,

(5) whether the corporation, enjoys monopoly status which is State Conferred or State protected.

However, the Court said that these tests are not conclusive but illustrative only and will have to be used with care and caution.

The question before the Court, in this case[55] was whether the International Airport Authority of India was 'State' within the meaning of Article 12 so as to be subjected to enforcement of fundamental rights against it. Examining this aspect, Bhagwati, J., as he then was, spoke for the three Judge Bench thus[56]:

> Now it is obvious that the government, which represents the executive authority of the State, may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. In the early days, when the government had limited functions it could operate effectively through natural persons constituting its civil service and they were found

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55. AIR 1979 SC 1628.

56. *Ramana Dayaram Shetty v. International Airport Authority of India,* AIR 1979 SC 1628, quoted in *Tekraj Vasandi v. Union of India,* (1988) 1 SCC 236 at 247.

adequate to discharge governmental functions, which were of traditional vintage. But as the tasks of the government multiplied with the advent of the Welfare State, it began to be increasingly felt that the framework of civil service was not sufficient to handle the new tasks, which were often of specialized and highly technical character. ..... As early as 1819 the Supreme Court of the *United States in Mac Cullough V. Maryland*[57] held that the Congress has power to charter corporations as incidental to or in aid of governmental functions, and, as pointed out by Mathew, J., in *Sukhdev v. Bhagatram*[58] such federal corporations would ex-hypothesi be agencies of the government. In Great Britain too, the police administration through separate corporations was gradually evolved and the conduct of basic industries through giant corporations has now become a permanent feature of public life.

So far as India is concerned, the genesis of the emergency of corporations as instrumentalities or agencies of government is to be found in the Government of India resolution on Industrial policy dated April 6,1948 where it was stated *inter alia* that "management of State enterprise will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this". It was in pursuance of the policy envisaged in this and subsequent resolutions on industrial policy that corporations were created by government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by government departmentally

57. 4 Wheat 315.

58. AIR 1975 SC 1331.

> through its service personnel but the instrumentality or agency of the corporations was resorted to in these cases having regard to the nature of the task to be performed.
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> The corporations acting as instrumentality or agency of government would obviously be subject to the same limitations in the field of constitutional and administrative law as government itself, though in the eye of the law, they be distinct and independent legal entities. If government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that government acting through the instrumentality or agency of corporations should equally be subject to the same limitations. But the question is how to determine whether a corporation is acting as instrumentality or agency of government. It is a question not entirely free from difficulty.

It was again pointed out in the same case that[59]:

A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860. Where a corporation is wholly controlled by government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of government[60].

The Court further stated:

> But the public nature of the function, if impregnated with governmental character or "tied or entwined with government" or fortified by some other additional factor, may render the

59. *Ramana Dayaram Shetty v. International Airport Authority of India,* AIR 1979 SC 1628, quoted in *Tekraj Vasandi v. Union of India,* (1988) 1 SCC 236 at 248.

60. *Ibid.*

> corporation an instrumentality or agency of government. Specifically, if a department of government is transferred to a corporation, it would be a strong factor supportive of this inference[61].

It will thus be seen that there are several factors, which may have to be considered in determining whether a corporation is an agency or instrumentality of government. We have referred to some of these factors and they may be summarized as under: Whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance, whether there is any other form of assistance, given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions. This particularization of relevant factors is however not exhaustive and by its very nature it cannot be, because with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relations between the corporation and government calling for flexibility and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a corporation is governmental instrumentality or agency.

The Court proceeded to consider whether International Airport Authority of India could be said to be an 'authority' falling within the meaning of 'State' in Article 12. The constitution of the body, the manner of filling it up, government's power of control in the matter of appointment of members and termination of membership were utilized for examining whether the Airport Authority was 'State. After referring to the special aspects, the court observed[62]:

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61. *Ibid.* at 249.

62. *Ibid.*

It will be seen from provisions that there are certain features of respondent I which are eloquent and throw considerable light on the true nature of respondent 1. In the first place, the chairman and members of respondent 1 are all persons nominated by the Central Government and the Central Government has also the power to terminate their appointment as also to remove them in certain specified circumstances. The Central Government is also vested with the power to take away the management of any Airport from respondent 1 and to entrust it to any other person or authority and for certain specified reasons, the Central Government can also supersede respondent 1. The Central Government has also power to give directions in writing from time to time on questions of policy and these directions are declared binding on respondent 1.

Reference was made to the case of *Subhajit Tewary*[63]. *Bhagwati, J.* referring thereto stated :

> This decision does not lay down any principle or test for the purpose of determining when a corporation can be said to be an 'authority'. If at all any test can be gleaned from the decision, it is whether the corporation is " really an agency of the government[64].

And ultimately it was held that the authority was "State" under article 12.

In *Som Prakash* v. *Union of India,*[65] the court held that a government company (Bharat Petroleum Corporation) fell within the meaning of the expression ' the state' used in Article 12. The expression 'other authorities' will include all constitutional or statutory authorities on whom powers are conferred for the purpose of carrying commercial activities or bodies created for the purpose of promoting economic activities. The expression 'other authorities' is not confined only to statutory corporations alone but my include

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63. AIR 1975 SC 1329.
64. *Subhajit Tewary v. Union of India,* AIR 1975 SC 1329, quoted in *Tekraj Vasandi v. Union of India* (1988). 1SCC 236 at 250.
65. AIR 1981 SC 212.

a government company, a registered society, or bodies which have some nexus with government.

Similarly, in *Star Enterprises* v. *C.T.D.C. of Maharashtra Ltd.*,[66] it has been held that a government company under section 617 of the Companies Act constituted as the Development Authority under the Maharashtra State Town Planning Act, 1966 is a 'State' within the meaning of Article 12 and therefore in its dealings with the citizens of India it would be required to act within the Rule of Law and would not be permitted to conduct its activity arbitrarily.

In *U.P Warehousing Corporation* v. *Vijai Narain*,[67] it was held that the U.P Warehousing Corporation which was constituted under a statute and owned and controlled by the Government was an agency or instrumentality of the Government and therefore, "the State" within the meaning of Article 12. Its employees have a statutory status and therefore in case of wrongful dismissal of an employee a writ could be issued against such body. Chinnappa Reddy, J., agreeing with majority, in his separate judgement summed up the position as follow:

> I find very hard indeed to discover any distinction on principle between a person under the employment of an agency or instrumentality of the government or a corporation set up under statute or incorporated but wholly owned by the Government. The function of the State has completely changed. It is a welfare state which has resulted in inter se governmental activity in manifold ways. Its activities have touched many aspects of a citizen's life. ..... The Government, its agencies and instrumentalities, corporation set by it or owned by it have thus become the biggest employers in the country. There is no reason why, if government is bound to observe the equality

66. (1990) 3 SCC 280
67. (1980) 3 SCC 459

clauses of the Constitution in the matter of employment, should not be equally bound. It is therefore right and the independence and integrity of those employed in the public sector should be secured as much as the independence and integrity of civil servants[68].

IV. Registered Societies

In *Ajay Hasia* v. *Khalid Mujib,*[69] it has been held that a Society registered under the Societies Registration Act, 1898, is an agency or "instrumentality of the State" and hence a 'State' within the meaning of Article 12. Its composition is determined by the representatives of the Government. The expenses of society are entirely provided by the Central Government. The rules made by the society require prior approval of the State and Central Government. The society is to comply with all directions of the Government. It is completely controlled by the Government. The Government has power to appoint and remove the members of the society. Thus, the State and the Central Government have full control of the working of the society. In view of these elements the society is an instrumentality of the State or the Central Government and it is therefore an "authority" within the meaning of Article 12. The test is not as to how the juristic person is created but why it has been brought into existence. A corporation may be statutory corporation created by a statute or a government company formed under the Companies Act, 1956, or a Society registered under the Societies Registration Act, 1960, or any other similar statute. It would be an 'authority' within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the case in the light of the relevant factors.

In *B. S. Minhas* v. *Indian Statitical Institute,*[70] it has been held that the Indian Statistical Society, a society Registered under the Societies Registration

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68. AIR 1980 SC 480 at 489.
69. AIR 1981 SC 487.
70. (1983) 4 SCC 582 following *Ajay Hasia* v. *Khalid Mujib,* AIR 1981 SC 487.

Act, 1860 being under the complete control of Government of India is an instrumentality of the Central Government and therefore an "authority" within the meaning of Article 12 of the Constitution. Accordingly, a writ petition under Article 32 against the Institute for violation of fundamental rights is maintainable. Similarly, the court held that the Indian Council of Agricultural Research is a society registered under the Societies Registration Act, is an instrumentality of Central Government, and an "authority" within the meaning of Article 12 and, therefore, amenable to writ-jurisdiction under Article 32 of the Constitution[71].

In *Monmohan Singh Jaitla* v. *Commissioner, Union Territory of Chandigarh,*[72] the Court following *Ajay Hasia's* case held that an aided school which received a Government grant of 90 percent was an "authority" within the meaning of Article 12. Similarly, it has been held that the *Food Corporation of India*[73] the *Steel Authority of India,*[74] *Bihar State Electricity Board,*[75] *Indian Oil Corporation,*[76] are the 'State' within the meaning of 'other authorities' under Article 12 as they are instrumentalities of the State. In *AISSF Association* v. *Defence Minister-cum- Chairman, B.O.G.S.S. Society,*[77] it has been held that Sainik School Society is the "state" and amenable to writ jurisdiction of the Court The entire fund is given by the State Government and the Central Government. The overall control vests in the Governmental authority.

In *S.M. Ilyas* v. *ICAR*[78], it has been held that the Indian Council of Agricultural Research is a State within the meaning of Article 12 of the Constitution.

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71. *P.K. Ramchandra Ayer* v. *Union of India,* (1984) 2 SCC 142.
72. (1984) Supp. SCC 540.
73. *Workmen Food Corporation of India* v. *M/S Food Corporation of India,* AIR 1985 SC 670 (1985) 2 SCC 136.
74. *Bihar State Harijan Kalyan Parishad* v. *Union of India* (1985) 2 SCC 644.
75. *Surya Narain Yadav* v. *B.S.F. Board,* AIR 1985 SC 941.
76. *Mahabir Auto Stores* v. *Indian Oil Corporation,* (1990) 3 SCC 752.
77. AIR 1989 SC 88
78. (1993) 1 SCC 182

In *Central Inland Water Transport Corporation* v. *Brojo Nath Ganguly,*[79] the Court applied the above test and held that the Central Inland Water Transport Corporation, a Government company which was wholly owned by the Central Government and managed by Chairman and Board of Directors appointed and remove by Central Government was "the State" within the meaning of Article 12 and therefore an instrumentality or agency of the State. It is nothing but the Governmental functions of vital public importance through the instrumentality of a Government Company. If there is an instrumentality or agency of the State which has assumed the grab of a Government Company as defined in Section 617 of the Companies Act, it does not follow that it thereby ceases to be an instrumentality or agency of the State.

In *Sheela Barse* v. *Secretary, Children's Aid Society,*[80] the court held that the Children's Aid Society, Bombay registered under the Societies Registration Act. 1860 was an instrumentality of the State and fell within the expression 'the state' within the meaning of Article 12. It is a Public Trust under the Bombay Public Trusts Act of 1950. The Chief Minister of the State is its ex-officio President. The Society receives grants from the State.

In *M.C. Mehta* v. *Union of India,*[81] the important question which was raised before the Court was whether a private corporation fell within the ambit of Article 12. Although the question whether a private corporation fell within the ambit of Article 12 was not finally decided by the Court, but it stressed the need to do so in future.

In *Sri Kona Seema Co-operative Central Bank Ltd.* v. *N. Seetharama Raju,*[82] it has been held that the Co-operative Bank registered under the A.P Co-operative Societies Act is not 'State' within the meaning of Article 12.

In *Tekraj Vasandi* v. *Union of India,*[83] it has been held that the "Institute

79. (1986) 3 SCC 156.
80. (1987) 3 SCC 50.
81. (1987) 1 SCC 395.
82. AIR 1990 A.P. 171.
83. (1988) 1 SCC 236.

of Constitutional and Parliamentary Studies", a society registered under the Societies Registration Act, 1860, is not a State within the meaning of Article 12. The Institute of Constitutional and Parliamentary Studies is neither an agency nor an instrumentality of the State. It is a voluntary organisation. The object of the society is not related to government business. In the functioning of the Society, the Government does not have deep and pervasive control. In a welfare State Government's control is very parvasive and, in fact touches all aspects of social existence. A society registered under the Societies Registration Act may be treated, as 'State' if either the government business is undertaken by the Society or the public obligation of the State is undertaken by the Society.

In the above mentioned case[84], the Institute of Constitutional and Parliamentary Studies (ICPS) was a society registered in 1965 under the Societies Registration Act, 1860. It came into existence as a voluntary organization for acquisition of appropriate democratic bias and spirit by the people's representatives. The Speaker of the Lok Sabha became its first President and three ministers, a former Chief Justice of India and former Attorney General joined as its Vice-Presidents. Some of the public officers were also associated in the administrative set-up of the ICPS. The registered office of the ICPS was initially located within the Parliament House but later on it was shifted out. The Memorandum of the Society permitted acceptance of gifts, donations and subscriptions. Though the annual contributions from the Government constitute the main source of income of the society, yet some money come from some other sources also. Since government money has been coming, the usual conditions attached to government grants have been applied and enforced.

The appellant was an employee of the ICPS. In a disciplinary action he was dismissed from the service. When he assailed the order in a writ petition before the High Court, the question whether ICPS was "State" within the meaning of Article 12 was raised as a major issue. The Single judge dismissed the writ petition holding that the ICPS was not covered by the definition of

84. (1988) 1 SCC 236.

State under Article 12. In appeal before the Supreme Court the counsel for the ICPS submitted that the ICPS was prepared to give a fresh opportunity to the appellant to meet the charges against him but invited the Court to enter into the merits of the issue as to whether the ICPS constitute "State" within the meaning of Article 12. Disposing of the appeal the Supreme Court Held :

> For appropriate consideration of the question whether ICPS is "State" within the meaning of Article 12 it is necessary to look into the constitution of the body, the purpose for which it has been created, the manner of its functioning including the mode of its funding and the broad features which have been found by the Supreme Court in several decisions to be relevant in the matter of determining a dispute of this type. There cannot be a strait-jacket formula. It is not necessary that all the tests should be satisfied for reaching the conclusion either for or against holding an institution to be "State". In a given case some of the features may emerge so boldly and prominently that a second view may not be possible. There may yet be other cases where the matter would be on the borderline and it would be difficult to take one view or the other outright. A broad picture of the matter has to be taken and a discerning mind has to be applied keeping the realities and human experiences in view so as to reach a reasonable conclusion[85].

The ICPS is neither an agency nor an instrumentality of the State so as to come within the purview of "other authorities" in Article 12. ICPS in a case of its type- typical in many ways and the normal tests may perhaps not properly apply to test its character. It was born out of a feeling that there should be a voluntary association mostly consisting of members of the two Houses of Parliament with some external support to fulfill the objects which were adopted by the Society. Services of some of the employee of Parliament were lent to the Society. But while Article 12 refers to Parliament as such, a few Members

85. *Ibid* at 237.

of Parliament cannot be considered as Parliament so as to constitute that body as referred to in Article 12. Individual Members of Parliament and the corporate body known as Parliament are certainly two different concepts. The speaker and the Ministers who joined as Vice-Presidents, Executive Chairman, Treasurer and members, there were many people who were really not a part of Government as such and some of them did not belong to Parliament. The objects of the Society were not related to governmental business but were related to the aspects which were expected to equip Members of Parliament and the State Legislature with the requisite knowledge and experience for better functioning. Many of the objects adopted by the society were not confined to the two Houses of Parliament and were intended to have an impact on society at large. The accounts of the Society are separately maintained and subject to audit in the same way as the affairs of societies receiving government grants are to be audited. Government usually imposes certain conditions and restrictions when grants are made. No exception has been made in respect of the Society and the mere fact that such restrictions are made is not a determinative aspect. The appellant also failed to establish that in the functioning of the society there is deep and pervasive control of Government. Though the Minister has tried to exercise his authority as the controlling department of Government in the matter of making the grant but that itself may not be a conclusive feature. In a Welfare State, governmental control is very pervasive and in fact touches all aspects of social existence. In the absence of a fair application of the tests to be made, there is possibility of turning every non-governmental society into an agency or instrumentality of the State. A society registered under the Societies Registration Act may be treated as "State" if either the governmental business is undertaken by the society or what is expected to be the public obligation of the State is undertaken to be performed as a part of the society's function. Such is not the position here[86].

However, even if the ICPS becomes "State" within the meaning of Article 12, its employees do not become holders of civil posts so as to become

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86. *Ibid* at 238.

entitled to the cover of Article 311. They would, however, be entitled to the benefits of part III of the constitution[87].

The Judgment of the Court was delivered by *Ranganath Misra, J.* as:

> This appeal by special leave calls in question the judgment of a Division Bench of the Delhi High Court in A Letters Patent Appeal upholding the decision of a learned single Judge rejecting the writ petition of the appellant. The appellant was an employee of the Institute of Constitutional and Parliamentary Studies (hereinafter referred to as ICPS for short) and in a disciplinary action he was dismissed from service by order dated November 17, 1982. When he assailed the order in a writ petition before the High Court the question whether ICPS was 'State' within the meaning of Article 12 of the Constitution came for consideration as the major issue arising in the matter[88].

Obviously ICPS can become 'State' only if it is found to be an authority within the territory of India or under the control of the Government of India.

In the case of *Rajasthan State Electricity Board v. Mohan Lal*[89]. Bhargava, J. Who delivered the main judgment observed:

> The meaning of the word 'authority' given in Webster's Third New International Dictionary, which can be applicable, is "a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue producing public enterprise". This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The

87. *Ibid* at 239.

88. *Ibid.*

89. AIR 1967 SC 1857.

> expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India ; and we do not see any reason to narrow down this meaning in the context in which the words 'other authorities' are used in Article 12 of the Constitution[90].

In *Ujjam Bai V. State of U.P.*[91], Ayyangar, J. had observed:

> Again, Article 12 winds up the list of authorities falling within the definition by referring to "other authorities" within the territory of India which cannot, obviously be read as *ejusdem generis* with either the government and the legislatures or local authorities. The words are of wide amplitude and capable of comprehending every authority created under a statute and functioning within the territory of India or under the control of the government of India[92].

In both the cases of *Sabhajit Tewary V. Union of India*[93] *and Sukhdev Singh V. Bhagatram Sardar Singh raghuvanshi*[94], the true meaning of Article 12 of the Constitution fell for consideration. *Sabhajit Tewary*[95] case was one where the status of the Council of Scientific and Industrial Research was examined. This court took note of the fact that the Council was a Society registered under the Societies Registration Act. Under Rule 3, the Prime Minister of India was the ex-officio President of the Society and under Rule 30 the governing body consisted of persons appointed by the Government of India representing the administrative ministry under which the Council of

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90. *Rajasthan State Electricity Board v. Mohan Lal,* AIR 1967 SC 1857, quoted in *Tekraj Vasandi v. Union of India*, (1988) 1 SCC 236 at 242.
91. AIR 1962 SC 1621.
92. *Ujjam Bai V. State of U. P.*, AIR 1962 SC 1621, quoted in *Tekraj Vasandi v. Union of India,* (1988) 1 SCC 236 at 243.
93. AIR 1975 SC 1329.
94. AIR 1975 SC 1331.
95. AIR 1975 SC 1329.

Scientific and Industrial Research is included and the ministry of Finance. The court also took note of the manner in which the affairs of the Society including funding were conducted. Ray, C.J., in the brief judgment that the court delivered in the case observed[96]:

> Extracting the features as aforesaid, it was contended that these would indicate that the Council of Scientific and Industrial Research was really an agency of the Government. This contention is sound. The Society does not have a statutory character like the Oil and Natural Gas Commission, or the Life Insurance Corporation or Industrial Finance Corporation. It is a society incorporated in accordance with the provisions of the Societies Registration Act. The fact that the Prime Minister is the President or that government appoints nominees to the Governing Body or that the government may terminate the membership will not establish anything more than the fact that the government takes special care that the promotion, guidance and cooperation of scientific and industrial research, the institution and functioning of specific research, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study of problems affecting particular industry in a trade, the utilization of the result of the researches conducted under the auspices of the Council towards the development of industries in the countries in the country are carried out in a responsible manner.

The Court has held in *Praga Tools Corporation v. C. A. Imanual*[97], *Heavy Engineering Mazdoor Union V. State of Bihar*[98] and in *S. L. Agarwal V. General Manager, Hindusthan Steel Ltd.*[99] that the Praga Tools Corporation,

96. *Sabhajit Tewary V. Union of India,* AIR 1975 SC 1329, quoted in *Tekraj Vasandi v. Union of India*, (1988) 1 SCC 236 at 244.
97. (1969) 1 SCC 585.
98. (1969) 1 SCC 765.
99. (1970) 1 SCC 177.

Heavy Engineering Mazdoor Union and Hindusthan Steel Ltd. are all companies incorporated under the companies Act and the employees of these companies do not enjoy the protection available to government servants as contemplated in Article 311. The companies were held in these cases to have independent existence of the government and by the law related to corporations. These could not be held to be departments of the government.

In *Sukhdev Singh*[100] case the leading judgment was delivered also by Ray, C.J. Two questions fell for consideration - (1) Whether an order of removal from service contrary to Regulations would enable the employee to a declaration against the statutory corporation of continuance in service or would it end up in claim for damages only and (2) whether the employee of a statutory corporation is entitled to claim protection of Articles 14 and 16 against the Corporation. The court, therefore, straightway went into the question as to whether statutory corporations were authorities within the meaning of Article 12. As a fact, three corporations being the Oil and Natural Gas Commission, the Life Insurance Corporation and the Industrial Finance Corporation were before the Court and each one of them had been set up under a special statute. The learned Chief Justice pointed out[101]:

> In the background of the provisions of the three Acts under consideration, the question arises as to whether these Corporation can be described to be authorities within the meaning of Article 12 of the Constitution.

Mathew, J.Referred to the precedents and other authorities from England, France and United States and Stated[102]:

> The ultimate question which is relevant for our purpose is whether such a corporation is an agency or instrumentality of the government for carrying on a business for the benefit of

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100. AIR 1975 SC 1331.

101. *Sukhdev Singh v. Bhagatram,* AIR 1975 SC 1331, quoted in *Tekraj Vasandi v. Union of India*, (1988) 1 SCC 236 at 245.

102. *Tekraj Vasandi v. Union of India*, (1988) 1 SCC 236 at 246.

> the public. In other words, the question is, for whose benefit was the corporation carrying on the business? When it is seen from the provisions of that Act that on liquidation of the corporation, its assets should be divided among the shareholders, namely, the Central and State Governments and others, if any, the implication is clear that the benefit of the accumulated income would go to the Central and State Governments. Nobody will deny that an agent has a legal personality different from that of the principal. The fact that the agent is subject to the direction of the principal does not mean that he has no legal personality of his own ... the crux of the matter is that public corporation is a new type of institution which has sprung from the new social and economic functions of government and that it therefore does not neatly fit into old legal categories. Instead of forcing it into them, the latter should be adapted to the need of changing times and conditions.
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> .... there is any basis for the apprehension expressed that by holding that these public corporations are 'State' within the meaning of Article 12, the employees of these corporations would become government servants. I also wish to make it clear that I express no opinion on the question whether private corporations or other like organizations, though they exercise power over their employees which might violet their fundamental rights, would be 'State' within the meaning of Article 12.

Thus it dose not matter that whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a government company or a company formed under the Companies Act,

1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute. Whether be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the government is not limited to a corporation created by a statute but is equally applicable to a company or society.

CHAPTER - 5

THE ENFORCEMENT OF FUNDAMENTAL RIGHTS OF THE INDIVIDUAL AGAINST THE STATE AND PRIVATE BODY

I. Fundamental Rights Against Private bodies

The Private sector undertakings and private corporations, national and multinational should be treated as "the State" in certain situations, so as to make them subject to fundamental rights. Here it must be pointed out at the outset that the guarantee of fundamental rights is essentially a device whereby the autonomy of an individual is protected from encroachment by those who have power and capacity to do the same. Since the governing power rests with the state, possibility of the encroachment has traditionally been from the State. This is the reason that fundamental rights have bbeen sought and given against the State. Protection of an individual against another individual is mainly the concern of ordinary law to be made and enforced by the state in exercise of its governing power. But this governing power cannot be so exercised as to dictate to the individual to do or not to do certain things in certain spheres of their life. Within his proctected domain a private party has the freedom of choice, freedom to act according to his likes and dislikes and even according to his prejudices and ideosyncracies. This one may do irrespective of the fact that such a selfish or irrational act may harm or even ruin another person or party. An attitude of sympathy and cooperation towards one's fellow citizens in an ideal which is not allowed to be achieved by legal coercion beyond a certain point. This is the essence of personal liberty and nothing to be said hereinafter is meant to negate this basic postulate.

But in certain circumstances an act of a private party begins to resemble the act of a public authority and private right begins to look like public power. This may happen because of, (i) Governmental nexus and assistance to the private act; or (ii) concentration of economic power; or (iii) the simple fact

that the private party has control over something which is indispensable for the ordinary living of other individuals. The circumstances may be diverse, but, the essence of the matter is that it is possible for a private party to exercise control over the lives and fortunes of others in vital matters and here it is only reasonable to suggest that in such circumstances the party should be required to observe the same norms as a public authority. In other words, in those circumstances the private party should be treated as "the State" and subjected to the discipline of fundamental rights. The determination of exact circumstances in which a private party should be treated as a public authority may be a question of detail which may have to be worked as a public authority may be a question of detail which may have to be worked out from case to case in the context of specific facts present there. It is also possible that there may be borderline cases where opinions of the judge concerned but also by prevailing needs and philosophy of the time which are themselves changeable. But what can be said safely is that now the time has come when the meaning of the term "the State" in article 12 of the Constitution should be given broader interpretation so as to include those sections of the private sector whose governing and controlling power over the ordinary multitude in indistinguishable from that of public authorities properly so called. If this is not done, the changes contemplated to be brought about by the new economic policy would make this part of the constitutional law of India look at variance from the realities of politico - economic life of India in the 21st century.

Since the above change has been advocated with the assumption that the same can be brought about by judicial innovation, the following submissions are made with a view to help advancing the interpretation on the subject within braod parameters of existing doctrinal framework.

First, many areas of the private sector can be covered under the existing agency and instrumentality test. The six indices of this test mentioned above which have so far been adumbrated by the court, are actually relevant mainly in relation to public sector undertakings and it is in the context of these undertakings that the above guidelines were laid down. But, here the essence of the matter is that there should be evidence of governmental nexus with the

private activity. This can be in the form of governmental assistance, collaboration or interference. The governmental assistance may take the form of, (i) tax concession, (ii) grant of monopoly; (iii) financial assistance; (iv) the power of eminent domain; or (v) any other way in which meaningful assistance may be given. Joint ventures or joint ownership of an undertaking will definitely come in the category of governmental collaboration. Since some governmental regulation. This may be indicative of the special importance which the government gives to that activity. This leads us to take note of another type of governmental nexus, which may be found even without any governmental assistance or collaboration. The private sector may undertake activities which may be of such public and general importance that they are generally allowed to be undertaken only by the government, and therefore, the principle should be applied that a private party doing the same job must do it subject to the same conditions as the government. Here public utilities readily come to mind as an example. This means that many private sector units can be subjected to fundamental rights by the agency and instrumentality test itself.

Second, industrial giants, national and multinational corporations can be held to be " the State" and subjects to fundamental rights on the ground that the property and business they own enable them to control the lives and fortunes of a host of people including the employees, distributors, retailors, consumers and in a way the community itself. Renner pointed out very early that private law institutions performed public law functions and the need was to recognise the reality so that power and responsibility could be combined together.[1] Miller and Friedman have drawn our attention to the same phenomenon. Millar has said that the need was for protection against the governing power and this should be available against every entity or sector where the governing power was in fact located[2]. Similarly Friedman has pointed out that now the group power was gaining ascendancy over the state and in

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1. Karl Renner, *The Institutions of Private Law and Their Social Functions*. (1949).
2. Arthur S. Miller, *"The Constitutional Law of the Society State"* , 10 Stan. L. Rev. 620 (1958)

this category he mentions organised industry and labour.[3] He also feels the need for the rule of law to be consistent with this new reality.

Third, framers of the Indian Constitution have themselves settled the issue that the need for the guarantee of fundamental rights can be as important against private parties as against the state. It is a different matter that at the time of the framing of the Constitution this need was perceived to be limited only to some kinds of cases. Thus article 15 (2) guarantees that no citizen shall be discriminated against on the ground of religion, race, caste, sex or place of birth with regard to "(a) access to shops, public restaurants, hotels and places of public entertainment, or (b) the use of wells, tanks bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public." Article 17 declares the untouchability is abolished and its practice in any form is forbidden. Article 23 prohibits traffic in human beings and beggar and other forms of forced labour. By article 24 employment of a child below the age of 14 years in any factory or mine or his engagement in any other hazardous employment is prohibited. Article 28(3) provides that a person attending an educational institution recognised by the State or receiving aid out of state funds shall not be required to participate in any religious instruction without his consent or that of his guardian in case he happens to be a minor nor shall he be required to attend any religious worship there without such consent. Lastly, article 29(2) guarantees that a citizen shall not be denied admission to a state recognised or state aided educational institution on grounds only of religion, race, caste, language or any of them.

The above provisions can be said to have been progressive according to the standards prevailing at the time when the Constitution was framed and adopted. But our experiences during the last four decades and more have amply demonstarted that they do not go far enough and in the years to come their inadequacy will be further felt. Thus article 15(2) prohibits discrimination on

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3. W. Friedman, *"Corporate Power, Government by Private Groups, and the law"* , 57 Colum. L. Rev. 155 (1957).

certain grounds in specified matters. But what is needed is the guarantee of general right to equality against the private sector when it assumes controlling power and begins to look like " the State". To take only one example, the supreme Court in *Maruti Udyog*,[4] implicity recognised that the manufactures could not give preferential treatment to a few customers unless they satisfied the standards of reasonable classification. If so, the same principle should logically apply to Hindustan Motors and Premier Automobiles and any distinction based on public sector and private sector dichotomy would be totally irrational and illogical. Similarly, a person attending a private educational institution and living in a hostel needs to be given not only the negative right not to be forced to participate in any worship or religious instruction, a right which article 28(3) guarantees, but also needs the positive right to practise his religion in a reasonable manner in that institution without any let or hindrance. Again, the basic interests of a student are not limited merely to getting admission without any discrimination, in the institution he can also claim the right of freedom of expression and association. Indeed, both the teachers and students can claim their basic right of academic freedom. Though the existing decisions are not conclusive one way or the other on the issue,[5] it is respecfully submitted that the elements of state aid, recognition and regulation should be enough to establish governmental means so as to enable the court to hold that private educational institutions are "the State".

II. Fundamental Rights in modern democratic thinking

Since the 17th Century, if not earlier, human thinking has been veering round to the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the State, in order that human liberty may be preserved, human personality developed and an effective social

4. *Ashok Kumar Mittal* V. *Maruti Udyog* (1986) 2 SCC 293.

5. The relief was granted in *Manmohan Singh Jaitla* v. *Commr. Union Territory of Chandigarh*, (1984) Supp. S.C.C 540; *Francis John* v. *Director of Education* , (1989) Supp, (2) SCC 598; *Master Vibhu Kapoor* v. *Council of Indian School Certificate Examination*, A.I.R. 1985 Del. 142 (F.B). It was refused in *Executive Committeee of Vaish Degree College, Shamli* v. *Laxmi Narain* , (1976) 2 SCC . 58.

and democratic life promoted, to recognise these rights and freedoms and allows them a free play.

The concept of human rights can be traced to the natural law philosophers, such as, Locke and Rousseau. The natural law philosophers philosophized over such inherent human rights and sought to preserve these rights by propounding the theory of "social contract."[6]

According to Locke, man is born "with a title of perfect freedom and an uncontrolled enjoyment of all the rights, and privileges of the Law of Nature" and he has by nature a power "to preserve his property - that is, his life, liberty, and estate, against the injuries and attempts of other men."[7]

The Declaration of the French Revolution, 1789, which may be regarded as a concrete political Statement on Human Rights and which was inspired by the Lockeian philosophy declared :

"The aim of all political association is the conservation of the natural and inalienable rights of man."

The concept of human rights protects individuals against the excesses of the State. The concept of human rights represents an attempt to protect the individual from oppression and injustice. In modern times, it is widely accepted that the right to liberty is the very essence of a free society and it must be safeguarded at all times. The idea of guaranteeing certain rights is to ensure that a person may have a minimum guaranteed freedom.

The underlying idea in entrenching certain basic and Fundamental Rights is to take them out of the reach of transient political majorities.

It has, therefore, come to be regarded as essential that these rights be entrenched in such a way that they may not be violated, tampered or interfered with by an oppressive government. With this end in view, some written constitutions guarantee a few rights to the people and forbid governmental

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6. Lloyd , *Introduction to Jurisprudence*, 117-123, 159 (1985)
7. Extracts from Locke *two treaties of Government.*

organs from interfering with the same. In that case, a guaranteed right can be limited or taken away only by the elaborate and formal process of constitutional amendment rather than by ordinary legislation. These rights are characterised as Fundamental Rights.

The entrenched Fundamental Rights have a dual aspect. From one point of view, they confer justiciable rights on the people which can be enforced through the courts against the government . From another point of view, the Fundamental Rights constitute restrictions and limitations on government action, whether it is taken by the Centre, or a State or a local government. The government cannot take any action, administrative or legislative, by which a Fundamental Rights is infringed.

Entrenchment means that the guaranteed rights cannot be taken away by an ordinary law. A law curtailing or infringing an entrenched right would be declared to be unconstitutional. If ever it is deemed necessary to curtail an entrenched right, that can only be done by the elaborate and more formal procedure by way of a constitutional amendment. As the Supreme Court has observed,[8] the purpose of enumerating Fundamental Rights in the Constitution "is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the government at the Centre or in the State".

The modern trend of guaranteeing Fundamental Rights to the people may be traced to the Constitution of the U.S.A. drafted in 1787.

The U.S. Constitution was the first modern Constitution to give concrete shape to the concept of human rights by putting them in to the Constitution and making them justiciable and enforceable through the instrumentality of the courts.

The original U.S Constitution did not contain may Fundamental Rights.

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8. *Chairman, Rly. Board* v. *Chandrima Das*, AIR 2000 SC 998, 997 .

There was trenchant criticism of the Constitution on this score. Consequently, the Bill of Rights came to be incorporated in the Constitution in 1791 in the form of ten amendments which embody the Lockeian ideas about the protection of life, liberty and property.[9]

The nature of the Fundamental Rights in the U.S.A. has been described thus: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majority and officials, to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other Fundamental Rights may not be submitted to vote; they depend on the outcome of no elections."[10]

In modern times, the concept of the people's basic rights has been given a more concrete and universal texture by the Charter of Human Rights enacted by the United Nations Organisation (U.N.O),[11] and the European Convention on Human Rights.[12] The principle ot the Universal Declaration of Human Rights inter alia declares:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

The General Assembly of the United Nations Organisations adopted the Universal Declaration of Human Rights on Dec. 10, 1948. This document has proved to be a mere declaration without any teeth. The Charter has so far remained merely a formal document without any measures having been taken to facilitate the realization of the basic freedoms and the human rights which the document contains.

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9. B. Bailyn, *Ideological Origins of the American Revolution,* (1967)
10. Justice Jackson in *West Verginia State Board of Education* v. *Barnette*, 319 U.S. 624.
11. Ian Brownlie, *Basic Documents of Human Rights* (1971)
12. For trends in the present day Africa in the area of human rights, see, D.O Ahic, *Neo-Nigerian Human Rights in Zambia : A Comparative Study with some countries in Africa and West Indies,* 12 J.I.L.I. (1970) at 609.

The concept of Fundamental Rights thus represents a trend in the modern democratic thinking. The enforcement of human rights is a matter of major significance to modern constitutional jurisprudence. The incorporation of Fundamental Rights as enforceable rights in the modern constitutional documents of natural law and natural rights.

For sometimes now a new trend is visible in India viz. to relate the Fundamental Rights in India to the International Human Rights. While interpreting the Fundamental Rights provisions in the Indian Constitution, the Supreme Court has drawn from the International Declarations on Human Rights,[13] The Supreme Court, for example, has made copious references to the Universal Declaration of Human Rights, 1948, and observed :

> The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence".[14] There is no formal declaration of people's Fundamental Rights in Britain. The orthodox doctrine of the Sovereignty of Parliament prevailing there does not envisage a legal check on the power of Parliament which is, as a matter of legal theory, free to make any law even though it abridges, modifies or abolishes any basic civic right and liberty of the people. The power of the

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13. The Supremen Court of India has frequently drawn from the Declaration of Human Rights to define the scope and content of the Fundamental Rights in India : for example: *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597; *M.H. Hoskot* v. *State of Maharashtra*, AIR 1978 SC 1548 ; *Randhir Singh* v. *Union of India*, AIR 1982 SC 879;*D.K. Basu* v. *Union of India*, AIR 1997 SC 610; *Vishaka* v. *State of Rajasthan* AIR 1997 SC 3011; *People's Union for Civil Liberties* v. *Union of India* (1997) 1 SCC 759; Chairman, *Rly Board* v.*Chandrima Das,* AIR 2000 SC 988; *Madhu Kishwar* v. *State of Bihar*, AIR 1996 SC at 1869 , the Supreme Court referred to the Declarations on "The Right to Development" adopted by the UN General Assembly on December 4, 1986, and also to Vienna Conventions on the Elimination of all forms of Discrimination against women (CEDAW) ratified by the UNO on Dec. 18, 1979.

    See also , People's Union for Civil Liberties v. Union of India, AIR 1997 SC 568, 575.

14. *Chairman, Railway Board* v. *Chandrima Das*, AIR 2000 SC 988 at 997.

> executive is however limited in the sense that it cannot interfere with the rights of the people without the sanction of law.[15]

There prevails in Britain the concept of Rule of Law which represents, in short, the thesis that the executive is answerable to the courts for any action which is contrary to the law of the land. Rule of law constitutes no legal restraint on the legislative power of Parliament and thus, cannot be equated to the concept of Fundamental Rights.

Until 1998, the protection of individual freedom in Britain, therefore, rested not on any constitutional favouring individual liberty and the Parliament form of government. British lawyers often questioned the very basis of the theory of declaring basic civil rights in a constitutional document.

The British Model could not be duplicated elsewhere. The fact remains that Britain is a small and homogenous nation, having deep-rooted democratic traditions. But these conditions do not prevail in other countries which are composed of diverse elements, having no deep-rooted traditions of individual liberty, and which, therefore, face very different problems from those of Britain.

Even in Britain, there was an ever growing realisation that guaranteed civil rights do serve a useful purpose and that Britain should also have a written Bill of Rights.[16] Britain had accepted the European Charter on Human Rights.[17]

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15. *Lord Atkin in Eshugbayi* v. *Govt. of Nigeria*, 1931 A.C. 662.

16. Hood Philips, *Const. and Adm. Law* , 40 438 (1978); also, *Reform of the Constitution* (1970); De Smith, *Const. And Adm. Law,* 439 (1977); Scarman, *English Law- The New Dimension*; Anderson, *On Liberty Law and Justice* (1978).

    On July, 7, 75, a resolution was moved in the House of Commons demanding that En gland should have a Bill of Rights. There is some opposition as well in academic circles to having a Bill of Rights; See Yardley, *Modern Constitutional Developments : some reflections.* 1975 Pub. Law 197 : Lloyd, *Do we need A bill of Rights*? M.L.R. 121 (1976) : H.W.R. Wade, Constitutional , Fundamentals, 24-40 (1980).

    See also, Report of Select Committee on a Bill of Rights (House of Lords , 1978).

17. There have been some cases in Britain in this area: *Waddington* v. *Miah*, (1974) 1 W.L.R. 613 ; *R* v. *Secretary of State for Home Affairs exp. Bhajan Singh,* (1975) 2 All ER 1081;*Bulmer Ltd* v. *Bollinger, S.A.* (1974) 2 All ER 1226.

But this was not good enough because the Charter did not bind Parliament but could be used only to interpret the local law. The feeling was that law made by Parliament was in essence law made by the House of Commons. This in practice, meant that a government having support of a majority in the House (though it had the support only of a minority of electorate), could often force through whatever legislation it desired. What was, therefore necessary was a Bill of Rights which could curb parliamentary legislative power.

The Australian Constitution, following the traditions of Britain, does not have a Bill of Rights but guarantees only a few rights, e.g., freedom of religion.[18]

In a federal country, the problem becomes more complicated as there may be attacks on individual liberty and freedom not only at the Central level, but even at the State level.

In the modern era, it has become almost a matter of course to prescribe formally the rights and liberties of the people which are deemed worthy of protection from government interference. The wide acceptance of the notice that a formal Bill of Rights is a near necessity in the effective constitutional government arises, to some extent, from a feeling that mere custom or tradition alone cannot provide to the Fundamental Rights the same protection as their importance deserves. "The unique English situation is not simply exportable, and other nations have generally felt that their governments need the constant reminder which a Bill of Rights provides, while their people need the reassurance which it can supply."[19].

An outstanding example of this trend in Canada can be reffered in this context To begin with, the Canadian Constitution had only a few guaranteed Rights.[20] Then, the Canadian Parliament enacted a law laying down basic Rights of the People.[21]

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18. S. 116 of the Australian Constitution.
19. Bowie, *Studies in Federalism,* 567, 601.
20. Ss. 93 and 133 of the British North America Act.
21. See The various articles on the subject in 37 Can. B.R. 1-217 (1959). Also Auburn, *Canadian Bill of Rights and Discriminatory Statutes,* 86 LQR 306 (1970); Walter S. Tranopolsky, *The Canadian Bill of Rights* (1975).

III. Protection of Fundamental Rights in India

In India, a few good reasons made the enunciation of the Fundamental Rights in the Constitution rather inevitable. For one thing, the main political party, the Congress, had for long been demanding these Rights against the British rule. During the British rule in India, human rights were violated by the rulers on a very wide scale. Therefore, the farmers of the Constitution, many of whom had suffered long incarceration during the British regime, had a very positive attitude towards these rights.

Secondly, the Indian society is fragmented into many religious, cultural and linguistic groups, and it was necessary to declare Fundamental Rights to give to the people a sense of security and confidence. Then, it was thought necessary that people should have some Rights which may be enforced against the government which may become arbitary at times. Though democracy was being introduced in India, yet democratic traditions were lacking, and there was a danger that the majority in the legislature may enact laws which may be oppressive to individuals or minority groups, and such a danger could be minimised by having a Bill of Rights in the Constitution.

The need to have the Fundamental Rights was so very well accepted on all hands that in the Constituent Assembly, the point was not even considered whether or not to incorporate such Rights in the Constitution. In fact, the fight all along was against the restrictions being imposed on them and the effort all along was to have the Fundamental Rights on as broad and pervasive a basis as possible.[22]

Articles 12 to 35 of the Constitution pertain to Fundamental Rights of the people. These Rights are reminiscent of some of the provisions of the Bills of Rights in the U.S Constitution declares the Fundamental Rights in broad and general terms. But as no rights is absolute, the courts have, in course of time, spelled out some restrictions and limitations on these Rights. The Indian Constitution, however, adopts a different approach in so far as some

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22. Granville Austin, *The Indian Constitution : Cornerstone of a Nation*, 50-113 (1966).

Rights are worded generally; in respect of some Fundamental Rights, the exceptions and qualifications have been formulated and expressed in a compendious form in the Constitution itself, while in respect of some other Rights, the Constitution confers power on the Legislature to impose limitations. The result of this strategy has been that the constitutional provisions pertaining to Fundamental Rights have become rather detailed and complex.

The framers of the Indian Constitution, learning from the experiences of the U.S.A., visualized a great many difficulties in enunciating the Fundamental Rights in general terms and in leaving it to the courts to enforce them, viz, the Legislature not being in a position to know what view the courts would take of a particular enactment, the process of legislation become difficult; there arises a vast mass of litigation about the validity of the laws and the judicial opinion is often changing so that law becomes uncertain; the judges are irremovable and are not elected; they are, therefore, not so sensitive to public needs in the social or economic sphere as the elected legislators and so a complete and unqualified veto over legislation could not be left in judicial hands.[23]

IV. The Supreme Court as protector and guarantor of Fundamental Rights

Supreme Court is the guardian of our Constitution. For the enforcement of fundamental rights it is most important to discuss about articles 32 and 226.

(i) Article 32

A right without a remedy does not have much substance. The fundamental Rights guarenteed by the Constitution would have been worth nothing had the constitution not provided an effective mechanism for their enforcement.

Art 32 (1) guarantees the right to move the Supreme Court, by

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23. B.N. Rau, *India's Constitution in the Making* 245.

appropriate proceedings, for the enforcement of the Fundamental Rights enumerated in the Constitution. Art 32(2) empowers the Supreme Court to issue appropriate orders ordirections, or writs including writs in the nature of hebeas corpus, mandamus, prohibition, quo warranto, and certiorari, which ever may be appropriate, for the enforcement of the petitioner's Fundamental Rights.

Under Clause (2) of Article 32 the Supreme Court is empowered to issue appropriate directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of any fundamental rights guaranteed by Part III of the Constitution. By this Article the Supreme Court has been constituted as a protector and guarantor of fundamental rights conferred by Part III. Once a citizen has shown that there is infringement of his fundamental right the court cannot refuse to entertain petitions seeking enforcement of fundamental rights.[24] In discharging the duties assigned to protect fundamental rights the Supreme Court in the words of Patanjali Sastri, J. has to play a role of a sentinel on the *qui vive*.[25] Again, in *Daryo v. State of U.P.*,[26] the Supreme Court took it as its solemn duty to protect the fundamental right zealously and vigilantly.

Scope of Clause (2) of Art. 32.- The language used in Art. 32 (2) is very wide. The power of the Supreme Court is not confined to issuing only writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, [27] but any direction or order or writ whichever is appropriate to enforce the fundamental rights, nor it is bound to follow all the procedural technicalities, attached to it is English law. These rights are all of English origin. The Supreme Court of India may only issue the above writs but also directions, order or writs, similar to the above so far as to fit in with any circumstances peculier to India. The Supreme Court is not bound to follow the procedural techinicalities of English law. However, it has been held that in

24. *Romesh Thapper* v. *State of Madras*, AIR 1950 SC 124 at p. 126.
25. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196.
26. AIR 1961 SC 1457 at p. 1461.
27. *Rashid Ahmad* v. *Municipal Board, Kairana*, AIR 1950 SC 163.

granting these writs it will follow the broad and fundamental principles that regulate its exercise in English law. In *T.C. Basappa* v. *T. Nagappa*, [28] the Supreme Court said:

> In view of the express provisions in our Constitution we need not now look back to the early history of the procedural technicalities of these writs in English law, not feel oppressed by the difference of change of opinion expressed in particular cases of Judges, we can make an order or issue a writ in the nature of certiorari, in all appropriate cases and in appropriate manner. So long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English Law.

Thus, the wording of Article 32 (2) is so elastic that it permits all necessary adaptation without legislative sanction from time to time so as to enable effective enforcement of the fundamental rights. Even if a proper writ has not been prayed for by the petitioner in a case his application cannot be thrown out. Article 32 permits large discretion to the Supreme Court to give the appropriate relief. The court can frame such writs as the exigencies of a particular case demand.

Art 13 is the key provision as it makes fundamental rights justiciable. Art 13 confers a power and impose a duty and an obligation on the course to declare a law void if it is inconsistent with a fundamental rights. This is a power of great consequence for the courts. The supreme court has figuratively characterised this role of the judiciary as that of a "sentinel on the qui vive"[29]. Art 32 confers power on the Supreme Court to enforce the Fundamental Rights.

Art 32 (3) empowers Parliament by law ot empower any other court to exercise within the limits of its territorial jurisdiciton all or any of the powers

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28. AIR 1954 SC 440.

29. *State of Madras* v. *V.G. Row*, AIR 1952 SC 196

exercisable by the Supreme Court under Art 32(2). This can however be done without prejudice to the Supreme Court's powers under Arts. 32 (1) and (2).

According the Art 32(4) the right guaranteed by Art 32 "shall not be suspended except as otherwise provided for by the Constitution."

Right of access to the Supreme Court under Art. 32 is a fundamental Rights itself.[30] Art 32 (1) provides a very important safeguard for the protection of the fundamental Rights of the citizens of India. Article 32 provides a guaranteed, quick and summary remedy for enforcing the Fundamental Rights because a person can go straight to the Supreme Court without having to undergo the dilatory process of proceeding from the lower to the higher court as he has to do in other ordinary litigation.

The Supreme Court has thus been consituted into the protector and guarantor of the Fundamental Rights. Commenting on the solemn role entrusted to itself by Art. 32, the Supreme Court has observed in *Daryao v. State of Uttar Pradesh*:[31]

> The Fundamental Rights are intended not only to protect individuals's right but they are based on the high public policy. Liberty of the individual and the protection of the Fundamental Rights are the very essence of the democratic way of life adotped by the Constitution, and it is the privilege and the duty of this court to uphold those rights. This court would naturally refuse to circum scribe them or to curtail them except as provided by the Constitution itself.

The court has emphasized in *Romesh Thappar* [32] that "this Court is thus constituted the protector and guarantor of the Fundamental Rights and it cannot consistently with the responsible so laid upon it, refuse to entertain

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30. *Bodhisattwa* v. *Subhra Chakraborty* AIR 1996 SC 922, 926 ; *Common Cause, a Registered Society* v. *Union of India*, AIR 1999 SC at 3020 .
31. AIR 1961 SC 1457 at 1461.
32. *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124.

applications seeking protection against infringement of such rights."

Under Article 32, the Supreme Court enjoys a broad discretion in the matter of framing the writs to suit the exigencies of the particular case and it would not throw out the application of the petitioner simply on the ground that the proper writ or direction has not been prayed for.[33] The Court's power is not confined to issuing writs only, it can make any order including even a declaratory order, or give any direction, as may appear to it to be necessary to give proper relief to the petitioner. [34]

It is meaningless to confer fundamental rights without providing and effective remedy for their enforcement, if and when they are violated. "A right without a remedy is a legal conundrum of most grotesque Kind." Art 32 confers one of the 'highly cherished rights.'[35]

The purpose for which Art. 32 can be invoked is to enforce Fundamental Rights. Violation of a Fundamental Right is a *sine qua non* of the exercise of the right conferred by Art. 32.[36]

The Supreme Court has described the significance of Art 32 in the following words in *Prem Chand Garg* v. *Excise Commissioner, U.P.*[37] (Per Gajendragadkar, J.):

> The Fundamental Right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this court should regard itself 'as the protector and guarantor of Fund mental Rights' and should declare that "it cannot, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights ..... In discharging the duties

33. *Chiranjit Lal* v. *union of India*, AIR 1951 SC 41.
34 *Kochunni* v. *State of Madras*, AIR 1959 SC 725, 733 .
35. *The Fertilizer Corporation* case, AIR 1981 SC 344, 347.
36. *Federation of Bar Association in Karnataka* v. *Union of India*, AIR 2000 SC 2544.
37. AIR 1963 SC 996.

> assigned to it, this court has to play the role of a 'sentinel of the qui vive' and it must always regard it as its solemn duty to protect the said Fundamental Rights 'zealously and vigilantly'.[38]

(ii) Article 32 Enforces Fundamental Rights

As stated above, Art 32 can be invoked only when there is a infringement of a Fundamental Rights. The Supreme Court has laid emphasis on this aspect of Art 32 as follows:

> It is well-settled that, the jurisdiciton conferred on the Supreme Courtunder Art 32 is an important and integral part of the Indian Constitution but violation of a Fundamental Right is the *sine qua non* for seeking enforcement of those rights by the Supreme Court. In order to establish the violation of a fundamental Right the court has to consider the direct and inevitable consequences of the action which is sought to be enforced.[39]

In order to enforce a Fundamental right, judicial review of administrative, legislative and governmental action or non-action is permissible. But, Art 32 cannot be invoked simply to adjudge the validity of any legislation or an administrative action unless it adversely affects petitioner's Fundamental Rights.[40]

The Supreme Court under Art. 32 (1) can, while considering a petition for the enforcement of a Fundamental Rights, declare an Act to the ultra vires, or beyond the competence of the enacting legislature, if it adversely affects a Fundamental Right.

Where an enactment, as soon as it comes into force, affects the

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38.. *Ibid*, at 999.

39. *Hindi Hitrashak Samiti* v. *Union of India,* AIR 1990 SC 851 .

40. *Shantabai* v. *State of Maharashtra*, AIR 1958 SC 532.

Fundamental Rights of a person by its very terms and without any further over act being done, the person prejudicially affected is entitled immediately to invoke Art. 32 and get a declaration as to the invalidity of the impugned Act.[41]

(iii) Alternative Remedy

Article 32 is in itself a Fundamental Right and, therefore, the existence of an alternative remedy is no bar to the Supreme Court entertaning a petition under Article 32 for the enforcement of a Fundamental Right.

When once the Court is satisfied that the petitioner's Fundamental Right has been infringed it is not only its right but also its duty to afford relief to the petitioner, and he need not establish either that he has no other adequate remedy, or that he has exhausted all remedies provided by law, but has not obtained proper redress. When the petitioner establishes infringement of his Fundamental Right, the Court has no discretion but to issue an appropriate writ in his favour.[42]

In *K.K. Kochuni* v. *State of Madras*,[43] the Court held that Article 32 itself being a fundamental right the Court will give relief notwithstanding the existence of an alternative remedy. The Court's power under Article 32 (2) is wide enough to order the taking of evidence, if necessary on disputed questions of fact, and to give appropriate relief to the petitioner by issuing the writ or order so as to suit the exigencies of the case.

(iv) Article 32 v. Article 226

No action lies in the Supreme Court under Art. 32 unless there is an infringement of a Fundamental Right.[44] As the Supreme Court has emphasized : "The violation of a Fundamental Right is the *sine qua non* of the exercise of the right conferred by Art. 32"[45]

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41. *Kochunni, K.K.* v. *State of Madras*, AIR 1959 SC 725.
42. *Daryad v. State of Uttar Pradesh,* AIR 1961 SC 1457.
43. AIR 1959 SC 725.
44. *Andhra Industrial Works* v. *Chief Controller of Imports*, AIR 1974 SC 1539
45. *The Fertilizer Corp.* case.

Art. 32 differs from Art. 226 in that whereas Art. 32 can be invoked only for the enforcement of Fundamental Rights, Art 226 can be invoked not only for the enforcement of Fundamental Rights but for 'any other purpose' as well. This means that the Supreme Court's power under art. 32 is restricted as compared with the power of a High Court under Art. 226 for if an administrative action does not affect a Fundamental Right, then it can be challenged only in the High Court under Art. 226, and not in the Supreme Court under Art. 32

The words "for any other purpose" found in Art 226 (but not in Art. 32), enable a High Court to take cognizance of any matter even if no Fundamental Right is involved.

It may, however, be pointed out that there have been a few exceptional cases where the Supreme Court has entertained writ petitions under Art. 32 although no question of Fundamental Right was involved. This approach of the Court is justifiable on the ground that in these cases questions of great constitutional significance were raised ; there was no forum except the Supreme Court where these questions could be authoritatively decided, and there was no other mechanism, except Art.32 to bring such matters within the cognizance of the Supreme Court. This matters *inter alia* are:

(i) misuse of the ordinance - making power by the State of Bihar; [46]

(ii) appointment of the Judges of the High Court and the Supreme Court;[47]

(iii) issues related with the procedure to remove a Supreme Court Judge. [48]

Reference may be made here to *Tamil Nadu Couvery NVV NU P Sangam* v. *Union of India.*[49] The society moved a writ petition under Art. 32 in the Supreme Court for a direction to the Government of India to refer the cauvery water dispute to a tribunal. The petition remained pending in the Court for

46. *D.C. Wadhwa* v. *State of Bihar*, AIR 1987 SC 579.
47. *Supreme Court Advocates - on - Record Ass.* v. *Union of India,* AIR 1994 SC 268.
48. *Sarojii Ramaswami* v. *Union of India*, AIR 1992 SC 2219.
49. AIR 1990 SC 316.

more than seven years. An objection was raised against the maintainability of the petition. Rejecting the objection,the Court ruled that to throw out the petition after seven years by accepting the objection against its maintainability "would be ignoring the actual state of affairs, would be too technical an approach and in our view would be wholly unfair and unjust".

(v) Inter-Relationship between Articles 32 and 226

In the matter of enforcement of Fundamental Rights, the High Courts under Art. 226, and the Supreme Court under Art. 32, enjoy concurrent jurisdiction.

A question has been raised whether a petitioner seeking to enforce his Fundamental Rights can go straight to the Supreme Court under Art. 32, or should be first go to a High Court under Art. 226. As early as 1950, in *Romesh Thapper*, [50] the Supreme Court ruled that such a petitioner can come straight to the Supreme Court without going ot the High Court first. The Court stated that unlike Art. 226, Art. 32 confers a Fundamental Right on the individual and imposes an obligation on the Supreme Court which it must discharge when a person complains of infringement of a Fundamental Right. Art. 32 provides a guaranteed remedy for the enforcement of the Fundamental Rights and constitutes the Supreme Court as the "guarantor and protector of Fundamental Rights." This proposition has been reiterated by the Supreme Court in a number of cases. [51]

This is continued to be the position till 1987 when a two judge Bench of the Supreme Court ruled in *Kanubhai*,[52] that a petitioner complaining of infraction of his fundamental Right should approach the High Court first rather than the Supreme Court in the first instance, the reason given for this view was that there was a huge backlog of cases pending before the Supreme Court.

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50. *Ramesh Thappar* v. *State of Madras,* AIR 1950 SC 124 .
51. *State of Madras* v *V.G. Row*, AIR 1952 SC 196; *K.K. Kochunni* v. *State of Madras,* AIR 1959 SC 725; *Kharak Singh* v. *State of Uttar Pradesh*, AIR 1963 SC 1295
52. *Kanubhai Brahmbhatt* v. *State of Gujarat*, AIR 1987 SC 1159.

In the case of *Andi Mukta Sadguru Shree Muktajee vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors v. V. R. Rudani & Ors.*[53] the Court held:

> Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issud to "any persons or authority", the term "authority" used in the context, must receive a liberal meaning unlike the term in Article 12 which is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers powers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevnt is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party, no matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied[54].

Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrived person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore merely because a non-governmental body exercises some public duty that by itself would not suffice to make such a State for the purpose of Article 12.

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53. AIR 1989 SC 1607.
54. *Andi Mukta Sadguru Shree Muktajee vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors v. V.R.Rudani & Ors.*, AIR 1989 SC 1607, quoted in *Zee Tele Films Ltd. v. Union of India,* AIR 2005 SC 2677 at 2691.

It should be noted that there can be no two views about the fact that the Constitution of this country is a living organism and it is the duty of Courts to interpret the same to fulfil the needs and aspirations of the people depending on the needs of the time. In Article 12 the term "other authorities" was introduced at the time of framing of the Constitution with a limited objective of granting judicial review of actions of such authorities which are created under the Statute and which discharge State functions. However, because of the need of the day this Court in *Rajasthan State Electricity Board*[55] and *Skhdev Singh*[56] noticing the socio-econimic policy of the country thought it fit to expend the definition of the term "other authorities" to include bodies other then statutory bodies. This development of law by judicial interpretation culminated in the judgment of the 7-Judge Bench in the case of *Pradeep Kumar Biswas*[57]. It is to be noted that in the meantime the socio-economic policy of the Government of India has changed[58] and the State is today distancing itself from commercial acticities and concentrating on governance rather than on business. Therefore, the situation prevailling at the time of *Sukhdev Singh*[59] is not in existance at least for the time being, hence there seems to be no need to further expand the scope of "other authorities" in Article 12 by judicial interpretation at least for the time being. It should also be borne in mind that. in a democracy there is a dividing line between a State enterprise and a non-State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.

Since it is the view expressed by a two Judge Bench, it can not be regarded as an authoritative pronouncement on an important constitutional issue, viz., inter relationship between Arts. 32 and 226. Such a vital pronouncement could be made only by the Constitution Bench consisting at

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55. AIR 1967 SC 1857.
56. AIR 1975 SC 1331.
57. (2002) 5 SCC 111.
58. *See Balco Employees' Union (Regd) v. Union of India & Ors.* (2002) 2 SCC 333.
59. AIR 1975 SC 1331.

least of five Judges, especially, when the long established position is sought to be overturned.

The ruling in *Kanubhai* seeks to negate what the Supreme Court has itself said in a number of cases during the last four decades emphasizing upon the significance of Art. 32, and the role assigned to it thereunder.[60]

Even otherwise, on merit, this view will make Art. 32 redundant for after having gone to the High Court first under Art. 226, the petitioner would then come to the Supreme Court by way of appeal and not under Art. 32, because of the principle of *res judicata,* when a litigant approaches the Supreme Court, the matter is decided by the Court finally. But if he approaches the High Court, the petition is first decided by a single judge, an appeal then lies to the division bench, and, thereafter, an appeal may be taken to the Supreme Court. In fact, this may cause more delay and prove costier to the petitioner than a writ petition directly under Art. 32. In effect, the *Kanubhai* ruling devalues the significance not only of the Fundamental Rights but of the Supreme Court itself. This could never have been the intention of the framers of the Constitution.

In practice, it seems that the *Kanubhai pronouncement* has had no effect on the existing practice and the writ petitions continue to be filed in the Supreme Court under Art. 32 without first going to the High Court under Art. 226.

(vi) Broad Canvas of Article 32

Art. 32 being a Fundamental Right itself, it cannot be diluted or whittled down by any law. Art. 32 can be invoked even when a law declares a particular administrative action as final.[61]

The powers of the Supreme Court under Art. 32 are plenary and not

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60. *State of Madras* v. *V.G. Rao*, AIR 1952 SC 196; *K. Kochunni* v. *State of Madras*, AIR 1959 SC 725.
61. *Gopalan* v. *State of Madras*, AIR 1950 SC 27; *Prem Chand* v. *Excise Commisioner*. AIR 1963 SC 996.

fettered by any legal constraints. If in exercise of those powers, the court commits a mistake, the court has plenary power to correct the mistake.[62]

That Art. 32 bestows the Supreme Court with great powers is illustrated by the following case. In *Khatri* v. *State of Bihar*,[63] several petitioners filed writ petitions under Art. 21 on the allegation that they were blinded by the police while they were in its custody. The question arose whether the Court could order production of certain reports submitted by the CID to the State Government claimed that this material was protected by Ss. 162 and 172 of the Cr. P.C. Rejecting the contention, the Court said that the proceedings under Art. 32 are neither an 'inquiry' nor a 'trial' for an offence. Neither the Supreme Court is a criminal Court while hearing a writ petition nor are the petitioners accused persons and so these sections of the Cr. P.C. are not applicable to the Court's writ jurisdiction under Art. 32.

(vii) Procedure Under Article 32

In *Bandhua Mukti Morcha*,[64] the Apex Court has clarified that procedurally, under Art. 32, it is not bound to follow the ordinary adversary procedure and may adopt such procedures may be effective for the enforcement of the Fundamental Rights. When a writ petition was moved on behalf of some workmen that they were being held in bondage, the court appointed two persons as commissioners to make report on the petitioners' condition. It was argued that their report had no evidentiary value since what was stated therein was based only *exparte* evidence which had not been tested by cross-examination. The court held the argument not well-founded and rejected it, as it was based upon a total misconception of the true nature of a preceeding under Art. 32.

Art 32(2) confers power on the Court is its widest terms. "It is not

62. *S. Nagaraj* v. *State of Karnataka*, (1993) Supp. (4) SCC 595 ; Common Cause, *a Regd. Society* v. *Union of India* , AIR 1995 SC 2979, 3025.
63. AIR 1981 SC 1068
64. AIR 1984 SC 802

confined to issuing the high prerogative writs", but "it is much wider and includes within its matrix power of issue any directions, order or writs which may be appropriate for enforcement of the Fundamental Rights in question".[65]

The Constitution is silent as to the procedure to be followed by the Court in exercising its power under Art. 32(2) because the Constitution - makers were anxious not to allow any procedural technicalities to stand in the way of enforcement of Fundamental Rights and they never intended to fetter the Court's discretion to evolve a procedure appropriate in the circumstances of a given case to enable it to exercise its power to enforce a Fundamental Right.

Whatever procedure is necessary to fulfil that purpose is permissible to the Court. It is not at all obligatory for the Court to follow adversarial procedure. No such restriction ought to be imposed on the Court. In such a system a poor person is always at a disadvantage against a rich person. When the poor come to the Court for enforcement of their Fundamental Rights, it is necessary to depart from the adversarial procedure and evolve a new procedure so as to enable such people to bring the necessary material before the Court so as to secure enforcement of their rights. In the words of Bhagwati, J. :

> We have therefore to abandon the *laissez faire* approach in the judicial process particularly where it involves a question of enforcement of Fundamental Rights meaningful for the large masses of people .... If we want the Fundamental Rights to become a living reality and the Supreme Court to become a real sentinel on the *qui vive*, we must free ourselves from the shackle of out dated and outmoded assumptions and bring to bear on the subject fresh outlook and original unconventional thinking.[66]

Accordingly, the Court has accepted even a letter addressed to the Court

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65. AIR 1984 SC 814.
66. AIR 1984 SC at 815-16

as an "appropriate" proceeding and has taken congnizance of the matter raised therein. The letter need not be in any particular form.[67]

The poor cannot produce relevant material before the Court in support of their case. Even when a case is brought on their behalf by a citizen acting *pro bono publico*, it would be almost impossible for him to gather the relevant material and place it before the court. If the court adopts a passive attitude and declines to intervene in the absence of relevent materials, "the Fundamental Rights would remain merely a teasing illusion so far as the poor and disadvantaged sections of the community are concerned."[68]

That is why the court appoints commissioners to gather facts and data in regard to a complaint of branch of a Fundamental Right made on behalf of the weaker sections of the society. The commissioners' report furnishes prima facie evidence of the facts and data. The court appoints as commissioners such persons as would carry out the assignment objectively and impartially without any predilection or prejudice. Any party can dispute the facts or data stated in the commissioner's report. It is entirely for the court to consider what weight ought to be attached to the facts mentioned in the report. The High Courts can also follow a similar procedure in exercise of their jurisdiction under Art. 226.

(viii) Article 32 cannot be Restricted by Legislation

Art. 32 being a Fundamental Right cannot be diluted by any legislation. Section 14 of the Preventive Detention Act, 1950, prevented the detenu, on pain of presecution, from disclosing to any court the grounds of his detention communicated to him by the detainig authority. The provision was held unconstitutional as it rendered negatory the exercise of the Supreme Court's power under Art. 32 for unless the court could examine the grounds on which

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67. *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802, 813-14 ; *M.C. Mehta* v. *Union of India*, AIR SC 1086, 1090; *Pratul Kumar Singh* v. *State of Orrissa*, AIR 1989 SC 1783.
68. AIR 1984 SC at 516.

the detention order had been based, it could not decide whether detenu's Fundamental Rights under Arts. 21 and 22 had been infringed or not.[69]

A similar point was raised in *Express Newspapers* v. *Union of India* in another way.[70] The Working Journalists Act, 1955, constituted a wage board for fixing the rates of wages of working journalists. The Act was challenged on the ground that it made no provision requiring the wage board to give reasons for its decision. It was argued that this rendered the petitioner's right to approach the Supreme Court for enforcement of his Fundamental Rights negatory because, in the absence of reasons, the Court would not be able to investigate the valid prohibited the wage board from giving reasons for its decision, as that would have rendered Art. 32 negatory. But as there was no such provision and it was left to the board's discretion to give reasons for its decision or not, Art. 32 was not infringed in any manner whatsoever.

In *Prem Chand* v. *Excise Commr.*,[71] the Supreme Court struck down one of its own rules, (O.35, R.12) which required furnishig of security to move the court under Art. 32, as it retarded the assertion or vindication of the Fundamental Right under Art. 32. The rule imposed a financial obligation on the petitioner, and if he did not comply with it, his petition would fail.

The Court also took the positin in *Prem Chand* that furnishing of security discriminated against the poor sections of the society, and that Art. 32 cannot be encumbered by rules which favoured the rich with access to justice. But a rule aiding and facilitating the orderly presentation of petitions under Art. 32 cannot be regarded as unconstitutional as contravening Art. 32. A rule requiring security for filing a petition for review of an order made earlier by the court dismissing an Art. 32 petition is valid as it does not restrict Art. 32 in any way.[72]

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69. *Gopalan* v. *State of Madras*, AIR 1950 SC 27 ; *Lachhman Das* v. *State of Punjab*, AIR 1963 SC 222.
70. AIR 1958 SC 578.
71. AIR 1963 SC 996.
72. *Lala Ram* v. *Supreme Court of India*, AIR 1967 C 847.

The Supreme Court has again asserted recently that its power and jurisdiction under Art. 32 cannot be curtailed by any law. In exercising its power under Art. 32, the Court can direct anybody to make any inquiry. All authorities in the country are bound by the directions of the Court and have to act in aid of the Court.

In *Paramjit,*[73] the Supreme Court directed the National Human Rights Commission to make an inquiry into a specific matter. Under the Act establishing the Commission, it cannot inquire into any matter which is more than one year old. But the Supreme Court ruled that the Commission could inquire into the referred matter even though it was older than one year because the Commission would be functioning sui generis under the direction issued by the Court under Art. 32 and not under its own constituent statute.

By and large the Supreme Court has used its jurisdiction under Art. 32 in a creative manner.

(ix) Quasi - Judicial Bodies

The Supreme Court has diluted the efficacy of Art. 32 as a technique to challenge a dicision by a quasi-judicial body. In *Ujjam Bai* v. *State of Uttar Pradesh,*[74] the court has held that an assessment of sales tax by a quasi-judicial authority, acting within its jurisdiction and under an intra vires law, could not be challenged under Art. 32 on the ground that it has misconstrued or misinterpreted the law, because no breach of any Fundamental Right was involved in such a situation. Such an error can be corrected by way of appeal to the Supreme Court.

Art. 32 is , however, available when a Fundamental Right is violated -

(1) by a *quasi-judicial* authority acting under an *ultra vires* law; or

(2) when the assessing authority seeks to impose a tax against a constitutional prohibition;[75] or demands to tax not leviable under any valid law; or

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73. *Paramjit Kaur* v. *State of Punjab*, AIR 1999 SC 34.

74. AIR 1962 SC 1621.

75. *Firm Mehtab Majid* v. *State of Madras*, AIR 1963 SC 928.

(3) where the stature is *intra vires* but the authority acts under it without jurisdiction, or wrongly assumes jurisdiction:[76] or

(4) where the action taken is procedurally *ultra vires,* for example, when principles of natural justice are infringed.[77]

The Government of India, by a statutory order, applied the Sea Customs and other relevant Act of Pondicherry, saving "all things done or omitted to be done November 1, 1954" from the mischief of the Acts being applied. The petitioner had placed orders for impose before, but received the consignments after, the said date, and the Customs Collector seized them and imposed a heavy penalty on him. The petitioner challenged the Collector's order under Art. 32 alleging infringment of Art. 19(1) (*g*) on the ground that the Collector was acting without jurisdiction. Rejecting the petition, the Supreme Court held by a majority that in seizing the consignments, the Collector was acting within jurisdiction and was discharging a *quasi-judicial* function. Although he might either be taking a wrong view of the facts, or misconstruing the statutory order in question, yet in none of these situtations could the Court interfere under Art. 32, in the latter event because of the ruling in the *Ujjam Bai* case.[78]

In STC v. Mysore,[79] the *Ujjam Bai* case were held inapplicable and an assessment of sales tax on inter-State sale of cement was quashed under Art. 32. Under the Constitution, a State can not tax an interstate sale. It was argued that the taxing officer was acting in a *quasi - judicial* capacity; he had jurisdiction to decide whether a particular sale was inter-State or not, and any error committed by him in deciding that question falling within his jurisdiction would not offend any Fundamental Right as had been held in the *Ujjam Bai* case.

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76. S.T.C. v. Mysore, AIR 1963 SC 558.
77. *Coffee Board* v. *Jt. Commercial Tax Officer*, AIR 1971 SC 870.
78. *Pioneer Traders* v. *Chief Controller of Imports and Exports*, AIR 1963 SC 734
79. AIR 1963 SC 548.

A writ petition was moved in the Supreme Court under Art. 32 on the ground that the licensing authority misapplied the Imports and Exports Control Act. The Court dismissed the same on the ground that a petition under Art. 32 is not competent to challenge any erroneous decision of an authority. Invoking the authority of *Ujjam Bai*, the court ruled that a wrong application of the law would not amount to a violation of Fundamental Rights. If the provisions of the law would not amount to a violation of Fundamental Rights whether the authority was right or wrong on facts. An erroneous decision does not violate Fundamental Rights.[80]

The above mentioned cases bring out the difficulties of challenging quasi-judicial decisions on the ground of infringement of Fundamental Rights through Art. 32 petitions. The law has become rather technical. It is always a difficult question to decide whether an authority is acting without jurisdiction, or within jurisdiction but taking a wrong view of facts or law. Art. 32 is available in the first case but not in the second. Similarly, if a quasi-judicial authority acting within jurisdiction, misinterprets a constitutional provision, rather than an ordinary law, Art. 32 may be available in the first case but not in the second. Similarly if a quasi-judicial authority acting within jurisdiction, misinterprets a constitutional provision, rather than an ordinary law, Art. 32 may be available . On the whole, therefore, it is hazardous task to challenge a quasi-judicial decision under Article 226 which is broader in scope than Article 32. This position, in a way, appears to be anomalous for, while Article 32 is a guaranteed right, Article 226 is not so.

(x) Questions of Fact

The Court has power to decide disputed questions of fact arising in a writ petition if it so desires. This was very clearly stated by the Court in *Kochunni,* [81] where the Court observed:

But we do to countenance the proposition that, on an

80. *J. Fernandez & Company* v. *Dy. Chief Controller Imports and Exports*, AIR 1975 SC 1208.

81. *K.K. Kochunni Moopil Nayar* v. *State of Madras*, AIR 1959 SC 725.

> application under Art. 32, this Court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or on any other ground. If we were to accede to the aforesaid contention of learned counsel; we would be failing in our duty as the custodian and protector of the Fundamental Rights .....Further, questions of fact can and very often are dealt with on affidavits.

This statement was made in 1959. Since then the attitude of the Court has stiffened on this question and, ordinarily, the Court does not now go into disputed questions of fact.[82] in a writ petition. The reason for this judicial stance is that disputed questions of fact can be decided properly by examining the pleadings raised by the parties and by taking evidence and such a course is not possible in a summary proceeding like that of a writ petition under Art.32.

(xi) Against whom a writ can be issued ?

By and large Fundamental Rights are enforceable against the state. The term 'State' has been defined in Art. 12 which has already been discussed earlier. There are a few fundamental Rights, such as, under Arts. 17, 21, 23 or 24 which are also available against private persons. In case of violation of any such right, the court can make appropriate orders against violation of such rights by private persons.[83]

The protection available under Article 21 is available against 'the state'. In *Ajay Hasia*[84], the Court held that the expression 'Other Authorities included an "instrumentality" or 'agency" of the government. Now the term "state" included even a company registered under the Indian Companies Act or a

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82. *Major Sodhi* v. *Union of India*, AIR 1991 SC 1617 ; *Daljit Singh Dalal* v. *Union of India*, AIR 1997 SC 1367.

83. *People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1473, 1490-91, *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011.

84. *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487.

society registered under the Societies Registration Act[85]. The above development will be applicable to Article 21[86].

The basic question which arises arises in this regard is : against whom the protection of Article 21 is available? This question was considered by the Court in *Gopalan's*[87] case, where the Court held that the protection was available only against the State. Justice Patanjali Sastri opined that the constitutional safeguards were directed against the State and its organs[88]. The Court preferred the English doctrine of immunity against unlawful executive interference. Article 21, according to Justice Mahajan, "gives complete immunity against the exercise of despotic power by the executive". It further gives immunity against invalid laws which contravene the Constitution[89]. However, in the opinion of Das, J., Article 21 puts a check on the legislature as well[90].

Bhagwati, J., followed the expansive approach of *Gopalan,* in the *Habeas Corpus*[91]. The learned judge opined:

> Article 21 operates not merely as restriction on executive action against deprivation of personal liberty without authority of law, but also enacts a check on the legislature[92].

A similar view was followed by the learned judge in *Bachan Singh*[93]. In this case the learned judge, following *Maneka,* observe:

> Article 21 affords protection not only against executive action but also against legislation[94].

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85. *Ibid.*
86. Dwivedi, B.P. *The Changing Dimension of Personal Liberty in India,* Wadhwa & Company, Allahabad, 1998 at 72.
87. *Gopalan v. State of Madras,* AIR 1950 SC 27.
88. *Ibid* at 74.
89. *Ibid* at 84, *Per* Mahajan, J.
90. *Ibid* at 109, *Per* Das, J.
91. *A.D.M. Jabalpur v. S. Kant Sukla,* AIR 1976 SC 1207.
92. *Ibid* at 1363.
93. *Bachan Singh v. State of Punjab,* AIR 1982 SC 1325.
94. *Ibid* at 1340.

Now it is well settled that the protection of Article 21 is available against the executive and the legislature as well. Is the protection of Article 21 available against the judiciary? It may be noted that the 'judiciary' is not expressly mentioned within the definition of the 'State' under Article 12. However, there are a few fundamental rights in part III which afford protection against the *Judiciary as well*[95]. In *Bachan Singh*[96]. Bhagwati, J., dissenting, opined that a law vesting 'uncontrolled and unregulated discretion in the court whether to award death sentence or life imprisonment' would fall foul of Article 21[97]. Thus, a judgment of the court awarding death sentence was treated as violative of Article 21.

In *Antulay* v. *R.S. Nayak*[98]. The basic question framed by Sabyasachi Mukharji, J., was whether the earlier directions given by the Supreme Court transferring the case of the appellant for trial from the Court of special Judge to the High Court was violative.

Fundamental rights are generally available against State. However, some of the socio-economic rights guaranteed under part III of the Indian Constitution are available against private individuals also[99]. The question whether Article 21 is available against private acts, for the *first* time, reached before the Supreme Court in *Gopalan's*[100] case where the court was of the opinion that it was a

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95. For example, Articles 20 (2) and (3), 22 (I); *See* also, *Naresh Sridhar Mirajkar* v. *State of Maharashtra,* AIR 1967 SC 1, 28-29 *per* Hidayatullah J.

96. *Bachan Singh v. State of Punjab,* AIR 1982 SC 1325.

97. *Ibid* at 1384.

98. AIR 1988 SC 1531.

99. For example, Articles 15(2), 17, 23 and 24.

100. *Gopalan v. State of Madras,* AIR 1950 SC 27, *See* also, *P.D. Shamdasani v. Central Bank of India Ltd,* AIR 1952 SC 59, 60, which was a case under Articles 19(1) (f) and 31(1), Patanjali Sastri, C.J., Speaking for the Bench of five Judges, observed; There is no express reference to the State in Article 21. But could it be suggested on that account that Article was intened to afford protection to life and personal liberty against violation by private individuals? The words "except by procedure established by law" plainly exclude such a suggestion.

misconception to think that the constitutional safeguards are directed against individuals. Justice Patanjali Sastri held that the protection against violation of the rights by individuals must be sought in the ordinary law[101]. The question of violation of Article 21 by private action pointedly came up before the Supreme Court in *Vidya Vermas*[102] case.

A significant development took place in India by the enactment of the Protection of Human Rights Act, 1993, by Parliament. The Act defines the 'human rights' to mean the 'the rights relating to *life, liberty,* equality and *dignity* of the individual[103]. Further, it includes the above rights guaranteed by the Constitution as well as embodied in the International Covenant on Economic, Social and Cultural Rights.

In *M.C. Mehta's*[104], case a significant question came up; whether a private corporation could come within the ambit of Article 12 and thus be subjected to the limitations of fundamental rights. The Court did not make a definite pronouncement on the issue of the State but it subjected the private corporation to the limitations of Article 21. Thus in view of the humanist approach to personal liberty the question as to who is the violator whether the 'State' or 'Private individual' itself loses its relevance. In *Sheela Barse* v. *Secretary, Children Aid Society*[105] the children Aid society, Bombay, a registered society was treated as the 'state' within the meaning of Article 12 and required to satisfy the requirement of Article 21. A large mass of private educational institutions have cropped up to provide for many disciplines including scientific, technical and medical education. The question arose in *Mohini Jain's*[106] case was whether a private educational institution by state recognition would be

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101. *Ibid* at 74.

102. *Vidya Verma v. Shiv Narain,* AIR 1956 SC 108.

103. Sec. 2 (d), the Protection of Human Rights Act, 1993, (emphasis added)

104. *M.C. Mehta v. Union of India,* AIR 1987 SC 1086.

105. AIR 1987 SC 656

106. *Mohini Jain v. State of Karnataka,* AIR 1992 SC 1858.

included under Article 12. Justice Kuldip Singh upheld the right to education and then observed:

> The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The state may discharge its obligation through State owned or sate recognized educational institutions. When the *State government grants recognition to the private educational institutions it crates an agency to fulfil its constitutional obligation* under the constitution[107].

In *Unni Krishnan*[108], the court following *Ajay Hasia*[109], found it impossible to hold that a private educational institution either by recognition or affiliation to the University could ever be called an instrumentality of state. It is submitted that the view expressed in *Mohini Jain's* case is more in consonance with the criteria laid down in *Ajay Hasia* case. Thus the prime concern of the court, it is submitted, has been to protect the right to personal liberty of the individual either extending the scope of Article 12 to include a private body into the definition of the State or to extend the protection even to the private acts[110].

(xii) Who can apply ?

Art. 32 does not prescribe the persons or classes of persons who can invoke the Supreme Court's jurisdiction for the redressal of their grievances. The matter of 'standing' this lies within the realm of the Supreme Court.

The general principle is that a person whose Fundamental Right has been infringed has *locus standi* to move the Supreme Court under Art. 32 for

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107. *Ibid* at 1866 (emphasis added).

108. *Unni Krishnan v. State of A.P.*, AIR 1993 SC 2178, at 2206, *per* Mohan, J.

109. *Ajay Hasia v. Khalid Mujib,* AIR 1981 SC 487.

110. *Air India Statutory Corporation v. United Labour Union,* AIR 1997 SC 645, 674.

the enforcement of his right. A person where Fundamental Right is affected has standing to file a petition under Art. 32

The legal right to be enforced under Art. 32 must ordinarily be the right of the petitioner himself. As rights are different and inherent in different legal entities, it is not competent to a person to seek to enforce the rights of another except when the law permits him to do so.[111] This principle emanates from the theory that the remedies and rights are correlative and, therefore, only a person whose own right is in jeopardy is entitled to seek a remedy.

Since a corporation has a distinct legal personality of its own, with rights and duties separate from those of its individual members, a shareholder cannot complain against a law which affects the Fundamental Right of the corporation except to the extent that it infringes his own Fundamental Right as well[112].

A well-known exception to this principle, however, is a petition for a writ of habeas corpus which can be made not only by the person who is mprisoned or detained but by any person provided he is not a complete stranger, for liberating a person from an illegal imprisonment.[113]

(xiii) Relief under Article 32

The phraseology of Art. 32 (2) is very broad. Thereunder the Supreme Court is authorized to issue orders, directions, or writs, "including" writs, " in the nature of" *mandamus*, *certiorari*, prohibition, *quo warranto* and h*abeas corpus*.

Under Art. 32, the Supreme Court may issue not only the specified writs but also make any order, or given any directions as it may consider appropriate in the circumstances of the case to give proper relief to the

111. *G. C. College, Silchar* v. *Gauhati University*, AIR 1973 SC 761 ; *S. Sinha* v. *S. Lal & Co.*, AIR 1973 SC 2720.

112. *Chiranjit Lal* v. *Union of India*, AIR 1951 SC 41.

113. *Sunil Batra* v. *Delhi Administration* (II), AIR 1980 SC 1579 .

petitioner. The Court can grant declaration or injunction as well if that be the proper relief. [114]

The Court can mould relief to meet the exigencies of the specific circumstances.[115]

What is the appropriate remedy to be given to the petitioner for the enforcement of his Fundamental Rights in a matter for the Court to decide. In the words of the Court:[116]

> The jurisdiction enjoyed by this Court under Art. 32 is very wide as this court, while conceding a petition for the enforcement of any of the Fundamental Rights ...., can declare an Act to be ultra vires or beyound the competence of the legislature.

The power of the Supreme Court is not restricted to the five writs specifically mentioned in Art. 32 (2). This is because of two reasons, viz :

(1) The power of the Court is 'inclusive';

(2) The Court has power to issue writs "in the nature of" the specified five writs.

This means that the Court has flexibility in the matter of issuing writs. The Court has explained the position in *M.C. Mehta* v. *Union of India*[117].

> ... This Court under Art. 32 (1) is free to devise any procedure appropriate for the particular purpose of the proceedings namely, enforcement of a Fundamental Right and under Art. 32 (1) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the Fundamental Right.

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114. *K. K Kochunni* v. *State of Punjab*, AIR 1959 SC 725; *P.J. Irani* v. *State of Madras*, AIR 1961 SC 1731
115. *Golaknath* v. *State of Punjab*, AIR 1967 SC 1643.
116. *Bodhisattwa* v. *Subha Chakraborty,* AIR 1996 SC 922, 926
117. AIR 1987 SC 1086, 1091.

CHAPTER 6

TEST FOR DETERMINING AGENCY OR INSTRUMENTALITY OF THE STATE

I. Meaning of Agency or Instrumentality

Black's Law Dictionary[1] defines "instrumentality" to mean "a means or agency through which a function of another entity is accomplished, such as a branch of a governing body". "Agency" is defined as:

> "A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the Principal) and bind that other party by words or actions."

Thus instrumentality and agency are the two terms which to some extent overlap in their meaning; "instrumentality" includes "means" also, which "agency" does not, in its meaning. "Quasi-governmental agency" is "a government-sponsored enterprise or corporation (sometime called a government-controlled corporation)". Authority, as *Webster's Comprehensive Dictionary*[2] defines, is "the person or persons in whome government or aommend is vested ; often in the plural". The applicable meaning of the word "authority" given in *Webster's Third New International Dictionary,* is "a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise".

The definition of the State under Art, 12 has a specific purpose and that is Part III of the Constitution, and not for making it a Government or department of the Government itself. This is the inevitable consequence of the other authorities being entities with independent status distinct from the State and this fact alone dose not militate against such entities or institutions

1. Black's *Law Dictionary* 7th Edn..
2. *Webster's Comprehensive Dictionary*[2] International Edition.

being agencies or instrumentalities to come under the net of Art. 12. The concept of Instrumentality or agency of the Government is not to be confined to entities created under or which owes its origin to any particular statute or order but would really depend upon a combination of one or more of relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be, by piercing the corporate veil of the entity concerned.

II. Important Judgments

In *Sukhdev Singh v. Bhagathram*[3] Mathew, J., opined that the question whether a public corporation of the nature of Oil and Natural Gas Commission, Life Insurance Corporation or Industrial Finance Corporation is a 'state' within the meaning of Art. 12 of the Constitution is one of far reaching importance[4].

In Rajasthan State Electricity Board[5] case, the question whether the Rajasthan Electricity Board was an authority within the meaning of the expression "other authorities" in Article 12 of the Constitution. Bhargava, J. delivering the judgment for the majority pointed out that the expression "other authorities" in Article 12 would include all constitutional and statutory authorities on whom powers are conferred by law. The learned judge also said that if any body of persons has authority to issue directions, the disobedience of which would be punishable as a criminal offence, that would be an indication that the authority is 'state'. Justice Shah who delivered a separate judgment agreeing with the conclusion reached by the majority preferred to adopt a slightly different meaning to the words "other authorities". He said that authorities, constitutional or statutory, would fall within the expression 'state' as defined in article 12 only if they are invested with severing power of the State, namely, the power to make rule or regulations which have the force of law[6].

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3. AIR 1975 SC 1331
4. 2. *Ibid* at 1348.
5. *Electricity Board, Rajasthan v. Mohan Lal,* AIR 1967 SC 1857, quoted in *Sukdev Singh v. Bhagatram,* AIR SC 1975 SC 1331 at 1348.
6. *Ibid.* at 1349.

The test propounded by the majority is satisfied so far as the Oil and Natural Gas Commission is concerned as Section 25 of the Oil and Natural Gas Commission Act provides for issuing binding directions to owners of land and premises not to prevent employees of the Commission from entering upon their property if the Commission so directs. In other words, as Section 25 authorizes the Commission to issue binding directions to third parties not to prevent the employees of the Commission from entering into their land and as disobedience of such directions is punishable under the relevant provision of the Indian Penal Code since those employees are deemed to be public servants under Section 21 of the Indian Penal Code by virtue of Section 27 of the Act, the Commission is an 'authority' within the meaning of the expression "other authorities" in Article 12.[7]

It is relevant to note that Article does not define the word 'State'. It only provides that 'State' includes the authorities specified therein. The question whether a corporation set up under a statute to carry on a business of public importance is 'State' despite the fact that it has no power to issue binding directions has to be decided on other considerations.

The concept of State has undergone drastic changes in recent years. Today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation.

> If we clearly grasp character of the state as a social agent, understanding it rationally as a form of service and not mystically as an ultimate power, we shall differ only in respect of the limits of its ability to render service[8]

To some people State is essentially a class-structure, 'an organization of one class dominating over the other class': others regard it as an organization that transcends all classes and stand for the whole community. They regard it as a power system. Some view it entirely as a legal structure, either in the old

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7. *Ibid.*

8. see Mac Iver, "*The Modern State*, 183..

Austinian sense which made it a relationship of governors and governed, or, in the language of modern jurisprudence, as a community 'organized for action under legal rules'. Some regard it as no more than a mutual insurance society, other as the very texture of all our life. Some class the State as a great 'corporation' and others consider it as indistinguishable from society itself.[9]

Part IV of the Constitution gives a picture of the services which the state is expected to undertake and render for the welfare of the people. Article 298 provides that the executive power of the Union and State extends to the carrying on of any business or trade, the question for consideration is whether a public corporation set up under a special statute to carry on a business or service which Parliament thinks necessary to be carried on in the interest of the nation is an agency or instrumentality of the State and would be subject to the limitations expressed in Article 13(2) of the Constitution. A state is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the state acting through a corporation and making it an agency or instrumentality of the State.[10]

The Supreme Court of the United States in *McCullough v. Maryland*[11], held that the Congress has power to charter corporations as incidental to or in aid of governmental functions. So far as federal corporations are concerned, they are, by hypothesis, agencies of government. With this premise it would follow that action of a federally chartered corporation would be governed by the constitutional limitation imposed on an agency of the Federal Government.[12]

The tasks of government multiplied with the advent of the welfare State and consequently, the framework of civil service administration became

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9. See Mac Iver, "*The Modern State*" at 3-4.
10. *Sukhdev Singh v. Bhagatram,* AIR 1975 SC 1331 at 1350.
11. (1919) 4 Wheat 316.
12. Adolf A Berle, "*Constitutional Limitations on Corporate Activity – Protection of Personal Rights from Invasion through Economic Power*" 100 Univ. of Pennsylvania Law Rev. 933.

increasingly insufficient for handling the new tasks which were often a specialized and highly technical character. At the same time, 'bureaucracy' came under a cloud. The distrust of government by civil service, justified or not, was a powerful factor in the development of a policy of public administration through separate corporations which would operate largely according to business principles and as separately accountable.

The public corporation, therefore, became a third arm of the Government, In Great Britain, the conduct of basic industries: through giant corporations is now a permanent feature of public life[13].

A public corporation is a legal entity established normally by Parliament and always under legal authority, usually in the form of a special statute, charged with the duty a carrying out specified governmental functions in the national interest, those functions being confined to a comparatively restricted field and subjected to control by the executive, while the corporation remains juristically an independent entity not directly responsible to Parliament. A public corporation is not generally a multi-purpose authority but a functional organization created for a specific purpose. It has generally no shares or shareholders. It responsibility generally is to Government. Its administration is in the hands of a Board appointed by the competent Minister. The employees of public corporation are not civil servants. It is, in fact, likely that in due course a special type of training for specialized form of public service will be developed and the status of the personnel of public corporation may more and more closely approximate to that of civil service without forming part of it. In so far as public corporations fulfil public tasks on behalf of government, they are public authorities and as such subject to control by government[14].

In France, "An enterprise publique is an enterprise the whole or the majority of whose capital belongs to the State or other public agencies. By reason of its industrial or commercial activities it is basically subject to private

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13. *Sukhdev Singh v. Bhagatram,* AIR 1975 SC 1331 at 1350.
14. *Ibid.* at 1351.

law (and particularly to commercial law as are private enterprises). But, because of its public nature, it finds itself subjected to a certain degree of dependence on and control by public authority"[15].

The motivation for the creation of public corporation naturally plays much larger part in underdeveloped and poor countries than in industrially advanced countries. This accounts for the emergence of public corporations and the present significance of public enterprise carried on by them. The Government of India resolution on industrial policy dated April 6, 1948 stated, among other things that "management of state enterprise will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this". The Government of India Resolution on Industrial Policy dated April 30, 1956 stated.[16]

The Constitution was framed on the theory that limitation should exist on the exercise of power by the State. The assumption was that the State alone was competent to wield power. But the essential problem of liberty and equality is on of freedom from arbitrary restriction and discrimination whenever and however imposed. The Constitution, therefore, should, wherever possible, be so construed as to apply to arbitrary application of power against individuals by centers of power. The emerging principle appears to be that a public, corporation being a creation of the State is subject to the constitutional lamination as the State itself. The preconditions of this are two, namely, that the corporation is created by State, and the existence of power in the corporation to invade the constitutional right of individual.

Large corporations have power and this power does not merely come from the statutes crating them. They acquire power because they produce goods or service upon which the community comes to rely. The methods by which these corporations produce and the distribution made in the course of their production by way of wages, dividends and interest, as also the profits withheld

15. See *"Government Enterprise"*, ed. W. Friedmann & J.F. Garner, at 107-108.
16. See *"Government in Business"*, S.S. Khera, at 368, 373.

and used for further capital progress and the manner in which and the conditions under which they employ their workmen and staff are vital both to the lives of many people and to the continued supply line of the country. Certain impersatives follow from this. Both big business and big labour unions exercise much quasi public authority. The problem posed by the big corporation is the protection of the individual rights of the employees. Suggestions are being made that the corporate organizations of big business and labour are no longer private phenomena; that they are public organisms and that constitutional and common law restrictions imposed upon State agencies must be imposed upon them.

The governing power wherever located must be subject to the fundamental constitutional limitations. The need to subject the power center to the control of constitution requires an expansion of the concept of State action. The historical trend in America of judicial decisions has been that of bringing more and more activity within the reach of the limitations of the Constitution. "The next step would be to draw private governments into the tent of state action. This is not a particularly starling proposition, for a number of recent cases have shown that 'the conception of state action where public functions are being performed"[17].

In *Marsh v. Alabama*[18], a corporation owned a 'company town'. Marsh, a Jehovah's witness offered his pamphlets and preached his doctrine on one of the town corners. He was arrested for trespassing by one of the company guards, was fined five dollars and the case went all the way up to the Supreme Court. On straight property logic, Marsh of course was trespassing; he was unwanted visitor a company's real estate. But, Court said operation of a town is a public function. Although private in the property sense. It was public in the functional sense. The substance of the doctrine there laid down is that where a corporation is privately performing a 'public function' it is held to the constitutional

17. See Arthus S. Millar: "*The Constitutional Law of the 'Security State*". 10 Stanford Law Rev. 620, at 664.
18. (1946) 326 US 501.

standards regarding civil rights and equal protection of the law that apply to the state itself. The Court held that administration of private property of such a town, though privately carried on, was, nevertheless in the nature of a 'public' function' that the private rights of the corporation must therefore be exercise within constitutional limitations, and the conviction for trespass was reversed.

But how far can this expansion go? Except in very few cases, our Constituion does not, through its own force, set any limitation upon private action. Article 13 (2) provides that no State shall make any law which takes away or abridges the right guaranteed by Part III. It is the State action of a particular character that is prohibited. Individual invasion of individual right is not, generally speaking, covered by Article 13 (2). In other words, it is against State action that fundamental rights are guaranteed. Wrong ful individual acts unsupported by State authority in the shape of laws, customs, or judicial or executive proceeding are not prohibited. Articles 17, 23 and 24 postulate that fundamental rights can be violated by private individuals and that the remedy under Article 32 may be available against them. But by and large, unless an act is sanctioned in some way by the State, the action would not be State action. In other words, until some law is passed or some action is taken through officers or agents of the State, there is no action by the State. In the *Civil Rights*[19] case, Bradley. J. speaking for the majority, took this view of the 14th Amendment. That Amendment provides:

> No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws[20].

A finding of state financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as state action.

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19. (1881) 109 US 3.

20 *Ibid.*

Another factor which can be considered is whether the operation is an important public function. The combination of state aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a state agency. If a given functioin is of such public importance and so closely related to governmental functions as to be classified as a governmental agency. If a given function is of such public importance and so closely related to governmental functions as to be classified as a governmental, agency. Then even the presence or absence of state financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description, then mere addition of state money would not influence the conclusion.

The State may aid a private operation in various ways other than by direct financial assistance. It may give the organization the power of eminent domain, it may grant tax exemptions, or it may give it a monopolistic status for certain purposes. All these are relevant in making an assessment whether the operation is private or savours of state action[21].

The difficulty of separating vital government functions from non-government functions has created further difficulties. Is the distinction between governmental and non-governmental functions which plagued the courts a rational one? The contrast is between governmental activities which are private and private activities which are governmental. Without the adoption of a radical laissez faire philosophy and the definition of state functions as they were current in the days of Herbert Spencer it is impossible to sort out proper from improper functions. Besides the so-called traditional functions, the modern state operates a multitude of public enterprises.

The Oil and Natural Gas Commission consisted of the Chairman, and not less than two, and not more than eight, other members appointed by the Central Government. The Central Government may, if it thinks fit, appoint one of the members as Vice-Chairman of the Commission. The Commission may, for the purpose of performing its functions or exercising its powers, appoint

21. See generally "*The meaning of State Action*, LX Columbia Law Rev. 1083.

such number of employees as it may consider necessary. The functions and the terms and conditions of service of such employees shall be such as may be provided by regulations made under the 1959 Act. The Commission may, with the previous approval of the Central Government, by notification in the Official Gazette, make regulations not inconsistent with the Act and the rules made there under, for enabling it to discharge its functions under the Act. The regulations provide inter aia for the terms and conditions of appointment and service and the scales of pay of employees of the Commission; the time and place of meetings of the Commission, the procedure to be followed in regard to the transaction of business at such meeting; the maintenance of minutes of meetings of the Commission and the transmission of copies thereof to the Central Government; the persons by whom, and the manner in which payments, deposits and investments may be made on behalf of the Commission; the custody of moneys required and the maintenance of accounts. The Central Government may amend, vary or rescind any regulation which it has approved; and thereupon the regulation shall have effect accordingly but without prejudice to the exercise of the powers of the Commission under sub-section (1) and Section 32[22].

The Life Insurance Corporation was established by the Life Insurance Corporation Act, 1956. Under Section 49 of the Act the Corporation may, with the previous approval of the Central Government, by notification in this Gazette of India, make regulations not inconsistent with the Act and the rules made hereunder to provide for all matters for which provision is expedient for the purpose of giving effect to the provisions of this Act. The regulations may provide inter alia for the powers and functions of the Corporation which may be delegated to the Zonal Managers the method of recruitment of employees and agents of the Corporation and the terms and conditions of service of persons who have become employees of the Corporation under Section 11 of the Act; the number, term of office and conditions of service of members of Boards constituted under Section 22 of the Act; the manner in which the Fund of the

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22. *Sukhdev Singh v. Bhagatram,* AIR 1975 SC 1331 at 1363.

Corporation shall be maintained; the form and manner in which policies may be issued and contracts binding on the Corporation may be executed[23].

The Industrial Finance Corporation was set up by the Industrial Finance Corporation Act, 1948. The superintendence of the business of the Corporation is entrusted to a Board of Directors. The Central Government may make rules in consultation with the Development Bank not inconsistent with the provisions of the 1948 Act and to give effect to the provisions of the Act Sec. 43 of the Act enacts that the Board may with the previous approval of the Development Bank make regulations not inconsistent with the Act and the rules made hereunder to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act. The Development Bank means the Industrial Development Bank established under the Industrial Development Act, 1964. The shares of the Central Government in the Corporation shall stand transferred to the Development Bank when the Central Government shall so notify. The regulations provide inter alia for the holding and conduct of elections under this Act including the final decision of doubts or disputes regarding the validity of the election; the manner in which and the conditions subject to which the shares of the Corporation may be held and transferred; the manner in which general meetings shall be convened, the procedure to be followed thereat; the duties and conduct, salaries, allowances and conditions of service of officers and other employees and of advisers and agents of the Corporation[24].

All these Acts confer rulemaking power on the Central Government. It is necessary to refer to the regulation making power conferred on the three organizations under consideration. ON behalf of these organizations the contention advanced was that the regulations relate to internal management, that the terms and conditions of service of employees as laid down in the regulations are not law but merely rules for the purposes of internal management. In so far as the appointments of the various employees of these

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23. *Ibid.*

24. *Ibid.* at 1364.

three organizations are concerned they are appointed by contract and these regulations merely form part of those contracts. On behalf of the employees the contention was that as the source of the power to make regulations is the statute the regulations are themselves law[25].

Finally, the Court was of the opinion that the Rules and Regulations of the Oil and Natural Gas Commission. Life Insurance Corporation. Industrial Finance Corporation have the force of law. The employees of these statutory bodies have a statutory status and they are entitled to a declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. These statutory bodies are authorities within the meaning of Art. 12 of the Constitution[26].

In order that an institution must be an 'authority' it should exercise part of the sovereign power or authority of the State in this connection the definition of the word in the General Clauses Act, which reads as follows:

> Local authority" shalL mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund[27].

They are all concerned with exercising part of the powers of the State. That is why a Port Trust is given even the power to make regulations to provide that a breach of its regulations would be punishable. In such a case it is undoubtedly exercising part of the power of the State. The whole purpose of the provisions of Part III of the Constitution is to confer fundamental right on the citizen as against the power of the State or those exercising the power of the state[28].

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25. *Ibid.*
26. *Ibid* at 1378.
27. *Sukhdev Singh v. Bhagatram,* AIR 1975 SC 1331 at 1369.
28. *Ibid.*

The case in *British Broadcasting Corpn. V. Johns*[29] is very much in point. It is not necessary to burden this judgment by quoting extensively from that decision. It was held there that the B.B.C. was not an instrument of Government. It was argued in that case that the Crown was entitled to a monopoly of broadcasting and therefore the Government purposes also include non-traditional provisions of Government if the Crown has constitutionally asserted that they are to be within the province of Government. Willmer, L.J. quoted with approval the remarks of Wilberforce, J., against whose judgment the Court of Appeal was being heard, to the effect:

> So I came to the conclusion that however widely one may be inclined to extend the conception of an act or function of government the Crown has not taken the path of engaging itself in a broadcasting service or of entrusting it to any agent. It has deliberately chosen the alternative of an independent instrument[30].

In the case of *Sabhajit Tewary v. Union of India*[31], the Supreme Court held that the Council of Scientific and Industrial Research which was sponsored and controlled by the Central Government and registered under the Societies Registration Act cannot be said to be "State" within the meaning of Article 12.

Again, *Teway case*[32] has also been distinguished in a number of susequent decisions. In *Ajay Hasia*[33] speaking for the Constitution Bench, Bhagwati, J. Observed :

> The test which the court applied for determining this question was the same as the one laid by us, namely, whether the council

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29. 1965(1) Ch. 32.
30. *British Broadcasting Corpn. V. Johns,* 1965(1) Ch. 32, quoted in *Sukhdev Singh v. Bhagatram,* AIR 1975 SC 1331 at 1369.
31. AIR 1975 SC 1329.
32. *Ibid.*
33. AIR 1981 SC 487.

> was an instrumentality or agency of the Government. The court impliedly asserted to the proposition that if the council were an agency of the Government, it would undoubtedly be an authority. But having regard to the various features enumerated in the judgement, the court held that the council was not an agency of the Government and hence not be regarded as an "authority".

In *Som Prakash Rekhi v. Union of India*[34] the Supreme Court held that there was sufficient material to hold Bharat Petroleum Corporation, registered as a company under the Indian Companies Act, 1956 as a "State" within the meaning of Article 12. It is clearly a limb of the Government, an agency of the State and recognised by and Clothed with rights and duties by the statute. The court was of the opinion that, If a statutory corporation, body or other authority is an instrumentality or agency of the Government, it would be an "authority" and therefore "State" within the meaning of that expression in Article 12, and is subject to the same constitutional limitations as Government. The preponderant considerations for pronouncing an entity as State agency or instrumentality are (i) financial resources of the State being the chief funding source (ii) functional character being governmental in essence, (iii) plenary control residing in Government, (iv) prior history of the same activity having been carried on by Government and made over to the new body and (v) some element of authority or command.

Whether the legal person is a corporation crated by a statue, as distinguished from under a statute, is not an important criterion although it may be an indicium[35].

A careful study of the features of the Airport Authority and a government company covered by Secs. 7,9,10 and 12 of Burma Shell (Acquisition of Undertakings in India) Act (1976) discloses a close parallel except that the Airport Authority is created by a statute while Bharat Petroleum (notified under

34. AIR 1981 SC 212.

35. *Ibid.*

Section 7 of the Act) is recognized by and clothed with rights and duties by the statute. Applying the constellation of criteria collected from Airport Authority[36], on a cumulative basis, to the given case, there is enough material to hold that the Bharat Petroleum Corporation is "State" within the enlarged meaning of Article 12. The commonsense signification of the expression "other authorities under the control of the Government of India" is plain and there is no reason to make exclusions on sophisticated grounds such as that the legal person must be a statutory corporation, must have power to make laws, must, be created by and not under a statute and so on[37].

Pathak, J., opined that, the Bharat Petroleum Corporation Limited is "State" within the meaning of Article 12 of the Constitution. There is, however, no support for the above proposition in the provisions of the Burma Shell (Acquisition of Undertaking in India) Act (1976)[38].

On the other hand, in *Praga Tools Corpn. v. C.A. Imanual*[39], some of the workmen sought a writ of mandamus against the Corporation which was a company registered under the Indian Companies Act, 1913. 56 percent of the share capital was held by the Central Government, 32 percent by the Government of Andhra Pradesh and remaining 12 percent was held by private individuals. The Supreme Court held:

> The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a Statute in respect of which enforcement could ne sought by means of mandamus[40].

Praga Tools Corpn. case[41] was dintinguished in *Internation Airport Authority case*[42] and in *Som Prakash Rekhi Case*[43]. In the latter case, Krishna

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36. AIR 1979 SC 1628
37. AIR 1979 SC 1628.
38. *Ibid* at 213..
39. AIR 1969 SC 1306.
40. AIR 1969 SC 1306 (emphasis added).
41. *Ibid.*
42. AIR 1979 SC 1628.
43. AIR 1981 SC 212.

Iyer; J. observed:

> There was no specific reference to Article 12 as such although it was mentioned early in the judgment that the company was a separate legal entity and could not be said to be 'either a *Government Corporation* or an industry run by or under the authority of the Union Government. It was also noticed that 12 percent shares in the company were held by private individuals and nothing more was known about the plenary control by government.

In *R.D. Shetty v. International Airport Authority* [44], the question before the Supreme Court was whether the International Airport Authority can be said to be "State" within the meaning of Article 12. Holding the Airport Authority to be 'State" by following the earlier judgements in *Rajasthan State Electricity Board Case*[45] and *Sukhdev Singh Case* [46], and adopting the line of reasoning of Mathew, J. in *Sukhdev Singh case*[47], Bhagawati J. (as he then was) laid down certain tests for determining as to when a Corporation can be said to be an instrumentality or agency of government with the preface:

What are the tests to determine whether a Corporation established by statute or incorporated under law is an instrumentality or agency of Government? It is not possible to formulate an all inclusive or exhausive test which would adequately answer this question. There is no cut and dried formula which would provide correct division of Corporations into those which are instrumentalities or agencies of Government and those which are not.

The following are the relevant factors which may convert a statutory Corporation, a Government Company, a Co-operative society and other

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44. AIR 1979 SC 1628.
45. AIR 1967 SC 1857.
46. AIR 1975 SC 1331.
47. *Ibid.*

registered society or body into a "State" within the meaning of Article 12 of the Constitution :

(1) If the entire share capital of the Corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Whether the financial assistance of the State is so much to meet almost the entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with government character.

(3) Whether the Corporation enjoys monopoly status which is State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.

(5) If the functions of the Corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) If a department of Government is transferred to a Corporation, it would be a strong factor supporting the inference that the Corporation is an instrumentality or agency of Government.[48]

His Lordship also rightly observed.[49]

> It is not enough to examine seriatim each of the factors upon which a Corporation is claimes to be an instrumentality or. agency of Government and to support a finding to that effect. *It is the aggregate or cumulative effect of all viz. relevant factors that is controlling.*

His Lordship, however, added the following warning[50]

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48. *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487, 496.

49. *R.D. Shetty v. International Airport Authority,* AIR 1979 SC 1628 (emphasis added).

50. *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487, 496 (emphasis added).

These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because which stressing the necessity of a wide meaning to be placed on the expression "other authorities". It must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with government within the sweep of the expression. *A wide enlargement of the meaning must in tempered by a wise limitation.*

In *Ajay Hasia v. Khalid Mujib*[51] the Supreme Court held that the Regional Engineering College, Srinagar, established, administered and managed by a Society registered under the Jammu and Kashmir Registration of Societies Act, 1893 was a "State" within the meaning of Article 12. Extending the principle laid down by the Court in earlier cases, it was observed:

It may be pointed out that it is immaterial, for this purpose whether the Corporation is created by a statute or under a statute. The test is whether it is instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence.

In the above mentioned case[52], the Regional Engineering College, Srinagar was one of the fifteen Engineering Colleges in the country sponsored by the Government of India. The College was established and its administration and management are carried on by a Society registered under the Jammu and Kashmir Registration of Societies Act, 1998. Having regard to the Memorandum of Association and the Rules of the society it was held that the Society was an instrumentality of the agency of the State and the Central Governments and it was an "authority" within the meaning of Article 12. The composition of the Society was dominated by the representatives appointed by the central Government and the governments of Jammu & Kashmir, Punjab, Rajasthan and Uttar Pradesh with the approval of the Central Government. The monies required for running the College are provide entirely by the Central

51. *Ibid.*
52. *Ibid.*

Government and the Governments of Jammu & Kashmir, and even if any other monies are to be received by the Society, it can be done only with the approval or the State and the Central Governments. The rules to be made by the Society are also required to have the prior approval of the State and the Central Governments and the accounts of the Society, have also to be submitted to both the Government for their scrutiny and satisfaction. The Society was also to comply with all such directions as may be issued by the State Government with the approval of the Central Government in respect of any matter dealt with in the report of the Reviewing Committee.

The control of the State and the Central Governments was indeed so deep and pervasive that no immovable property of the society can be disposed of in any manner without the approval of both the Governments. The State and the Central Government have even the power to appoint any other person or persons to be member of the Society and any member of the Society other then a member representing the State or the Central Government can be removed from the membership of the Society by the State Government with the approval of the Central Government. The Board of Governors, which was in charge of General superintendence. Directions and Control of the affairs of Society and of its income and property was also largely controlled by nominees of the State and the Central Governments. Thus the State Government and by reason of the provision for approval. The Central Govt. also have full control of the working of the Society[53].

While considering this question it is necessary to bear in mind that an authority falling within the expression "other authorities" is, by reason of its inclusion within the definition of 'State' in Article 12, subject to the same constitutional limitations as the Government and is equally bound by the basic obligation to obey the constitutional mandate of the Fundamental Rights enshrined in Part III of the Constitution. We must therefore give such an interpretation to the expression 'other authorities" as will not stultify the operation and reach of the fundamental rights by enabling the Government to

53. *Ibid.* at 488.

its obligation in relation to the Fundamentals Rights by settings up an authority to act as its instrumentality or agency for carrying out its functions. Where constitutional fundamentals vital to the maintenance to human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form. Now it is obvious that the Government may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions[54].

In the early days when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions which were of traditional vintage. But as the tasks of the Government multiplied with the advent of the welfare State, it began to be increasingly felt that the frame work of civil service was not sufficient to handle the new tasks which were often specialized and highly technical in character and which called for flexibility of approach and quick decision making.

The inadequacy of the civil service to deal with these new problems came to be realized and it became necessary to forge a new instrumentality or administrative device for handling these new problems. It was in these circumstance and with a view to supplying this administrative need that the corporation came into being as the third arm of the Government and over the years it has been increasingly utilized by the Government for setting up and running public enterprises and carrying out other public functions[55].

Today with increasing assumption by the Government of commercial venture and economic projects, the corporation has become an effective legal contrivance in the hands of the Government for carrying out its activities, for it is found that this legal facility of corporate instrument provides considerable flexibility and elasticity and facilitates proper and efficient management with

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54. *Ibid* at 492.

55. *Ibid.*

professional skills and on business principles and it is blissfully free from "departmental rigidity, slow motion procedure and hierarchy of officers"[56].

The Government in many of its commercial ventures and public enterprises is resorting to more and more frequently to this resourceful legal contrivance of a corporation because it has many practical advantages and at the same time dose not involve the slightest diminution in its ownership and control of the undertaking. In such cases "the true owner is the State, the real operator is the State and the effective controllorate is the State and accountability for its actions to the community and the Parliament is of the State"[57].

It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management, but behind the formal ownership which is cast in the corporate mould, the reality is very much the deeply pervasive presence of the Government. It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government. Now it is obvious that if a corporation is an instrumentality or agency of the Government, it must be subject to the same limitations in the field of constitutional law as the Government itself, though in the eye of the law it would be a distinct and independent legal entity. If the Government acting through its officer is subject to certain constitutional limitations, it must follow a fortiori that the Government acting through the instrumentality or agency of a corporation should equally be subject to the same limitations. If such corporation were to be free from the basic obligation to obey the Fundamental Rights, would lead to considerable erosion of the efficiency of the Fundamental Rights, for in that event the Government would be enabled to override the Fundamental Rights by adopting

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56. *Ibid.*

57. *Ibid* at 493.

the stratagem of carrying out its functions through the instrumentality or agency of a corporation, while retaining control over it. The Fundamental Rights would then be reduced to little more than an idle dream or a promise of unreality[58].

It must be remembered that the Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation. The courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the Fundamental Rights[59]

The constitutional philosophy of a democratic socialist requires the Government to undertake a multitude of socio-economic operations and the Government, having regard to the practical advantages of functioning through the legal device of a corporation embarks on myriad commercial and economic activities by resorting to the instrumentality or agency of a corporation, but this contrivance of carrying on such activities through a corporation cannot exonerate the Government from implicit obedience to the Fundamental Rights.

To use the corporate methodology is not to liberate the Government from its basic obligation to respect the fundamental Rights and not to override them. The mantle of a corporation may be adopted in order to free the Government from the inevitable constraints of red-tapism and slow motion but by doing so, the Government cannot be allowed to play truant with the basic human rights. Otherwise it would be the easiest thing for the Government to assign to a plurality of corporations almost every State business such as Post and Telegraph, TV and Radio, Rail Road and Telephones- in short every

58. *Ibid.*

59. *Ibid* at 493.

economic activity - and thereby cheat the people of India out of the Fundamental Rights guaranteed to them. That would be a mockery of the Constitution and nothing short of treachery and breach of faith with the people of India, because, though apparently the corporation will be carrying out these functions. It will in truth and reality by the Government which will be controlling the corporation and carrying out these functions through the instrumentality or agency of the corporation[60].

By a process of judicial construction it can not be allowed that, the Fundamental Rights to be rendered futile and meaningless and thereby wipe out Chapter III from the Constitution. That would be contrary to the constitutional faith of the Post Menaka Gandhi era. It is the Fundamental Rights which along with the Directive Principles constitute the life force of the Constitution and they must be quickened into effective action by meaningful and purposive interpretation. If a corporation is found to be a mere agency or surrogate of the Government, "in fact owned by the Government, in truth controlled by the government and in effect an incarnation of the government" the court must not allow the enforcement of Fundamental Rights to be frustrated by taking the view that it is not the Government and therefore not subject to the constitutional limitations. Where a corporation is an instrumentality or agency of the government, it must be held to be an 'authority' within the meaning of Article 12 and hence subject to the same basic obligation to obey the Fundamental Rights as the Government[61].

Krishna Iyer, J. in this context rightly observed:

> Having regard to the directive in Article 38 and the amplitude of the other Articles in Part IV, government may appropriately embark upon almost any activity which is non-socialist republic may fall within the private sector. Any person's employment may appropriately embark upon almost any activity which is a non-socialist republic may fall within the

60. *Ibid.*

61. *Ibid* at 494

> private sector. Any person's employment, entertainment, travel, rest and leisure, hospital facility and funeral service may be controlled by the State. And if all these enterprises are executed through Government Companies, bureaus, societies, councils, institutes and homes, the citizen may forfeit his fundamental freedoms *vis-a-vis* these strange beings which are Government *in fact* but corporation *in form* . If only fundamental rights were forbidden access to Corporation, Companies, bureaus, institutes, councils and kindered bodies which act as agencies of the Administration, thereby may be a breakdown of the rule of law and the constitutional order in a large sector of Governmental activity carried on under the guise of 'jural persons'. It may pave the way for a new tyranny by arbitrary administrators operated from behind by government but unaccountable to Part III of the Constitution. We cannot assent to an interpretation which leads to such a disastrous conclusion unless the language of Article 12 offers no other alternative.[62]

His Lordship rightly observed:

> If a corporation is found to be a mere agency or surrogate of the government, "in fact owned by the government, in truth controlled by the government and in effect in incarnation of the government", the court must not allow the enforcement of Fundamental Rights to be frustrated by taking the view that it is not the government and therefore not subject to the constitutional limitation.[63]

"The Court cannot", Krishna Iyer, J. propounds, "connive at a process which eventually makes fundamental rights as race as roses in December, ice in June".[64]

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62. AIR 1981 SC 212.

63. *Ajay Hasia* v. *Khalid Mujib,* AIR 1981 SC 487, 731-34.

64. *Som Prakash Rekhi* v. *Union of India,* AIR 1981 SC 212, 224

A special mention must be made of the recent pronouncement of the Supreme Court in the Case of *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*[65]. In that case the Supreme Court was called upon to decide whether Central Inland Water Transport Corporation, a Government Company incorporated under the Companies Act can be said to be 'State' within the meaning of Article 12 of the Constitution. After referring to all the previous judgements and after applying various tests laid down therein, the court held the Corporation to be "State" under Article 12 of the Constitution. In order to arrive at the said conclusion, the Supreme Court took into consideration, inter alia, the following factors: (i) the Corporation was 'wholly owned' and 'entirely financed' by three Governments : (1) Union of India; (2) State of W.B. and (3) State of Assam; (ii) it was "completely under the control of the Central Government, and was managed by the Chairman and Board of Directors appointed by the Central Government and removable by it"; and (iii) the activities carried on by the Corporation "were of great importance to public interest, concern and welfare". Thus, in every aspect, it was a "veil behind which the Central Government operated through instrumentality of a Government company". Speaking for the Court, Madon, J. rightly observed:

> For the purposes of Article 12 one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State. The Corporation .....squarely falls within these observations, and it also satisfies the various tests which have been laid down ..... *It is nothing but the government operating behind a corporate veil, carrying out a governmental activity and governmental functions of vital public importance*. These can thus be no doubt that the Corporation is 'the State within the meaning of Article 12 of the Constitution.[66]

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65. AIR 1986 SC 1571.
66. *Central Inland Water Transport Corpn.* v. *Brojo Nath Ganguly,* AIR 1986 SC 1571 (emphasis added).

In *Ramachandra Iyer v. Union of India*[67] distinguishing *Tewary Case*[68], the Supreme Court observed:

> Much water has flown down the Jamuna since the dicta in *Sabhajit Tewary* case[69] and conceding that it is not specifically overruled in later decision, its ration is considerably watered down so as to be a decision confined to its own facts.[70]

In General Manager, *Kisan Sahkari Chini Mills Ltd., v. Satrughan Nishad*[71], the facts are that the Mill is a co-operative society registered as such under Uttar Pradesh Co-operative Societies Act, 1965. The contesting respondents filed various writ applications in the High Court alleging therein that they had worked on Class III and IV posts in the Mill for a period ranging from 5 to 12 years. According to them some of them were permanent workmen whereas others were seasonal. Uttar Pradesh Co-operative Sugar Factories Federation Limited (hereinafter referred to as 'the Federation') is the apex body of co-operative sugar mills in the State and its function is advisory in order to safeguard operational and financial interest of the sugar mills.

On 22nd November, 1999, Chairman-cum-Man aging Director of the Federation, who was also Scretary to the Government of Uttar Pradesh in the Department of Sugar Industry and Cane Development, had sent a letter to General Manager of the Mill in which it was mentioned that during the course of discussion the Managing Director had with the General Manager and other officers of the Mill, it transpired that out of 708 were surplus whose services were required to be dispensed with in view of the deteriorating financial condition of the Mill. By the said letter the Mill was advised to consider the desirability of dispensing with services of its surplus workmen. Thereupon, services of surplus workmen were dispensed with without giving any notice

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67. AIR 1984 SC 514.
68. AIR 1975 SC 1329.
69. *Ibid.*
70. *Sabhajit Tewary v. Union of India,* AIR 1975 SC 1329 (emphasis supplied).
71. AIR 2003 SC 4531

and paying retrenchment compensation as required under Section 6N of the Uttar Pradesh Industrial Disputes Act, 1947 (hereinafter referred to as the Act') in spite of the fact that they had worked for more than 240 days which necessitated filling of the various writ applications in the High Court.

Writ applications were contested by the Mill on grounds, *inter alia,* that the Mill, which is a co-operative society, was neither State nor instrumentally or agency of the State within the meaning of Article 12 of the Constitution of India, hence, the writ jurisdictioin of the High Court could not be invoked. According to them, service conditions of the contesting respondents, who were the workmen, were governed by standing orders of the Mill and the dispute raised by them related to enforcement of rights and obligations created under the Act, as such the remedy available to them was to raise an industrial dispute under the provisions of the Act. Further ground of contest was that although the workmen had claimed to have worked between the years 1983-84 to 2000-01 but in not a single year, the Mill during these aforesaid period was from 45 days to 99 days. According to them, the contesting respondents were seasonal workers and as they did not work for a period of 240 days in any year, were not entitled to claim protection under Section 6N of the Act.

The learned single Judge of the High Court overruled preliminary objection raised on behalf of the Mill, came to the conclusion that the Mill, which is a society, was State within the meaning of Article 12 of the Constitution as it was instrumentality of the State and there was infraction of the provision of Section 6N of the Act. Accordingly, the writ applications were allowed, orders of termination of the contesting respondents were quashed and it was directed that their services shall be regularized in a phased manner within a period of two years. The said order has been affirmed by the Division Bench on appeals being preferred by the Mill[72].

In the case of *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology and other*[73], a Bench of seven Judges of this Court has noted and

72. *Ibid* at 4532.

73. (2000) 5 SCC 111

quoted with approval in extenso the tests propounded in International Airport Authority case and approved in the case of Ajay Hasia for determining as to when a Corporation can be said to be an instrumentality or agency of the Government so as to come within the meaning of the expression 'authority' in Article 12 of the Constitution. There the Bench referred to the case of *Chander Mohan Khanna v. NCERT*[74], where, after considering the memorandum of association and the rules, this Court came to the conclusion that NCERT was largely an autonomous body and its activities were not wholly related to governmental functions and the Government control was confined only to the proper utilization of the grants and since its funding was not entirely from Government resources, the case did not satisfy there requirements of the State under Article 12 of the Constitution. Further, reference was also made in that case to the decision of this Court in *Mysore Paper Mills Ltd.* v. *Mysore Paper Mills Officer*[75], where it was held that the company was an authority within the meaning of Article 12 of the Constitution as it was substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public interest under the control of the Government.

From the decisions referred to above, it would be clear that the form in which the body is constituted, namely, whether it is a society or co-operative society or a company, is not decisive. There can be no hard and fast formula and in different facts or situations, different factors may be found to be overwhelming and indicating that the body is an authority under Article 12 of the Constitution. In this context, Bye-Laws of the Mill would have to be seen. In the instant case, in one of the writ applications filed before the High Court, it was asserted that the Government of Uttar Pradesh held 50% shares in the Mill which fact was denied in the counter-affidavit filed on behalf of the State and it was averred that majority of the shares were held by cane growers. Of courts, it was not said that the Government of Uttar Pradesh did not hold any

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74. (1994) 4 SCC 578.
75. (2002) 2 SCC 167

share. Before this Court, it was stated on behalf of the contesting respondents in the counter-affidavit that the Government of Uttar Pradesh held 50% shares in the Mill which was not denied on behalf of the Mill. Therefore, even if it is taken to be admitted due to non-traverse, the share of the State Government would be only 50% and not entire. Thus, the first test laid down is not fulfilled by the Mill. It has been stated on behalf of the contesting respondents that the Mill used to receive some financial assistance from the Government. According to the Mill, the Government had advanced some loans to the Mill. It has nowhere been stated that the State used to meet any expenditure of the Mill much-less almost the entire one, but as a matter of fact, it operates on the basis of self-generated finances. There is nothing to show that the Mill enjoys monopoly status in the matter of production of sugar. A perusal of Bye-Laws of the Mill would show that its membership is open to cane growers, other Societies. Gram Sabha, State Government, etc. and under Bye-Law 52, a Committee of Management consisting of 15 members is constituted, out of whom, 5 members are required to be elected by the representatives of individual members, 3 out of co-operative society and other institutions and 2 representatives of financial institutions besides 5 members who are required to be nominated by the State Government which shall be inclusive of the Chairman and Administrator.[76]

Thus, the ratio of the nominees of State Government in the Committee is only 1/3rd and the management of the Committee is dominated by 2/3 non-Government members. Under the Bye-Laws, the State Government can neither issue any direction to the Mill nor determine its policy as it is an autonomous body. The State has no control at all in the functioning of the Mill much-less deep and pervasive one. The role of the Federation, which is the apex body and whose ex-officio Chairman-cum-Managing Director is Secretary, Department of Sugar Industry and Cane, Government of Uttar Pradesh, is only advisory and to guide its members. The letter sent by Managing Director of the Federation on 22nd November, 1999 was merely by way of an advice and was in the nature of a suggestion to the Mill in view of its deteriorating financial

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76. *General Manager, K.S.C.M. Ltd. v. Satrughan Nishad,* AIR 2003 SC 4531 at 4534.

condition. From the said letter, which is in the advisory capacity, it cannot be inferred that the State had any deep and pervasive control over the Mill. Thus, it is found that, the indicia exists in the case of Mill, as such the same being neither instrumentality nor agency of Government cannot be said to be an authority and, therefore, it is not State within the meaning of Article 12 of the Constitution[77].

77. *Ibid.* at 4535.

CHAPTER - 7

THE ROLE OF JUDICIARY AND THE RECENT DEVELOPMENTS REGARDING ARTICLE 12

I. Judicial Activism

Judicial Activism does not carry any statutory definition. It connotes that function of the judiciary which represents its active role in promoting justice.

Judicial activism, to define broadly, is the assumption of an active role on the part of the Judiciary[1]. In the words of Justice J.S. Verma, Judicial Activism must necessarily mean "the active process of implementation of the rule of law, essential for the preservation of a functional democracy".

The jurist, speaking of judicial activism in the modern context, explores how justice to the individual or group of individuals or to the society in general is ensured through the active participation of the court, particularly as against public agencies.

Judicial Activism is an ascriptive term. It means different things to different people. While some may exalt the term by describing it as judicial creativity, dynamism of the judges, bringing a revolution in the field of human rights and social welfare through enforcement of public duties etc., others have criticized the term by describing it as judicial extremism, judicial terrorism, transgression into the domains of the other organs of the State negating the constitutional spirit etc.

The Indian republic, in principle, has broadly accepted the Montesquian anatomy of State as a trinity of instrumentalities consisting of the Legislature, the Executive and the Judiciary. Following the theory of separation of powers,

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1. Chaterji, Susanta, "*For Public administration*": *Is Judicial Activism Really Deterrent to Legislative Anarchy and Executive Tyranny?*". *The Administrator*, Vol. XLII, April-June 1997, at 9,11.

organs of a modern government – Legislature, Executive and Judiciary – are entrusted with three different functions, viz. policy-making, policy-implementation, and policy-adjudication respectively. But there is a harmony of purpose among the instrumentalities, as outlined in the Preamble to the Constitution. The *Modus vivendi* is comity, not rivalry.

The Administration is required to implement the will of "We the People of India", as reflected in the Constitution of India, in accordance with the laws and policies adopted thereof. For the attainment of the constitutional goals the Administration must essentially be responsive to the needs and aspirations of the people and sensitive to the demands of the rule of law. Open government, democracy, transparency and accountability are some of the significant values that should inform the democratic institutions of the contemporary polity. However, other contrary outcomes may result if any one or more of the three organs come to be divested or robbed of the original ideology. When value-erosion or operational aberration takes place, mismatch follows and cracks surface; governance strays off its orbit resulting in goal-derailment and administrative disaster[2]. That is why, the Judiciary, in any system of good governance, is entrusted with the power of judicial review of administrative actions as 'sentinel in *qui vive*'.

The realist school of jurisprudence exploded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judges made the law. It stated that the law was what courts said it was.

Theoretically, though, the Judiciary is expected to adjudicate or evaluate the policies promulgated by the Legislative or Executive wing of the government, it, equally importantly, checks excesses committed by the other two branches and enforces the rights of the people in case of default or distortion by the Legislature and executive in the discharge of duties, using the power of judicial review.

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2. Dey, Bata K., "*Defining Good Governance*", *Indian Journal of Public Administration*, Vol. 44, July-Sept. 1998 at 412,419.

The Judiciary is looked upon today, perhaps more than ever before, for removal of the maladies in public life. One reason may be the general disenchantment of people for the other limbs of government. While the Legislature and Executive in a parliamentary from of government are exposed to the pulls and pressures of the electoral forces, the judiciary well performs the entrusted task of holding the scale of justice even and aloft .

The transition from the colonial administration to the administration of a welfare state has generated onerous responsibilities for the Administration for securing and promoting the legitimate interests of the people. Today, the government has to undertake multifarious political, social and economic activities in discharge of its constitutional responsibilities and in the process exercise of a large measure of discretionary power becomes inevitable. The increase of administrative power is fraught with the danger of its abuse.

Failure to use, as well as abuse, of its power by the Administration is sure to disturb the heart-beat of social aspiration, thereby, necessitating appropriate correctional therapy. The judiciary operates as a mechanism of this correction and judicial activism serves as potent pacemaker to correct as far as possible, malfunctioning in violation of the constitutional mandates and to stimulate the State organs to function in the right direction. Balanced judicial activism is, therefore, indispensable for imparting the needed vitality to the rule of law in a welfare state[3].

Failure on part of the legislative and executive wings of the Government to provide 'good governance' makes judicial activism an imperative. The illustration of a few ruling of the Supreme Court of India evolving new dimensions of public law having implications for public administration would bring out the impact of judicial activism.

In a series of path-breaking pronouncements, for instance, *S. P. Gupta v. Union of India*[4], the Supreme Court of India, through public interest litigation,

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3. Bhattacharjee, G.R."*Judicial Activism: Its Message for Administrator*". *The Administrator;* Vol. XLII, April-June 1997, at 31,32.
4. AIR 1982, SC 149.

has granted access to persons inspired by public interest to invite judicial intervention against abuse of power or misuse of power or inaction of the government. Not only was the requirement of *locus standi* liberalized to facilitate access but the concept of justifiability was widened to include within judicial purview actions or inactions that were not considered to be capable of resolution through judicial process according to traditional notions of justifiability. Most of these cases had witnessed gross and callous failure of neglect on the part of public functionaries or administrative authorities in the discharge of their public duties. The Supreme Court of India has come to the rescue a grossly under-paid workers,[5] bonded labour,[6] prisoner,[7] pavement dwellers,[8] under-trial-detenues,[9] inmates of protection homes,[10] victims of Bhopal gas disaster[11] and so on and so forth.

By may landmark judgements, for instance, *Ratlam Municipality v. Virdichand*[12], the Apex Court has activated the administrative machinery when they failed to perform their legal obligation. The judicial process has achieved not merely initiation of action in case of inaction, but also monitored and channelised the action in the proper direction.

The Supreme Court had demonstrated that it is truly a sentinel on the *qui vive* in petitions relating to scandals involving the high and the mighty and gave necessary directions to the investigating agencies. In *Vineet Narain v. Union of India*[13] Apex Court took upon itself the task of monitoring the investigations pertaining to the Hawala transactions.

One of the known means for getting clean and less polluted persons to govern the country is their exposure to public scrutiny. The Court ruled that

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5. *People's Union for Democratic Right v. Union of India*, AIR 1982 SC 1473.
6. *Bandhua Mukti Morcha v. Union of India,* AIR 1984 SC 802.
7. *Sunil Batra v. Delhi Administration,* AIR 1978 SC 1675.
8. *Olga Tellis v. Bombay Municipal Corporation,* (1985) 3 SCC 545.
9. *Hussainara Khatoon v. Satte of Bihar,* AIR 1979 SC 1360.
10. *Upendra Baxi v. State of U.P.,* (1983) 2 SCC 308: (1986) 4 SCC 106.
11. *Union Carbide Corporation v. Union of India,* (1991) 4 SCC 584.
12. AIR 1980 SC 1622.
13. AIR 1996 SC 3386.

voters; right to know antecedents of contesting candidates is a facet of Art. 19(1) (a) and that such disclosure is necessary for survival of true democracy[14].

In *Common Cause v. Union of India*[15] the Supreme Court cancelled the allotment of petrol pumps made by the then Minister of State of Petroleum and Natural Gas, Capt. Satis Sharma on the ground of nepotism and malafide and passed severe structures against the minister.

The activist trust of the Supreme Court for ensuring good governance and probity in public life is brought to light by the above-mentioned illustrative cases.

The above decisions indicate a demonstration of ad hocism due to the deficiency of the institutions (the Legislature and Executive). The Courts by taking resort to judicial activism are encroaching upon the exclusive domain of the other instrumentalities inasmuch as the goal of the Court is to render justice.

It is the primary duty of the Executive to provide a fair and just government. It is not for the Courts to function as an extended arm of the Executive[16]. However, as has rightly been observed, judicial power or activism is inversely proportional to the political process. The weaker the political process, stronger is the judicial power; the reverse is true in part. By means of judicial activism, the Judiciary merely assists in the process of governance; it does not take over the functions of the Executive wing of the government.

The aforesaid judicial activism has alone led the public administration to be conscious and conscientious of public interest as its goal.

Judicial activism is not just a matter of serial affirmation of judicial power over other domains and instrumentalities of state power; it is as much a narrative of evolution of new constitutional cultures of power. No panacea for

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14. *People Union for Civil Liberties v. Union of India,* AIR 2003 SC 2363.
15. AIR 1996 SC 3538.
16. Palkhiwala, Nani, "*Role of Judiciary: Government by the Judiciary*". *CMLJ,* Vol. 31, Oct-Dec d1995, at 193.

the nation's constitutional ills, it offers a kind of chemotherapy for the carcinogenic body politic. And even the therapeutic uses of judicial power change with the changing contexts of domination and resistance[17].

Judicial activism has made a number of salutary, wholesome and beneficial effects on the public administration to make it effective and participative. But one must not be overenthusiastic in thinking that courts can remedy all the ills in public life.

Judicial activism in India encompasses an area of legislative vacuum in the field of human rights. Judicial activism reinforces the strength of democracy and reaffirms the faith of the common man in the 'rule of law'. The judiciary, however, can act only as an alarm clock but not as a timekeeper. After giving the alarm call it must ensure to see that the executive performs its duties in the manner envisaged by the Constitution.

It would be seen that judicial activism which is the search for the spirit of law, has been profitably used by powerless minorities, such as bonded labour, prison inmates, under trial prisoners, sex workers and such other powerless minority group as are crusading for protection of human rights of women and children or seeking redressal against governmental lawlessness, or relief against developmental policies which benefit the have at the cost of the have nots.

Judicial activism, however, is not an unguided missile. It has to be controlled and properly channelised. Courts have to function within established parameters and constitutional bounds. Decision should have a jurisprudential base with clearly discernible principle. Limit of jurisdiction cannot be pushed back so as to make them irrelevant. Court have to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution. People of this country have reposed faith and trust in the courts and, therefore, the judge have to act as their trustees. Betrayal of that trust would lead to judicial despotism which posterity would not forgive[18].

17. Prof. U. Baxi, Preface to Sathe, S.P. *Judicial activism in India: Transgressing Borders and Enforcing Limits,* Oxford University Press, 2005 edition, at xvi

18. Anand, A.S., Judicial Review - Judicial Activism-Need for Caution, 42 JILI (2000) at 157.

It must always be remembered that the judges in exercise of their power of judicial review are not expected to decide a dispute or controversy which is purely theoretical or for which there are not judicially manageable standards available with them. The courts do not, generally speaking, interfere with the policy matters of the executive unless the policy is either against the Constitution or some statute or is actuated by *mala fides*. Policy matter, fiscal or otherwise, are thus best left to the judgement of the executive. The danger of judiciary creating a multiplicity of rights without the possibility of adequate enforcement will in the ultimate analysis be counter productive and undermine the credibility of the institution. Court cannot 'create rights' where none exist nor can they go on making orders which are incapable of enforcement or violative of other laws or settled legal principles[19].

Article 142 of the Constitution of India vests in the Supreme Court powers of very wide amplitude. The plenary jurisdiction under article 142 is the residual source of power which the Supreme Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties while administering justice according to law. In *Supreme Court Bar Association* v. *Union of India and another*[20], while dealing with the power under article 142 of the Constitution, a constitution bench of the Supreme Court said:

> It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorize the Court to *ignore* the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to 'supplant' substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where

19. *Ibid.*
20. (1998) 4 SCC 409

> none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly... The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is *necessary for doing complete justice* 'between the parties in any cause or matter pending before it'. The very nature of the power must lead the Court to set limits for itself within which to exercise those powers.[21]...

Thus, even under article 142(1) of the Constitution, the Supreme Court held that the court does not have any jurisdiction to make an order plainly inconsistent with the express statutory provisions of substantive law, much less, inconsistent with any constitutional provision.

It is in fact stating the obvious to say that courts must, while exercising the power of judicial review, exercise proper restraint and base their decisions on recognized doctrines or principles of law. Judicial activism and judicial restraint are two sides of the same coin. It is therefore essential to remember that judicial restraint in the exercise of its functions is of equal importance for the judiciary while discharging its judicial obligations under the Constitution. With a view to see that judicial activism does not become 'judicial adventurism'. The courts must act with caution and proper restraint. They must remember that judicial activism is not an unguided missile and failure to bear this in mind would lead to chaos. People would, thus, not know which organ of the state to look to for ensuring check on the abuse or misuse of power.

It would be prudent to remember the following observations of Lord Justice Lawton in *Laker Airways*[22].

> In the United Kingdom aviation policy is determined by ministers within the legal framework set out by

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21. *Ibid.*

22. 1977 (2) WLR 234 at 267.

> Parliament. Judges have nothing to do with either policy making or the carrying out of policy. Their function is to decide whether a minister has acted within the powers given him by statute or the common law. If he is declared by a court, after due process of law, to have acted outside his power, he must stop doing what he has done until such time as Parliament gives him the powers he wants. In a case such as this I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play.

Thus 'judicial whistle' needs to be blown for a limited purpose and with caution. It needs to be remembered that courts cannot run the government nor the administration indulge in abuse or non-use of power and get away with it. The courts have the duty of implementing the constitutional safeguards that protect individual rights but they cannot push back the limits of the Constitution to accommodate the challenged violation.

All it means is that judges are expected to circumspect and self disciplined in the discharge of their judicial functions. It is an onerous duty cast on the judiciary to see that either inadvertently or overzealously, they do not allow the instrumentality of the courts to be polluted thereby eroding public trust and confidence in the institution.

Judicial activism is a delicate exercise involving creativity. Great skill is required for innovation. Caution is needed because of the danger of populism imperceptibly influencing the psyche. Public adulation must not sway the judges and personal aggrandizement must be eschewed. It is imperative to preserve the sanctity and credibility of judicial process.

II. Public Interest Litigation

The liberalization of *locus standi* and the conceptualization of Public Interest Litigation in the area of personal liberty was possible in India by judicial

activism of certain judges of the Supreme Court, particularly justice Krishna Iyer and justice Bhagwati. The Court, by using post *Maneka* tools, contributed for jurisdictional liberalism to humanize our judicial system.

The Court started the PIL with the prison conditions. Mrs Kapila Hingorani, a Supreme Court advocate, filed a petition based on a series of Articles in a national daily exposing the plight of Bihar under trial prisoners, most of whom had served for a longer period than that would have been to their credit if convicted[23].

The Supreme Court was anxious to see that the fundamental rights were available to the poor and the destitute in India in theory as well as in practice[24].

This way court broke the old traditional theory and embarked upon unorthodox and unconventional strategies for bringing justice to the poor and the Court moved even on a letter addressed to the Court[25]. In *Sunil Batra,* the Court treated a letter written by Batra from the Tihar Jail to one of the judges of the Supreme Court as a writ petition for *habeas Corpus*[26].

In 1980, Justice Bhagwati started the innovative use of judicial power in a rather informal way. He started entertaining letters on behalf of disadvantaged people and treated some of them as writ petitions. One such letter was addressed by two Professors of Law on behalf of the inmates of Agra Protective Home run by the State of Uttar Pradesh[27]. Then there was a letter written by a social science researcher, Dr. Vasudha Dhagamwar,

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23. *Hussainara Khatoon, v. State of Bihar,* AIR 1979 SC 1360 (Case No.1) AIR 1979 SC 1369 (Case No.2), AIR 1979 SC 1377 (Case No.3), AIR 1979 SC 1819 (Case No.4).
24. Ghouse, Mohmmad, '*Human Rights and Fundamental Rights*'.11 IBR (1984) 396, 413.
25. Chaturvedi, M.N. *Liberalizing the Requirement of Standing in Public Interest Litigation,* 26 JILI (1984) 52, Cassels, Jamie, *Judicial Activism and Public Interest Litigation in India. Attempting the Impossible*? 37 AJCL (1989) 495, 499.
26. *Sunil Batra v. Delhi Administration,* AIR 1980 SC 1579, *see* also, *Khatri v. State of Bihar,* AIR 1981 SC 928 (first case), *Khatri v. State of Bihar,* AIR 1981 SC 1068. (second case).
27. *Upendera Baxi v. State of U.P.* (1981) 3 Scale 1137.

complaining of the detention of several under trial prisoners in jails in the state of Bihar, and particularly of four tribal boys who were confined in jail for nearly eight years[28]. The Court directed the lower Court to expedite the case. The next case which relates to the release of the petitioner from the jail, was brought by the Free Legal Aid Committee, Hazaribagh[29].

The practice of entertaining letters as petitions, which was initiated and followed on an *ad hoc* basic by some of the justices was ultimately institutionalized by justice Bhagwati in the *Judges Appointment and Transfer Case*[30]. It laid down that where legal injury was caused or legal wrong was done to a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position could not approach the court for judicial redress, any member of the public acting bonafide could bring an action in court seeking judicial redress. This theme was further developed by Bhagwati, J., in *Asiad*[31] *case,* where the Court treated a letter written by a social action group as writ petition.

It was alleged in the letter that there were violations of various labour laws in relation to workmen employed in the construction work connected with the Asian Games. In the opinion of Bhagwati, J., it would violate their fundamental right under Article 21. The reasoning given by Bhagwati, J., was as follows:

> Here the workmen whose rights are said to have been violated and to whom a life of basic human dignity has been denied are poor, ignorant, illiterate human's who, by reason for their poverty and social and economic disability, are unable to approach the courts for judicial redress and hence the

28. *Kadra Pahadiya v. State of Bihar,* AIR 1981 SC 939 (First case), *Kadra Pahadiya v. State of Bihar,* AIR 1981 SC 1167 (second case).
29. *Sant Bir v. State of Bihar,* AIR 1982 SC 1470.
30. *S.P. Gupta v. President of India,* AIR 1982 SC 149.
31. *Peoples Union for Democratic Rights v. Union of India,* AIR 1982 SC 1473, *see* also *Sheela Barse v. State of Maharashtra,* AIR 1983 SC 378; *Veena Sethi, v. State of Bihar,* AIR 1983 SC 339

> petitioners have under the liberalized rule of standing *locus standi* to maintain the present writ petition espousing the cause of the workmen[32].

Elaborating the State attitude towards PIL the learned judge suggested:

> The state public authority which is arrayed as a respondent in public interest litigation should in fact, welcome it, as it would give it an opportunity to right a wrong or to redress an injustice done to the poor and weaker sections of the community whose welfare is and must be the prime concern of the state or public authority[33].

In *Sheela Barse's*[34] case, the Court treated a letter from a journalist as writ petition, complaining of custodial violence to women prisoners while confined in police lock up. In another letter the shocking situation of Bihar State administration was brought to the notice of the Supreme Court, where certain prisoners had already been in jail for a period of over 25 years without any justification[35].

The letter was addressed to justice Bhagwati by the Free legal Aid Committee, Hazaribagh. Which admitting the letter as writ petition Bhagwati, J., observed:

> It is the solemn duty of this Court to protect and uphold the basic rights of the weaker sections of the society and it is this duty we are trying to discharge in entertaining this public interest litigation[36].

In *Bandhua Mukti Morcha v. Union of India*[37], the court brought the public interest litigation as an 'appropriate' proceeding under Article 32 and

32. *Ibid.* at 1483.
33. *Ibid.* at 1478, see also *State of Himachal Pradesh v. A. Parent of a student of Medial College, Simla,* AIR 1985 SC 910.
34. AIR 1983 SC 378.
35. *Miss Veena Sethi v. State of Bihar,* AIR 1983 SC 339
36. *Ibid.* at 340.
37. AIR 1984 SC 802/

226. The learned judge has given the meaning of 'appropriate' proceeding to mean:

> A member of the public may move the court, even by just writing a letter, because it would not be right or fair to expect a person acting *pro-bono publico* to incur expenses out of his own pocket for going to a lawyer and preparing a regular writ petition for being filed in court for enforcement of fundamental right of the poor and deprived sections of the community and in such a case, a *letter addressed by him can legitimately be regarded as an 'appropriate' proceeding*[38].

This way Bhagwati, J., put the *ad*-hoc arrangement on a sound jurisprudential foundation. While justice R.S. Pathak criticized the practice of entertaining letter as writ petitions and insisted on certain formalities. He said:

> While this Court has readily acted upon letters and telegrams in the past, there is need to insist now on an appropriate verification of the petition or other communication before acting on it... There may be exceptional circumstances which may justify the waiver of the rule[39].

Two out of three judges expressed the opinion that the letters or other communication should be addressed to the whole Court, that is, to the chief justice and his companion judges and not to a particular, judge[40]. A change over in this wavelength can be seen in the *Neeraja's*[41], case where the Bench, consisting of Bhagwati and Sen, JJ., treated the letter from a journalist as writ petition but in the light of the opinion of the Court in *Stone Quarries*[42], it requested the advocate to file a regular writ petition in substitution of this letter. This case relates to the rehabilitation of bonded labourers. To avoid the

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38. *Ibid.* at 814 (emphasis added).
39. *Ibid.* at 840-41.
40. *Ibid. at 841 per* Pathak, J. at 848, *per* A.N. Sen, J.
41. *Neeraja Chaudhary v. State of M.P.,* AIR 1984 SC 1099.
42. *Bandhua Mukti Morcha v. Union of India,* AIR 1984 SC 802.

above difficulty when Bhagwati, J., became the chief justice of India. he set up a Public Interest Litigation Cell in the Supreme Court. Now a letter received by the Court is processed by this Cell.

The Court utilized the innovative technique of appointing inquiry commission, whenever it thought fit, for the purpose of ascertaining facts in PIL cases. In *Mukesh Advani*[43] the Court treated a letter as writ petition and directed the District judge, Bhopal to enquire and report about the working conditions in flagstone mines at Raisen. It relied on the report of the District Judge who found that there was no bonded labour.

In *Sheela Barse*[44], the letter for release of children below the age of 18 years detained in jails all over India, was treated by justice Bhagwati as writ petition. Now the tendency of the social activist was to seek judicial intervention in only public matter through PIL. A series of PIL petitions were filed in the Supreme Court by journalists, social action groups and pavement dwellers of Bombay facing the threat of forcible eviction and demolition of their dwelling[45] and the Court maintained the writ petition.

A demand for affirmative action in cases of executive inaction, misaction or slow action reached the Court in *Umed Ram Sharma*[46] where the Court held that residents in hilly areas affected by denial of proper roads and non-availability of roads had *locus standi* to maintain the petition for proper direction. In this case the Bench, consisting of R.S. Pathak, Sabyasachi Mukherjee and V.D. Tulzapurkar[47] JJ., although a critique of PIL allowed PIL to operate.

In *M.C. Mehta*[48], a case on environmental pollution, Bhagwati, C.J., speaking on behalf of five judges Constitution Bench, laid down two important principles. First, we 'must not forget that letter would ordinarily be addressed

43. *Mukesh Advani v. State of M.P.*, AIR 1985 SC 1363.
44. *Sheela Barse v. Union of India,* AIR 1986 SC 1773 (Second case).
45. *Olga Tellis v. Bombay Municipal Corporation,* AIR 1986 SC 180.
46. *State of H.P. v. Umed Ram,* AIR 1986 SC 847.
47. Tulzapurkar, Judiciary: Attacks and Survival, AIR 1983 (Jour.) 9.
48. *M.C. Mehta v. Union of India,* AIR 1987 SC 1086.

by poor and disadvantaged persons or by social action groups who may not know the proper form of address". Secondly, about the requirement of affidavit, the learned Chief Justice observed:

> If the Court were to insist on an affidavit as a condition of entertaining the letter the entire object and purpose of epistolary jurisdiction would be frustrated because most of the poor and disadvantaged persons will then not be able to have easy access to the court and even the social action group will find it difficult to approach the Court[49].

The above liberal approach adopted by Bhagwati, C.J., is a welcome step, however, it is submitted, that the Court should think over some limit at least to enquire about the genuineness of such letter in order to prevent the misuse of PIL.

The PIL has been proved very useful in ameliorating the conditions of girls in Agra Protective Homes[50] and of children in remand homes and observation homes[51]. It has been successful in providing compensation to poor victims of police firing in Bihar by evolving niew right to compensation for the violation of Article 21.[52] It is true that the Supreme Court has regarded the poor and the disadvantaged as entitled to preferential consideration[53] but in few cases the Court could not provide actual relief asked therefore[54]. In some cases where the matter of large mass of poor people was involved the Court left with a direction to the government to improve their lot[55]. The Court felt its

49. *Ibid.* at 1090.
50. *Upendra Boxi v. State U.P.,* AIR 1987 SC 191, *see* also, *Vikram Deo Singh Tomar v. State of Bihar,* AIR 1988 SC 1782.
51. *Sheela Barse v. Children Aid Society,* AIR 1987 SC 656.
52. *People Union for Democratic Rights v. State of Bihar,* AIR 1987 Sc 355.
53 *Bihar legal Support Society, New Delhi v. C. J. of India,* AIR 1987 SC 38,39.
54. *Vincent v. Union of India,* AIR 1987 SC 990, *see* also, *Sivarao, v. Union of India,* AIR 1988 SC 952.
55. *Sodan Singh v. New Delhi Municipal Committee,* AIR 1989 Sc 1988. *Kishen Pattanayak v. State of Orissa.* AIR 1989 SC 677, *see* for comment Pande, B.B., When They came to the Court Seeking Basis Needs Alternatives to the Flawed Response. 31 JILI 360 (1989) and XXV ASIL (1989) 50.

concern in the matter of death of a child, victim of police torture through PIL and awarded compensation for violation of Article 21[56].

It extended its arms to prevent the death in police lockups and custody[57] and to protect Chakma refugees settled in Arunachal Pradesh from forceful eviction.[58] The similar power is widely used by the High Court while exercising its power under Article 226[59]. While admitting a letter written by tribal woman alleging police atrocities the court thought it a duty of the Court in PIL cases to grant relief to the needy persons who were really oppressed, illiterate and uneducated and observed:

> On the other hand we do not want to encourage such sort of litigation, otherwise the traditional litigation will suffer and the courts of law instead of dispensing justice will have to take upon themselves administrative and executive funcitons[60].

The Court is now thinking about the limits and 'Caution' in utilizing the extraordinary strategy of PIL technique. However, in the matter of seminal importance, e.g., public health[61] and environment[62] the Court has shown its deep concern in expanding the PIL process. The Court extended Article 21 even to include the right to property to provide remedy to the victims of riots Mrs. Indira Gandhi in which their properties were destroyed due to arson and looting[63]. In a PIL normally any public spirited person or organization comes

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56. *People's Union for Democratic Rights v. Police Commissioner, Delhi Police,* (1989) 4 SCC 730, SAHELI a *Women's Resources Centre v. Commr. Of Police, Delhi,* AIR 1990 SC 513, *Nilabati Beher v. State of Orissa,* AIR 1993 SC 1960.
57. *D.K. Basu v. State of W.B., AIR 1997* SC 610.
58. *National Human Rights Commission v. State of Arunachal Pradesh,* AIR 1996 SC 1235.
59. *Rajasthan Kisan Sangthan v. State,* AIR 1989 Raj, 10.
60. *Ibid.* at 16.
61. *A.S. Mittal v. State of U.P.* AIR 1989 SC 1570, *Paramanand Katara v. Union of India,* AIR 1989 SC 2039, *K.C. Malhotra v. State,* AIR 1994 MP 48.
62. *Subhash Kumar v. State of Bihar* AIR 1991 SC 420, *Law Society of India v. Fertilizers and Chemical Travancore Ltd.*, AIR 1994 Ker, 308.
63. *R. Gandhi v. Union of India,* AIR 1989 Mad. 205.

before the Court for obtaining relief in favour of persons economically or socially oppressed and unable to approach the court for vindication of their fundamental or legal right complaining against State action or inaction. A unique application as PIL was moved before the Calcutta High Court where the State itself came up before the court championing the cause of numerous small depositors of the residuary non-banking companies[64]. In this historic case the court laid down that the State could move public interest litigation for protection and vindication of the legal and constitutional right of the under privileged and the determinate class of persons who were unable to approach the court who sometimes were not even aware of their rights to save themselves from exploitation. The above interpretation, it is submitted, will go a long way in the effective performance of State's duty to protect the public interest through PIL.

The PIL movement in India, espousing the cause of unorganized and unrepresentative people, itself has been unorganized and most of the cases were initiated by law professors, journalist, social scientists and lawyers who had no permanent plan to improve their lot. The points raised by Pathak[65], J., about the grave danger inherent in a practice where a mere letter was treated as a petition from a person whose antecedents and status were unknown or uncertain, could not be overlooked. The warning given by learned judge that 'the Court must be even vigilant against the abuse of its process' requires serious consideration confide. *Nilima*[66] discloses such a situation, where a letter was received from a woman complaining of illegal confinement, the Court treated the letter for urgent action. The letter was placed before the court after a lapse of two and half months. In this respect the court directed the matter to be placed before the Chief Justice of India for taking action against responsible

64. *State of W.B. v. Union of India,* AIR 1996 Cal. 181: *M/s Overland Investment Ltd. v. State,* AIR 1997 Cal. 18.

65. *Bandhua Mukti Marcha, v. Union of India,* AIR 1984 SC 802, at 840 per Pathak, J., this point has also attracted the attention of the academics, *see,* for example, Singh, Parmanand. Thinking About the Limits of Judicial Vindication of Public Interest. (1985) 3 SCC 1 (Jour).

66. *Nilima Priyadarshini v. State of Bihar,* AIR 1987 SC 2021 (*First Case), Nilima v. State of Bihar,* AIR 1989 SC 490 (Second Case).

officials for such delay. Subsequently it was found that the letter was forged and the girl prayed for the prosecution of persons committing such forgery. The court taking the case as unfortunate story, however, did not proceed with the prosecution[67]. Such a case brought unnecessary suffering and embarrassment to the Court as well as to the girl for whose benefit the PIL was meant. It is submitted that there is a need to put some check on PIL to avoid its misuse. However, the Court is now thinking to protect the society from the called "Protectors" to prevent the misuse of PIL. *Chhetriya Pardushan Sangharsh Samiti*[68]. Sabyasachi Mukharji, C.J., cautioned:

> While it is the duty of this court to enforce fundamental rights, it is also the duty of this court to ensure that this weapon under Article 32 should not be misused or permitted to be misused creating a bottleneck in the superior court preventing other genuine violation of fundamental rights being considered by the Court. That would be an act or a conduct which will defeat the very purpose of preservation of fundamental rights[69].

In another case[70] the Court refused to consider a litigation between the members of the erstwhile Raj family to settle their own scores as a public interest litigation. The matter was related to the management of a trust, Savaiman Singh II Museum. Mukharji. C.J., opined that the issue for the benefit of a particular section of people for their personal rights could not be a *pro bono publico.* The Court laid down some guidelines for PIL in *Subhash Kumar*[71] to invoke the jurisdiction of the Court. Justice K.N. Singh opined that recourse to a PIL proceeding should be taken by a person genuinely interested in the "Protection of society of behalf of the community". A PIL could not be invoked by a person or body of persons to satisfy his or its personal grudge and enmity[72].

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67. *Ibid.* (Second case).
68. *Chhetriya Pardushan Mukti Sangharsh Samiti v. State of U.P.* AIR 1990 SC 2060.
69. *Ibid.* at 2062.
70. *Ramsharan Autyanuprasi v. Union of India,* AIR 1989 SC 549.
71. *Subhash Kumar v. State of Bihar,* AIR 1991 420.
72 *Ibid.* at 424, for a critical comment on this issues, *see*, Dhavan Rajeev. Law as Struggle: Public Interest Law in India. 36 JILI (1994) 302.

Any personal interest cannot be enforced through the process of this Court under Article 32 of the Constitution in the garb of a PIL Singh, J., further observed:

> It is duty of this Court to discourage such petitions and to ensure that the cause of justice is not obstructed or polluted by unscrupulous litigants by invoking the extra ordinary jurisdiction of this court for personal matters[73].

It is notable that in order to discourage people from bringing petitions which are motivated by merely personal interest in the name of public interest, the court went to the extend of imposing heavy cost of Rs. 10,000/- on the petitioners[74]. In the matter of a PIL involving issues of constitutional law the court expected that the petitioners having no expert knowledge in that field should refrain from filing such petition[75]. The Court also initiated contempt proceedings and punished the contemner with fine and imprisonment in appropriate cases[76]. It is submitted that the use of PIL should be limited for the incapable, poor and illiterate people who are unable to enforce their rights.

In view of the operations by the court on a wider canvass of judicial review, a potent weapon was forged by the Supreme Court by way of Public Interest Litigation (PIL) also known as social action litigation. The Supreme Court has ruled that where judicial redress is sought in respect of a legal injury or a legal wrong suffered by persons, who by reason of their poverty or disability are unable to approach the court for enforcement of their fundamental rights, any member of the public, acting *bona fide*, can maintain an action for judicial redress. Thus, the underprivileged and the downtrodden have secured access to court through the agency of a public-spirited Person or organisation. This weapon was effectively used by the Supermen Court and the High Courts, being Constitutional courts. To a large extent from 1980 onwards[77].

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73. *Ibid.*
74. *Prayag Vyapor Mandal v. State of U.P.* AIR 1997 All. I.
75. *S. P. Anand v. H.D.Deve Gowda,* AIR 1997 SC 272.
76. *In Re: Dr. D.C. Saxena v. Hon'ble the Chief Justice of India,* AIR 1996 SC 2481.
77. Anand, A.S., *Judicial Review - Judicial Activism - Need for Caution,* 42 JILL, (2000) at 155.

With a view to retain legitimacy and its efficacy the potent weapon of PIL forged for the benefit of the weaker sections of society and those who, as a class, cannot agitate their legal problems by themselves has to be used carefully so that it may not get blunted by wrong or overuse. Care has to be taken to see that PIL essentially remains Public Interest Litigation and does not become either Political Interest Litigation or Personal Interest Litigation or Publicity Interest Litigation or used for persecution. If that happens, it would be unfortunate. PIL would loose its legitimacy and the credibility of the courts would suffer. Finding the delicate balance between ensuring justice in the society around us and yet maintaining institutional legitimacy is a continuing challenge for the higher judiciary. The court must be careful to see that by their over zealousness they do not consciously or unconsciously cause uncertainty and confusion in the law. In that event, the law will not only develop along uncertain lines instead of straight and consistent path but the judiciary's image may also in the bargain get tarnished and its respectability eroded. That would be a sad day. Judicial authoritarianism cannot be permitted under any circumstances[78].

The expanded concept of *locus standi* in connection with PIL, by judicial interpretation form time to time, has expanded the jurisdictional limits of the courts exercising judicial review. This expanded role has been given the title of 'judicial activism' by those who are critical of this expanded role of the judiciary. The main thrust of the criticism is that the judiciary by its directives to the administration is usurping the functions of the legislatures and of the executive and is running the country and, according to some, ruining it. What these critics of the judiciary overlook is that it is the tardiness of legislature and the indifference of the executive to address itself to the complaints of the citizens about violations of their human rights which provides the necessity for judicial intervention. In case where the executive refuses to carry out the legislative will or ignores or thwarts it, it is surely legitimate for courts to step in and ensure compliance with the legislative mandate. When the court is

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78. *Ibid.* at 156.

apprised of and is satisfied about gross violations of basic human rights it cannot fold its hands in despair and look the other way. The judiciary can neither prevaricate nor procrastinate. It *must* respond to the knock of the oppressed and the downtrodden for justice by adopting certain operational principles within the parameters of the Constitution and pass appropriate directions in order to render full and effective relief. If the judiciary were to shut its door to the citizen who finds the legislature as not responding and executive indifferent, the citizen would take to the streets and that would be bad both for the rule of law and democratic functioning of the state. Courts have come to realise and accept that judicial response to human rights cannot be blunted by legal bigotry. Courts no longer feel bound by the rigid rule of *locus standi* where the question involved is injury to public interest. Judiciary in this country has been the most vigilant defender of democracy, democratic values and constitutionalism.

III. Violation of Fundamental Rights and Judicial Review

Judicial review is the most important and powerful weapon in the hands of Judiciary through which it protects the individual from the violation of the fundamental rights. The scope of judicial review is in three specific areas:

i. Judicial review of legislative action'
ii. Judicial review of executive or administrative action;
iii. Judicial review of judicial action.

In our Constitution distribution of legislative powers between the Parliament and the legislatures of the states is defined. Various heads of legislation are contained in the three lists – union, state and concurrent-contained in the seventh schedule to the Constitution. The enactments of legislatures can be challenged on the ground that they are in conflict with chapter III of the Constitution or are otherwise *ultra vires* the Constitution.

Judicial review is not an expression exclusively used in constitutinal law. Literally, it means the revision of the decree or sentence of an inferior court by a superior court. Under general law, it works through the remedies of

appeal, revisioin and the like, as prescribed by the procedural laws of the land, irrespective of the political system which prevails. Judicial review has, however, a more technical significance in public law, particularly in countries having written constitutions. In such countries it means that courts have the power of testing the validity of the legislative as well as other governmental actions. The necessity of empowering the courts to declare a statute unconstitutional arises not because the judiciary is to be made supreme but only because a system of checks and balances between the legislature and the executive on the one hand and the judiciary on the other hand provides the means by which mistakes committed by one are corrected by the other and *vice versa.* The function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule. On the contrary, the duty of the judiciary is simply to give effect to the legislative policy of a statute in the light of the policy of the Constitution. The duty of the judiciary is to consider and decide whether a particular statute accords or conflicts with the Constitution and make a declaration accordingly[79].

The legislature, the executive and the judiciary are three co-ordinate organs of the state. All the three are bound by the Constitution. The ministers representing the executive, the elected candidates as members of Parliament representing the legislature and the judge of the Supreme Court and the High Courts representing the judiciary have all to take the oaths prescribed by the third schedule to the Constitution. When it is said, therefore, that the judiciary is the guardian of the Constitution, it is not implied that the legislature and the executive are not equally to guard the Constitution. For the progress of the nation, however, it is imperative that all the three wings of the state function in complete harmony[80].

A judicial, decision either stigmatises or legitimises a decision of the legislature or of the executive. In either case the court neither approves nor condemns any legislative policy, nor is it concerned with its wisdom or

79. Anand, A.S., *Judicial Review - Judicial Activism - Need for Caution,* 42 JILL, (2000) at 149.
80. *Ibid.*

expediency. Its concern is merely to determine whether the legislation is in conformity with or contrary to the provisions of the Constitution. It often includes consideration of the rationality of the status. Similarly, where the court strikes down an executive order, it does so not in a spirit of confrontation or to assert its superiority but in discharge of its constitutional duties and the majesty of the law. In all those cases, the court discharges its duty as a judicial sentinel[81].

When the validity of an Act is challenged before a court of law, the judiciary is required to consider the constitutionality of the statute on the touchstone of the parameters fixed by the Constitution. It is no reflection either on the government or on the Parliament that their views as to constitutionality are again being reviewed by the judiciary. In interpreting the existing law, that is to say, what the law is, the courts are required to keep the particular situation in view and interpret the law so as to provide a solution to the particular problem to the extent possible. This is a legitimate exercise by the judiciary of its constitutional obligation by virtue of the role assigned to it in the constitutional scheme. The gaps in the existing law, which are filed by updating the law, result in the evolution of juristic principles, which in due course of time get incorporated in the law of the land and thereby promote the growth of law[82].

Judicial review is an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every state action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by reason of a doubt raised in that behalf in the courts. This well-established constitutional principle of the existence of the power of judicial review and its need was indicated by Chief Justice Marshall in *Marbury* v. *Modison*[83]:

> It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts

81. *Ibid.* at 150.
82. *Ibid.*
83. 2 L Ed. 60, 1 Cranch 137 (1803).

> must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the Court must determine which of the conflicting rules governs the case. This is of very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution, and no such ordinary act (sic.), must govern the case to which they both apply ... why otherwise does it (the Constitution) direct the judges to take an oath to support it?

Judicial institutions have a sacrosanct role to play not only for resolving *inter-se* disputes but also to act as a balancing mechanism between the conflicting pulls and pressure operating in a society. Court of law are the products of the Constitution and the instrumentalities for fulfilling the ideals of the state enshrined therein. Their function is to administer justice according to the law and in doing so, they have to respond to the hopes and aspirations of the people because the people of this country, in no uncertain terms, have committed themselves to secure justice-social, economic and poitical-besides equality and dignity to all.

In human affairs, there is a constant recurring cycle of change and experiment. A society changes as the norms acceptable to the society undergo a change. The judges have been alive to this reality and while discharging their duties have tried to develop and expound the law on those lines while acting within the bounds and limits set out for them in the Constitution.

The progress of the society is dependant upon proper application of law to its needs and since the society today realises more than ever before its rights and obligations, the judiciary has to mould and shape that law to deal with such rights and obligations.

The law has not remained static. The doctrine of exclusivity of fundamental rights as evolved in *Gopalan's* case[84] was thrown overboard by the same Supreme Court, about two decades later in *Bank Nationalisation* case[85], and four years later in 1974, in *Hardhan Saha's* case[86], the Supreme Court judged the constitutionality of preventive detention with reference to article 19 also.

Twenty eight years after the judgment in *Gopalan's* case[87], in 1978 the Supreme Court in *Maneka Gandhi's* case[88], pronounced that the procedure contemplated by article 21 must be 'right, just and fair' and not arbitrary; it must pass the test of reasonableness and the procedure should be in conformity with the principles of natural justice and unless it was so, it would be no procedure at all and the requirement of article 21 would not be satisfied.

Responding to the changing times and aspirations of the people, the judiciary, with a view to see that the fundamental rights embodied in the Constitution of India have a meaning for the down-trodden and the under privileged classes, pronounced in *Madhav Haskot's* case[89] that providing free legal service to the poor and needy was an essential element of the 'reasonable, fair and just procedure'.

In *Nandini Satpathy* v. *P. L. Dani*[90], the Supreme Court held that an accused has the right to consult a lawyer during interrogation and that the right not to make self-incriminatory statements should be widely interpreted to cover the pre-trial stage also. Again, in *Sheela Barse* v. *State of Maharashtra*[91] the Supreme Court laiddown certain safeguards for arrested persons. In *Bandhua Mukti Morhca's* case[92] the Supreme Court held that right to life guaranteed by article 21 included the right to live with human dignity, free from exploitation.

84. AIR 1950 SC 27.
85. AIR 1970 SC 564.
86. AIR 1974 SC 2154.
87. AIR 1950 SC 27.
88. AIR 1978 SC 597.
89. AIR 1978 SC 1548.
90. AIR 1978 SC 1025.
91. 1983 (1) SCC 96.
92. AIR 1984 SC 802.

The courts have, thus, been making judicial intervention in cases concerning violation of human rights as an ongoing judicial process. Decisions on such matters as the right to protection against solitary confinement as in *Sunil Batra* v. *Delhi Admn,*[93], the right not be held in fetters as in *Charles Sobraj* v. *Supdt., Central Jail*[94], the right against handcuffing as in *T.V. Vatheeswaran* v. *State of Tamil Nadu*[95], the right against custodial violence as in *Nilabati Behera* v. *State of Orissa*[96], the rights of the arrestee as in *D.K. Basu v. State of W.B.*[97], or the female employees not to be sexually harassed at the place of work as in the case of *Vishaka* v. *State of Rajasthan*[98] and *Apparel Export Promotion Council* v. *A.K. Chopra*[99] are just a few pointers in that direction.

IV. Compensatory Remedy

In many of its decisions, the Supreme Court of India started a new era of compensatory jurisprudence in Indian legal history. The question of compensation for violation of the fundamental right was considered by the court, for the first time, in the *Khatri*[100] case, involving police atrocities. The question was whether the state was liable to pay compensation to the blinded prisoners who were blinded by the police force acting not in their private capacity but as police officials. The court conceded[101] that the state is liable for compensation but it did not pronounce on the issue of compensation as the fact of blinding was disputed. Even though the fact of blinding was difficult to

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93. 1978 (4) SCC 494.
94. 1978 (4) SCC 104.
95. 1983 (2) SCC 68.
96. 1993 (2) SCC 476.
97. 1997 (1) SCC 426.
98. 1997 (6) SCC 241.
99. JT 1999 1999 (1) SC 61.
100. *Khatri, v. State of Bihar,* AIR 1982 SC 928 (First case). AIR 1981 SC 1068 (Second case), popularly known as *Bhagalpur Blinding* cases.
101. *Ibid.* see also, *Veena Sethi v. State of Bihar,* AIR 1983 SC 339, 137 .

prove[102], it is submitted, that the court should have awarded compensation to the victims.

Failure of the prison administration in extending human treatment to its inmates is a tragic feature of this country. It is, however, surprising that when such matters are brought before the court, the state attempted to defend the lawlessness of its officer. To put an end to this lawlessness, the supreme Court evolved a new remedy of compensating the victims in *Rudal Sah*[103]. This writ petition disclosed a sordid and disturbing state of affairs. Though the petitioner was acquitted by the Court of Session, Muzaffarpur, Bihar, on June 3, 1968 he was released from the jail on October 16, 1982, that is to say, more than 14 years after he was acquitted. By this petition, the petitioner asked for his release on the ground that detention in the jail was unlawful. He also asked for certain ancillary relief like rehabilitation, reimbursement of expenses which he may incur for medical treatment and compensation for the illegal incarceration. The court held that the detention was illegal and passed an order for payment of Rs. 30,000/- to the petitioner as interim compensation. Chandrachud, C.J., made it clear that the order of the Court was not based on the consent of state but the right of the petitioner. The state must repair the damage done by its officer to the petitioner's rights.[104] This right to compensation, the court rightly observed, is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and present for their protection the powers of the state as a shield[105]. However, the petitioner must come with clean hands and if he is found in falsehood before the Court he may be disentitled from receiving any monetary compensation[106].

In *Sebastian M. Hongray*[107], two persons were taken to a military camp for interrogation and thereafter they were not seen. The Court issued the writ

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102. *See, Khatri* cases I and II, Id. At 930.

103. *Rudal Sah v. State of Bihar,* AIR 1983 SC 1086.

104. *Ibid.* at 1089.

105. *Ibid., see* Kuttikrishnan, C., Right to life as a Limit on State Power: The Growth of Human Rights Jurisprudence in India, XII Ac.L.R. 1 (1988) 1.37.

106. *Dhananjay Sharma v. State of Haryana,* AIR 1995 SC 1795.

107. *Sebastian M. Hongray v. Union of India,* AIR 1984 SC 571 (First Case).

of habeas corpus to produce them before it. However, they could not be produced. In these circumstances the court directed the Government to pay Rs. One lac each to the wives as a measure of 'exemplary cost"[108]. it may be noted here that there is no mention of Article 21. However, the judgment could be understood only when we take it as compensation for violation of fundamental right to life and personal liberty as the petition was admitted under Article 32 and the order of compensation was made in the *Habeas Corpus* petition itself.

The constitutional safeguards for protection of arrested persons are flagrantly violated by police official[109]. It is the most unhappy part of our criminal justice system that some times, magistrates also neglect to act in accordance with law. Such a situation arose in *Bhim Singh, v. State of J. & K.*[110] where a member of the Legislative Assembly was arrested by the police while going to attend the session of the House. He was not produced before any magistrate within the requisite period though remand was obtained. The court held that it constituted a gross violation of Articles 21 and 22(2)[111]. Since Bhim Singh was already released, the court held that he could be compensated by awarding suitable monetary compensation by way of exemplary costs. Following the *Rudal Sah*[112] and *Sebastin*[113] case the court directed the state to pay a sum of Rs. 50,000 to Bhim Singh.

Another significant question, in this respect, is whether the police officer responsible for the act, could be made personally liable to pay compensation

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108. AIR 1984 SC 1026 (Second case), *see* also, *Charanjit Kaur v. Union of India,* AIR 1994 SC 1491 where the compensation of Rs. 6 lacs was awarded for a death of military officer in mysterious circumstances. *People Union for Civil Liberties v. Union of India,* AIR 1997 SC 1203,wher compensation of Rs. One lac was awarded to the families of each of the deceased who were killed in fake encounters by the police.
109. *State of Punjab v. Sukhpal Singh.* AIR 1990 SC 231.
110. AIR 1986 SC 494.
111. *Ibid.* at 499, *see* also, *Rajasthan Kisan Sangthan v. State,* AIR 1989 Rj. 10, *State of Maharashtra v. R.S. Patil,* (1991) 2 SCC 373, *Arvinder Singh Bagga v. State of U.P.,* AIR SC 117.
112. *Rudal Sah v. State of Bihar,* AIR 1983 SC 1086.
113. AIR 1984 SC 1026 (second case).

to the victim. In *R.S. Patil's*[114] case a new dimension of right to compensation emerged. Before the present case it was the liability of the State to pay compensation for violation of the right to personal liberty. In this wavelength the State's liability to pay compensation extended even to the personal or illegal act of the officer. In order to make such officer liable in *R.S. Patil* the question was whether the poice officer could be made personally liable to pay compensation to the victim. But the Supreme Court, it is submitted, missed the opportunity of developing personal liability of the police officer and absolved the responsibility of the police officers. But this approach find modification in the *Arvinder Singh Bagga*[115] case, where the court directed the State to take immediate step to Mohan J., opined that upon payment by the state it will be open to recover personally the amount of compensation from the concerned police officers[116]. It may be pointed out that the present judgment would go a long way in economising the liability of the State and would teach a leason to the erring officers who would be responsible to their duties.

A complex problem of modern industrial society came up before the court in *M.C. Mehta*[117], where it considered the compensation claims of accident victims due to escape of olium gas. It extended the right to life and personal liberty to protect the victims of industrial hazards. Bhagwait, C.J., stated:

> Where an enterprise is engaged in hazardous or inherently dangerous activity and harms results to any one on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident[118].

Thus, once the activities carried on is hazardous or inherently dangerous,

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114. *State of Maharashtra v. R.S. Patil,* (1991) 2 SCC 373.
115. *Arvinder Singh Bagga v. State of U.P.* AIR 1995 SC 117.
116. *Ibid.* at 119, *see* also, *Tabassum Sultana v. State of U.P.,* AIR 1997 All. 177.
117. *M.C. Mehta, v. Union of India,* AIR 1987 SC 1086.
118. *Ibid.* at 1099.

the person carrying on such activity as liable to make good the loss caused to any person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity[119]. Though the Court laid down the principle of liability it did not adjudicate on the compensation claim in the wirt petitions and returned the matter to the civil court for disposal. Violation of the fundamental right was not considered in the present case as an 'appropriate case" for awarding the compensation in its writ jurisdiction[120].

It is submitted that in case of industrial hazards the compensation should be awarded in the writ jurisdiction itself. It may be pointed out that such case could be covered within the criterion laid down by the court for determining an 'appropriate case"[121]. The right of victim in such case does not depend upon the fact that the damage was caused by the state or private individual because even the private person may be directed to pay the compensation[122].

The expansive interpretation of Article 12 in recent years, has imposed a positive duty upon the state to protect the individual's property which was considered by the court in *R. Gandhi v. Union of India*[123] The compensation was claimed for destruction of the property of the victims due to total failure of the state of perform its mandatory duty to protect the life and livelihood of the citizens. The High Court upheld the compensation claims to rehabilitation of the affected persons. In this respect a significant question arises: Is the

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119. *Indian Council for Enviro-Legal Action v. Union of India,* AIR 1996 SC 1446, 1465.

120. *Ibid.* at 1091, however, the above principle is a good guideline for working out compensation in the cases to which the ratio is intended to apply. *See, Union Carbide Corporatin v. Union of India,* AIR 1992 SC 248 at 261, 309.

121. *Ibid. see* also, *R.L. & E. Kendra Dehrandun* v. *State of U.P.,* AIR 1991 SC 2216.

122. *Ibid see also R.L. & E. Kendra, Dehradun v. State of U.P.,* AIR 1991 SC 2216, where the court directed the lessee to pay Rs. 3 lacs under Article 32 for repairing the damage done to ecology by his act. *Bodhisattwa Gautam v. Subhra Chakraborty,* AIR 1996 SC 922, 928. *Delhi Domestic working women's Forum v. Union of India,* (1995) 1 SCC 141, *Vishaka v. State of Rajasthan,* AIR 1997 SC 3011.

123. AIR 1989 Mad. 205, *see* also, *M/s. Inder Puri General Store v. Union of India,* AIR 1992 J & K. 11 K. *Sai Reddy v. Dy. Executive Engineer, J. & C.A.D. Nampally,* AIR 1995 A.P. 208.

obligation of the State to protect the property of its citizens in absolute terms and the need to protect the property in the light of the resources available as also the practical problems and difficulties faced in the day-to-day administration of the State. The expectations from the State should be in the realm of reasonable care required to be taken by the State in giving such protection to the property of its citizens as in normal circumstance it is required. The concept of reasonable care, therefore, in turn gives rise to an equally important concept of negligence on the part of the State[124]. When the State was not negligent in its duty to protect the citizens property in communal riot, it cannot be made liable to pay for the loss.

It is significant that the plea of sovereign immunity was never taken by the state in the above cases. The conflict between the concept of sovereign function and personal liberty was considered for the first time, by the Andhra Pradesh High Court in *C. Ramkonda Reddy v. State*[125]. Here the compensation was claimed for the death of a prisoner in jail. The court held that there was failure or negligence on the part of the police to guard jail properly and ensure safety of prisoners[126].

The court gave primacy to Article 21 over the sovereign immunity. In the opinion of the Court where a citizen had been deprived of his life or liberty, otherwise than in accordance with the procedure prescribed by law, it was no answer to say that the said deprivation was brought about in the discharge of the sovereign function[127]. The Andhra Pradesh High Court declined to follow *Kasturi Lal*[128] in the light of the stand taken by the Supreme Court in *Rudal Sah*[129], *Sebastian*[130] and *Bhim Singh*[131] case. The court directed the State to pay Rs. 1,44,000 as the only mode for enforcing Article 21.

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124. *State of J & K. v. M/s. Jeet General Store,* AIR 1996 J. & K. 51.54.
125. AIR 1989 A.P. 235.
126. *Ibid.* at 244.
127. *Ibid.* At 247, *per* Jeevan Reddy, J.
128. *Kasturilal v. State of U.P.,* AIR 1965 SC 1039.
129. *Rudal Sah v. State of Bihar,* AIR 1983 SC 1086.
130. *Sebastian M. Hangray v. Union of India,* AIR 1984 SC 1026.
131. *Bhim Singh v. State of J. & K.* AIR 1986 SC 494.

The jurisprudential basis of the principle to award compensation was laid down by the court in *Nilabati Behera v. State of Orissa*[132], where it held that the defence of sovereign immunity was not applicable to a claim in public law for compensation. Verma, J., delivering the judgment for the court, opined that the proceeding for compensation under Article 32 and 226 was a public law remedy to which sovereign immunity did not apply. Even though it could be available as a defence in private law in an action based on tort[133]. Thus, the compensation to the victims whose rights have been violated would depend upon the nature of proceeding one chooses to pursue. It is submitted that the above decision did not clarify the position when the claim of compensation was raised in appeal cases and the extent of sovereign immunity to prevent the victims from compensation in a private law suit. Therefore, in order to prevent an exodus of litigations availing writ jurisdiction in the place of a civil suit, the very defence of sovereign immunity should be scrapped[134]. The same principle of compensation should be applicable to public law and private law remedies. In that case, the sovereign immunity defence is reduced to non fundamental rights issues irrespective of the nature of proceedings[135].

When the victim is entitled for compensation he should be provided relief by the court. In *SAHELI*[136], the court held that the mother of the child was entitled to get compensation for the death of her son, who died as a result of injury caused by the police officers, from Delhi Administration. Ray, J., observed that Naresh was done to death due to the beating and assault by the agency of the sovereign power acting in violation and excess of the power vested in such agency[137]. The court made it clear that, "It is well settled now

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132. AIR 1993 SC 1960, *see* also *Qumar Sultana v. Commr., Municiapl Corpn. Of Hyderabad.* AIR 1995 A.P. 203.
133. *Ibid.* at 1969.
134. *See,* Dwivedi, B.P., *From Sah to SAHELI: A New Dimension to Government Liability,* 36 *JILI* (1994) 99, 108.
135. *See.* Singh, Mahendra P., *Constitutional Liability of the State: Erosion of Sovereign Immunity* 15 The *lawyes,* May 1994, 17.
136. SAHELI a *Women's Resources Centre v. Commr. Of Police,* Delhi, AIR 1990 SC 513.
137. *Ibid.* at 516.

that the State is responsible for the tortuous acts of its employees". Following *Vidyawati*[138], the court rejected the defence of soverign immunity and directed the state to pay Rs. 75000 to the mother of the deceased child[139]. The most remarkable point in SAHELI was that it did not make any distinction between the cases of violation of fundamental rights and other legal rights.

Following the above view in *Hazur Singh v. Behari Lal*[140], B. R. Arora, J., explained the present position of the sovereign immunity as follows:

> State cannot claim any immunity from payment of damages for the illegal and wrongful action of its officers on the so called doctrine of sovereign immunity. Time has come to give a good bye to the doctrine of sovereign immunity and to sweep of this archaic rule, which has become out moded in the concept of modern development[141].

The compensation is awarded, generally, on the basis of the entitlement of the claimant at the law. The modern concept of justice is more concerned with providing relief to the victims than the niceties of legal principles[142]. For this purpose, the court may also take into consideration the economic condition of parties while determining the quantum of compensation[143]. Some recent decisions are a pointer where the court awarded compensation to the victims irrespective of justification of their claim. In *People Union for Democratic Rights* v. *State of Bihar*[144], the police opened fire at a peaceful meeting without any warning or provocation as a result of which 21 persons died and several persons suffered injuries. The court directed the State to pay compensation of

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138. *State of Rajasthan v. Vidyawati,* AIR 1962 SC 933.
139. *SAHELI'S* case, AIR 1990 SC 513 *see* also, *People Union for Democratic Rights v. Police Commissioner, Delhi Police,* (1989) 4 SCC 730, *P.V. Kapor v. Delhi Admn.* 1992 Cr. L.J. 128 (Delhi).
140. AIR 1993 Raj. 51.
141. *Ibid.* at 59. *see* also, *N. Nagendra Rao, & Co. v. State of A.P.* AIR 1994 SC 2663.
142. *See, Union Carbide Corporation v. Union of India,* AIR 1990 SC 273.
143. *See, M.C. Mehta, v. Union of India,* AIR 1987 SC 1086.
144. AIR 1987 SC 355.

Rs 20,000 for each case of death without prejudice to any just claim of compesation[145]. Though this observation is comparable with *Rudal Sah* where the court said that the order (or compensation) will not preclude the petitioner from bringing a suit to recover appropriate damages from the State and its erring officials[146] · the difference is that in *Rudal Sah* the court decided the compensation claims, while in the latter case it did not decide the claims and returned the matter to the High Court.

Jwala Devi v. Bhoop Singh[147], is another decision falling in the above category. It was alleged by an old woman that she was assaulted, tortured and paraded in the street after rubbing black shoe polish on her face by police officials. These allegations could not be proved before the court and the claim for compensation was rejected. But the court directed the Sate to pay Rs. 5,000/ = to the petitioner[148]. A similar order was passed by the court in a medical mishap case[149], where the eyes of the patient were irreversibly damaged after operation by a team of doctors. As to the question of appropriate compensation to the victims in this case, Ranganath Misra, J. (as he then was), observed that, 'on *humanitarian consideration* the victims should be afforded some monetary relief by the State Government'[150]. The court directed the State to pay Rs. 12,500/= to each of the victims. It may be pointed out here that in all the above mentioned cases Justice Misra was a member of the Bench[151]. It is indeed a remarkable development for which the credit goes to justice Misra, Indeed, we suggested that the Supreme Court a the guardian of civil liberties should make use of this new technique more frequently in compensating such victims.

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145. *Ibid.* at 366.
146. *Ibid. M.C. Mehta's* case, at 1089.
147. AIR at 1443.
148. *Ibid.* at 1443.
149. *A.S. Mittal v. State of U.P.* AIR 1998 SC 1570.
150. *Ibid* at 1577 (emphasis added) such order is justified under Article 142. *See,* Dwivedi, B.P., *From Sah to SAHELI: A New Dimension to Government Liability*, 36 JILI (1994) 99,108, *see* also, Jain S.N. *Money Compensation for Administrative Wrongs through Article* 32, 25 JILI (1983) at 118.
151. *See* case mentioned above.

Subsequently, a new development took place in Indian liberty jurisprudence by including the right to medical assistance, perfect and competent medical aid and timely treatment to a person in government owned and managed hospital or government sponsored scheme, into life and liberty under Article 21. The question arises in this respect is, whether the failure on the part of a government hospital, doctors and staffs employed there in, to provide such service may amount to violation of Article21 and the State may be held liable to pay compensation for medical negligence? The court answered this question in affirmative and directed the State to compensate the victims in such cases[152]. In order to develop the accountability of the doctors and staff, it is submitted, that the State should be entitled to recover the said amount from the negligent employees.

To sum up the aforesaid principle, it is pertinent to quote the words of Dr. A. S. Anand, J.:

> 'monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrongdoer.[153]

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152 *Jasbir Kaur v. State of Punjab,* AIR 1995 P&H 278, (the court awarded the compensation of Rs. One lac when a newly born child was taken away by a cat in government owned and managed hospital) *P.B. Khet Majdoor Samity v. Sate of W.B.,* AIR 1996 SC 2426 (a compensatin of Rs. 25,000/= was awarded for the failure of the government hospital to provide timely medical treatment), *Tabassum Sultana v. State of U.P.* AIR 1997 All. 177 (the compensation of Rs. There lacs was awarded for the loss of motherhood of young lady after the operation for tubectomy under the government sponsored scheme).

153 *D.K. Basu v. State of W.B.,* AIR 1997 SC 610, 628.

Thus, the courts have evolved a general principle of Governmental liability. It does not make any distinction between a fundamental right or other legal right. It is also universal in its application covering writ jurisdiction as well as a civil suit. Officials of the Government act, for and on behalf of the state. Thus, the state is rightly made liable for their acts and defaults. The solution lies with the enactment of comprehensive legislation[154] or judicial innovation completely discarding the sovereign immunity. The Court has initiated the emergence of a fundamental right to compensation.

The judiciary has thus, been rendering judgments which are in tune and temper with the legislative intent while keeping pace with time and jealously protecting and developing the dimensions of the fundamental human rights of the citizens so as to make them meaningful and realistic. New contents are being provided to criminal justice also resulting in prison reforms and humanitarian treatment of the prisoners and the under trials. The doctrine of equality has been employed to provide equal pay for equal work. Ecology, public health and environment are receiving attention of the courts. Exploitation of children, women and labour is receiving the concern it deserves. The executive is being made more and more to realize its responsibilities.

V. Recent Judgments Regarding Article 12

In course of time, the Supreme Court has been expanding the horizon of the term "other authority" in Article 12. A large number of bodies statutory and non-statutory, have been held to be 'authorities' for purposes of Article 12. Even if the entire share capital of a company is subscribed by the government, it cannot yet be treated as a government department. The company

154. *See,* Singh, Mahendra P,, *Constutiional Liability of the State: Erosion of Sovereign Imunity* 15 The *Lawyers,* May 1994, *see* also, *Chauhan, v. S., Sovereign Immunity Versus Fundamental Rights*: Gray Area of Tension in the Constitutional Law of India, AIR 1992 (Jour). 129, at 135 where the learned author pleads for legislation to cure the anomaly. On the other hand. Alice Jacob takes the view that the cure lies in the hands of the judiciary and not the legislature, *see,* Jacob, Alice, Vicarious Liability of Government in Torts, 7 JILI (1965) at 251.

has its own corporate personality distinct from the government. Such a government company can still be treated as an authority under Article 12[155]. Government Companies, such as Bharat Earth Movers Ltd., Indian Talephone Industries Ltd., in which the Government holds 51% share capital, and which are subject to pervasive government control, have been held to be "other authorities" under Article 12[156].

(i) Co-operative Society

In *U.P. State Coop. Land Development Bank Ltd. v. Chandra Bhan Dubey*[157], the court held that, U.P. State Co-operative Land Development Bank Ltd. was a cooperative society but it was under pervasive control of the State Government and was an extended arm of the Government. It was thus an instrumentality of the State.

The courts have been led to take such an expansive view of Article 12 because of the feeling that if instrumentalities of the government are not subjected to the same legal discipline as the government itself because of the plea that they were distinct and autonomous legal entities, then the government would be tempted to adopt the stratagem of setting up such administrative structures on a big scale in order to evade the discipline and constraints of the Fundamental Rights thus eroding and negating their efficacy to a very large extent. In this process, judicial control over these bodies would be very much weakened[158].

(ii) Company

I was held by the Court in *Biman Kishore Bose v United India Insurance Co. Ltd.*[159], that a company enjoying the monopoly of carrying on a business

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155. *Hindustan Steel Works Construction Ltd. v. State of Kerala,* AIR 1997 SC 2275; *Steel Authority of India Ltd. v. Shri Ambica Mills Ltd.,* Air 1998 SC 418; *Balbir Kaur v. Steel Authority of India,* AIR 2000 SC 1596.

156. *M. Kumar v. Earth Movers Ltd.,* AIR 1999 Kant 343.

157. AIR 1999 SC 75 3.

158. Steel Authority of India Ltd. v. National Union Water Front Workers, AIR 2001 SC 3427.

159. (2001) 6 SCC 477..

under an Act of Legislature has the "trappings" of "State" and is an "authority" under Article 12.

Once a body is characterized as an "authority" under Article 12, several significant incidents invariably follow, viz.:

(1) The body becomes subject to the discipline of the Fundamental Rights which means that its actions and decisions can be challenged with reference to the Fundamental Rights.

(2) The body also becomes subject to the discipline of Administrative Law.

(3) The body becomes subject to the writ jurisdiction of the Supreme Court under Article 32 and that of the High Court under Article 226.

(iii) Government Company

Mysore Paper Mills, a government company, has been held to be an instrumentality of the State Government and, hence, an authority under Article 12[160]. More than 97% of the share capital of the company has been contributed by the State Government and the financial institutions of the Central Government. Out of 12 directors, 5 were government nominees and the rest are approved by the Government. The company has been entrusted with important public duties and the Government exercises various other forms of supervision over the company. The company is an instrumentality of the Government and its physical form of a company "is merely a clock or cover for the Government".

Not only a body sponsored or created by the government may be treated as an "authority", but even a private body may be so treated if — (i) it is supported by extraordinary assistance given by the State, Or (ii) if the State funding is not very large, state financial support coupled with an unusual degree of control over its management and policies may lead to the same result.

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160. *Mysore Paper Mills Ltd. v. The Mysore Paper Mills Officer' Association,* AIR 2002 SC 609.

(iv) Nationalised Bank

In *Canara Bank v. M.D. Chikkaswamy*[161], it was held by the Court that, Nationalised Bank was an instrumentality of the State and therefore it was a State within the meaning of Article 12. Nationalised Banks have larger obligations meant for the good of the people and the society. Therefore, subject to *bona fide* errors that may crept in, when the Nationalised Bank makes a claim for recovery of the amount, it has an obligation to be fairly accurate with regard to its claim both regarding the principal amount claimed and also the rate of interest.

(v) Council of Scientific and Industrial Research

The expansive interpretation of the expression "other authorities" in Article 12 is furnished by the recent decision of the Supreme Court in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*[162]. In this case, the Supreme Court has overruled *Sabhajit Tewary*[163] and has held that the Council of Scientific and Industrial Research (CSIR) is an authority under Article 12 and was bound by Article 14. The court has ruled that "the control of the Government in CSIR is ubiquitous". The court laid down the following proposition for identification of 'authorities" within Article 12:

> The question in each case would be-whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a state within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a state[164].

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161. AIR 2002 Kar 100.
162. (2002) 5 SCC 111.
163. AIR 1975 SC 1329.
164. (2002) 5 SCC at 134.

When the law provides for a general control over a business in terms of a statute and not in respect of the body in question, it would not be a 'State'[165]

Pradeep Kumar Biswas[166] and *Bassi Reddy*[167] were recently considered in *Gayatri De v. Mousumi Co-operative Housing Sosiety Ltd. and others*[168], wherein a mandamus was issued against a Co-operative Society on the ground that the order impugned therein was issued by an "administrator" appointed by the High Court who had also no statutory role to perform.

(vi) Religious Board

In *Chain Singh v. Mata Vaishno Devi Shrine Board*[169]. It was contended that a religious board was a 'State'. Although Mata Vishno Devi Shrine Board was constituted under a statute, it was *per se* not a State actor. It was observed that the decisions of this Court in *Bhuri Nath and Others v. State of J. & K. and others*[170], requires reconsidaration in the light of the principles laid down in *Pradeep Kumar Biswas*[171].

In *Virendra Kumar Srivastava v. U.P.Rajya Karmachari Kal. Nigam and other*[172], a division Bench of this Court while applying the tests laid down in *Pradeep Kumar Biswas*[173] observed that there exists a distinction between a 'State' based on its being a statutory body and a one based on the principles propounded in the case of *Ajay Hasia & Ors, v. Khalid Mujib*[174].

All autonomous bodies having some nexus with the Government by

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165. See *Federal Bank Ltd. v. Sagar Thomas*, AIR 2003 SC 4325: *K.R. Anitha and others v. Regional Director ESI Corporation*, AIR 2003 SC 3393; *G. Bassi Reddy v. International Crops Research Institute*, AIR 2003 SC 1764.
166. (2002) 5 SCC 111.
167. AIR 2003 SC 1764.
168. AIR 2004 SC 2271.
169. 2004 AIR SCW 5402.
170. AIR 1997 SC 1711.
171. (2002) 5 SCC 111.
172. AIR 2005 SC 411.
173. (2002) 5 SCC 111.
174. AIR 1981 SC 487.

itself would not bring them within the sweep of the expression 'State' Each case must be determined on its own merits.

Having regard to the modern conditions when Government is entering into business like private sector and also undertaking public utility services, many of its actions may be a State action even if some of them may be non-governmental in the strict sence of the general rule. Although rule is that a writ cannot be issued against a private body but thereto the following exceptions have been introduced by judicial gloss : (a) Where the institution is governed by a statute which imposes legal duties upon it; (b) Where the institution is 'State' within the meaning of Art 12, (c) Where even though the institution is not 'State' within the preview of Art. 12, it performs some public function, whether statutory or otherwise[175].

(vii) Board of Control for Cricket in India

In *Zee Telefilms Ltd.* v. *Union of India,*[176] a five-judges bench of the Supreme Court examined the question whether BCCI came within the meaning of 'State' under article 12.

The court noted that the scope of article 12 had been subjected to expansion as a consequence of a certain socio-economic miliew.[177] However , as was pointed out in *Balco Employees' Union (regd.)* v. *Union of India,*[178] the socio-economic policy of the government had changed, and presently it lays emphasis on governance more than business and commercial activities Consequently, the court felt that no further need existed to expand the scope of article 12 and further.[179]

It was contended before the court the BCCI should be treated as 'State' because it controlled and reguleted cricketer's right guaranteed under article

175. *Zee Tefilm Ltd. v. Union of India,* AIR 2005 SC 2677 at 2680.
176. (2005) 4 SCC 649
177. *Id* at 683.
178. (2002) 2 SCC 333.
179. (2005) 4 SCC 649, 684.

19 (1) (g). Rejecting the contention outright; the court held that this right could be claimed only against the state. Article 19(1)(g) applied only when it was established that the regulating authority in question fell within the scope of 'state' under article 12.[180]

Thus, to argue that every entity, which validly or invalidly arrogates to itself to regulate or for that matter even starts regulating the fundamental rights of the citizen under Article 19(1)(g), is a State within the meaning of Article 12, is to put the cart before the horse.[181]

In *Zoroastrian Cooperative Housing Society Ltd.* v. *District Registrar Cooperative Societies (urban),*[182] the question was whether cooperative societies fall within the meaning of 'State' in Article 12. The court, speaking through Balasubramanyan J pointed out that a cooperative society cannot be considered 'State' unless the tests laid down in *Ajay Hasia v. Khalid Mujib*[183] were satisfied. Since no case had been made out that the society in question satisfied these tests, the court was compelled to hold that it was not 'State' within the meaning of Article 12.[184].

(viii) Local or Statutory Authority

In *Srikant v. Vasantrao*[185], The court has consistently refused to apply the enlarged definition of 'State' given in Part III (and Part IV) of the Constitution, for interpreting the words 'State' or 'State Government. While the term 'State' may include a State Government as also statutory or other authorities for the purposes of part – III (or Part –IV) of the Constitution, the term 'State Government' in its ordinary sense does not encompass in its fold either a local or statutory authority. Therefore, though Godawari Marathwada Irrigation Development Corporation and Maharashtra Jeevan Pradhikaran may

180. *Id.* at 680.
181. *Id.* at 680-88
182. (2005) 5 SCC 632.
183. AIR 1981 SC 487.
184. (2005) 5 SCC 632, 659.
185. AIR 2006 SC 918.

fall within the scope of 'State' for purpose of Part-III of the Constitution, they are not 'State Government' for the purposes of section 9-A of the Act.

(ix) Private Dispute

In *Ram Chandra Prasad v. Food Corporation of India*[186], it was submitted by the petitioner who was the learned advocate of this Court, appearing in person, that despite rendering of professional service to the Food Corporation of India as empanelled advocate of the said Corporation all the bills as submitted has not been fully paid. The petitioner filed a supplementary affidavit giving the details of the bills and the amount as still payable. It has been further contended by the petitioner that the taxi fare though was agreed upon to be paid has not been paid. It was also another case of the petitioner that since he was engaged to deal with the taxation matters his fees cannot be equated with the shipping matter. In a nutshell the entire writ application was based on the factual matrix that the petitioner has not been paid proper fees with reference to the duty as discharged by him. In this case the Food Corporation of India even if an authority under Article 12 of the Constitution of India, but the engagement of a lawyer by such authorities is within the commercial transaction and contractual domain of the Corporation. The engagement of a lawyer and payment of fees since within the field of contractual matter and when the claim of the petitioner has been disputed, the Court was of the view that the matter does not involve for any adjudication having public element thereof. It was simply a private dispute between one learned advocated and his client about non-payment of fees and the Court was of the view that it was absolutely on the private domain for which writ was not maintainable.

(x) Independent Body

In *Lt. Governor of Delhi v. V. K. Sodhi,*[187] the Court held that State Council of Education, Research and Training (SCERT) is not State or other authority within meaning of Art. 12. The two elements, one, of a function of the State, namely, the co-ordinating of education and the other, of the Council

186. AIR 2007 Cal 169.

187. AIR 2007 SC 2885.

(SCERT) being dependant on the funding by the State, satisfied two of the tests indicated to constitute 'State'. But, from that alone it could not be assumed that SCERT is a State. It has to be noted that though finance is made available by the State, in the matter of administration of that finance, the Council is supreme. The administration is also completely with the council. There is no govermental interference or control either financially, functionally or adminitratively, in the working of the Council. SCERT, in addition to the operational autonomy of the executive Committee, it could also amend its bye-laws subject to the provisions of the Delhi Societies Registration Act though with the previous concurrence of the Government of Delhi. The proceedings of the Council are to be made available by the Secretary for inspection of the Registrar of Societies as per the provisions of the Societies Registration Act. The records and proceedings of the Council have also to be made available for inspection by the Registrar of Societies. In the case of dossolution of SCERT the liabilities and assets are to be taken over at book value by the Govt. of Delhi which had to appoint a liquidator for completing the dissolution of the Body. The creditors loans and other liabilities of SCERT shall have preference and bear a first charge on the assets of the Council at the time of dissolution. This is not an unconditional vesting of the assets on disolution with the Government. It is also provided that the provisions of the Societies Registration Act, 1860 had to be complied with in the matter of filing list of office-bearers every year with the Registrar and the carrying out of the amendments in accordance with the procedure laid down in the Act of 1860 and the disolution being in terms of Ss. 13 and 14 of the Societies Registration Act, 1860 and making all the provisions of the Societies Registration Act applicable to the Society. These provisions, indicate that SCERT is subservient to the provisions of the Societies Registration Act rather than to the State Goernment and that the intention was to keep SCERT as an independent body[188].

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188. *Ibid.*

(xi) Statutory Body

In *Punjab Water Supply and Swerage Board v. Ranjodh Singh*[189], the Court held that statutory body was a 'State' within the meaning of Article 12. The State may have some control with regard to recruitment of employees of local authorities, but such control must be exercised by the State strictly in terms of the provisions of the Act. The statutory bodies are bound to apply the rules of recruitment laid down under statutory rules. They being 'States' within the meaning of Article 12 of the Constitution of India are bound to implement the constitutional scheme of equality. Neither the statutory bodies can refuse to fulfill such constitutional duty, nor the State can issue any direction contrary to or inconsistent with the constitutional principles adumbrated under Article 14 and 16 the Constitution of India.

189. AIR 2007 SC 1082.

CHAPTER - 8

CONCLUSION

The State can not exist without individuals as the king can not rule without his subjects. It is for the protection of the interests of the individual that the State came into existence. The State, being a sovereign authority, may any time turn into tyrannical way and the basic rights of the individuals may be endangered and under these circumstances the Fundamental Rights are the only weapon in the hands of the individual through which they can seek justice against arbitrariness of the State. Therefore, it is suggested that more and more private Institutions and other bodies should be included within the sweep of Article12.

Political theoreticians from ancient times through middle ages and modern times, have provided divergent and sometimes diametrically opposite ideas about the nature, purposes, functions and relationship with the individuals and the State. Opinions differ as to the connotation of the term 'State' since the concept emerged.

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." No doubt it is true that the Historical and

Evolutionary Theory has enjoyed enduring popularity, yet it is difficult to find the finality of judgment in this theory. Historical method and evolutionary process tell us the various ways by which governments came into being or perished away.

The function of the state is to make and enforce a legal framework. Its main purpose is the maintenance of law and order. The State as supreme authority claims sole imperium within a territory. It is sovereign. The State is the source of law or at least its very nature is tied up with the existence of law. The law originates with the State.

Positivism regards law as the expression of the will of the State through the medium of the legislature. Theories of legal realism too, like positivism, look on law as the expression of the will of the State, but see this as made through the medium of the courts. Like Austin, the realist looks on law as the command of the sovereign, but his sovereign is not Parliament but the judges; for the realist the sovereign is the court.

The really crucial formal feature of the State is that it is a continuous public power. This public power is formally distinct from both ruler and ruled. Its acts have legal authority and are distinct from the intentions of individual agents or groups. Thus the State, as public power, embodies offices and roles which carry the authority of the State. Since this appears to give the State an autonomy apart from private individuals many theorists have been led to accord the State a personality.

The identity of State and legal order is apparent from the fact that even sociologists characterise the State as "politically" organized society. Since society - as a unit - is constituted by organisation, it is more correct to define the State as "political organization". An organization is an order.

The State is a political organization because it is an order regulating the use of force, because it monopolizes the use of force. This however is one of the essential characters of law. The State is a politically organized society because it is a community constituted by a coercive order, and this coercive order is the law.

The fundamental Rights are mostly of individual character and are primarily meant to protect individuals against arbitrary State action. They are intended to foster the idea of a political democracy and are meant to prevent the establishment of authoritarian rule.

The fundamental Rights of the Constitution are, in general, those rights of citizens, or those negative obligations of the State not to encroach on individual liberty, that have become well-known since the late eighteenth century and since the drafting of the Bill of Rights of the American Constitution - for the Indians no less than other people, become heir to this liberal tradition.

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 the 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.

The Sub-Committee on Fundamental Rights, at its first meeting 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, eventually 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"

The Indian Constitution provides for the political regime in which certain basic rights are guaranteed to the people and the governing power is restrained from being so exercised as to interfere with enjoyment of these rights. Still the rights remain basically a guarantee against State action. It is another matter that "the State" is given a special definition in the Constitution for the purpose of fundamental rights. Article 12 of the Constitution of India defines the 'State' as : In this part unless the context otherwise requires "the state' includes (1) the Government and Parliament of India and (2) the Government and the Legislature of each of the states and (3) all local or other authorities within the territory of India or under the control of the Government of India.

As a general rule a writ lies against the "State" as defined under Article 12 of the Indian Constitution. The term 'State" has been widely defined with a view to securing the guarantee of fundamental rights in respect of all possible institutions. The scope of this wide definition has been further expanded by judicial interpretation of the term "other authorities" occurring in Article 12. The ambit and scope of the expression "other authorities" under Article 12 is very wide and the development and growth of law shows the said phrase has been interpreted more and more liberally so as to include within its sweep more and more authorities with a view to giving protection to the aggrieved persons against the actions taken by these authorities.

One of the important aspects of judicial activism has been the interpretation of Article -12. The Supreme Court has been expanding the meaning of the words "other authorities with a view to bringing even non-statutory organisations within the purview of the definition of the "State" so as to bring them under the control of the provisions of the fundamental rights.

The law regarding what is State for the purpose of Article 12 has been settled since *Ajay Hasia's* case. However, question as to what is an instrumentality or agency of the State keep on coming before the courts.

It must be remembered that Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32 in the Supreme Court. Whereas Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. Therefore, the term "authority" used in Article 226, must receive a liberal meaning unlike the terms in article 12. The words "any persons or authority" used in article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The only relevant factor is the nature of duty imposed on the body. The form of the body concerned is not relevant.

Article 12 gives an extended meaning to the words ' the state' wherever they occur in Part III of the constitution. The term "the State" will include not only the Executive and Legislative organs of the Union and the States, but also local bodies (such as municipal authorities) as well as 'other authorities', which include the 'instrumentalities' or agencies' of the State, or bodies or institutions which discharge public functions of the governmental character.

The scope of this wide definition has been further expanded by judicial interpretation of the term 'other authorities' occurring in Art. 12. This expansive interpretation promotes the expansion of administrative law as more bodies are covered under its scope. It helps in the expansion of judicial review as many more bodies become subject to the writ jurisdiction, and it also makes bodies amenable to the restrictions of fundamental rights.

This definition is only for the purpose of the provisions contained in Part III. Hence, even though a body of persons may not constitute ' the state' within the instant definition, a writ under Article 226 may lie against it on non-constitutional grounds or on the ground of contravention of some provision of the Constitution outside Part III e.g., where such body has a public duty to perform or where its acts are supported by the State or Public Officials.

Under Article 12 the word 'includes' indicates that the definition of 'the State' is not confined to a Government Department and the legislature but extends to any administrative action (whether statutory or non-statutory), judicial or quasi-judicial, which can be brought within the fold of the 'State action', which violates a fundamental right. Therefore, the scope of the word 'the state' has been widened through interpreting each and every words used in Article 12. The Supreme Court has shown the vital role for widening the scope of this Article 50 that the Fundamental Rights of the citizen can be better protected against the arbitrary practices of the Government Departments, legislature as well as administrative actions.

The expression Local Authorities includes a 'Panchayat; a Port Trust' or other bodies coming within the definition of 'local authority' in s. 3 (31) of the General Clauses Act, 1897.

The expression "authority" has a definite connotation. It has different dimensions and, thus, must receive a liberal interpretation. To arrive at a conclusion, as to which "other authorities" could come within the purview of Article 12, we may notice the meaning of the word "authority".

The expression other authorities refers to - Instrumentalities or agencies, of the Government and Government Departments. But every instrumentality of the Government is not necessarily a 'Government Department, The instrumentalities or agencies, even though performing some of the functions of the State, cannot be equated with a government department, if they have an independent status distinct from the State e.g. government companies and public undertakings though for the purpose of enforcing fundamental rights, they could be held to be State. Every type of public authority, exercising statutory powers, whether such powers are governmental or quasi-governmental or non-governmental and whether such authority is under the control of the Government or not, and even thought it may be engaged in carrying on some activities in the nature of trade or commerce e.g., a Board, a University, the Chief Justice of High Court, having the power to issue rules, bye laws or regulations having the force of law or the power to make statutory appointments i.e., the High

court on the administrative side, a public corporation. An authority set up under a statute for the purpose of administering a law enacted by the Legislature, including those vested with the duty to make decisions in order to implement them comes within the sweep of Article 12.

A non-statutory body, exercising no statutory powers is not 'State', e.g., a company. Private bodies, having no statutory power, not being supported by a State act.

A society, registered under the Societies Registration Act, unless it can be held that the Society was an instrumentality or agency of the State or exercised statutory power to make rules, bye-laws or regulations having statutory force and an autonomous body which is controlled by the Government only as to the proper utilisation of its financial grant may be included within the sweep of Article 12.

Even a private body or a corporation or an aided private school may, however, be included within the definition of 'State' if it acts as an 'agency' of the Government.

In determining whether a corporation or a Government company or a private body is an instrumentality or agency of the state, the tests which would be applicable are, firstly, whether the entire share capital is held by the Government; secondly, whether the corporation enjoys monopoly status conferred by the State; thirdly, whether the functions of the corporation are governmental functions or functions closely related thereto; fourthly, if a department of the Government has been transferred to the corporation; fifthly, the volume of financial assistance received from the State; sixthly, the quantum of State control; seventhly, whether any statutory duties are imposed upon the corporation and lastly, the character of the corporation may change with respect to its different functions.

Till about the year 1967 the courts in India had taken the view that even statutory bodies like Universities, Selection Committee for admission to Government Colleges were not "other authorities" for the purpose of Article

12. In the year 1967 the case of *Rajasthan State Electricity Board V. Mohan Lal & Ors.*, the Court held that the expression "other authorities" is wide enough to include within it every authority created by a Statute on which powers are conferred to carry out governmental or quasi-governmental functions and functioning within the territory of India or under the control of the Government of India. Even while holding so Shah, J. in a separate but concurring judgment observed that every constitutional or statutory authority on whom powers are conferred by law was not "other authority" within the meaning of Article 12. He also observed further that it is only those authorities which are invested with sovereign powers, that is power to make rules or regulations and to administer or enforce them to the detriment of citizens and others that fall within the definition of 'State' in Article 12: if constitutional or statutory bodies invested with power but not sharing the sovereign power of the State are not "State" within the meaning of the Article.

Almost a decade later another Constitution Bench of this Court somewhat expanded this concept of "other authority" in the case of *Sukhdev Singh & Ors, V. Bhagatram Sardar Singh Raghuvanshi & Anr.* In this case the Court held, the bodies like Oil and Natural Gas Commission, Industrial Finance Corporation and Life Insurance Corporation which were created by statutes because of the nature of their activities do come within the term 'other authorities ' in Article 12.

In *Sabhajit Tewary v. U.O.I & Ors.* the judgment was delivered by the very same Constitution Bench which delivered the judgment in *Sukhdev Singh* case. In this judgment the court noticing its judgment in *Sukhdev Singh & Ors.*, rejected the contention of the petitioner therein that Council for Scientific and Industrial Research the respondent body in the said writ petition which was only registered under the Societies Registration Act would come under the term "other authorities" in Article 12.

This distinction to be noticed between the two judgments referred to hereinabove namely *Sukhdev Singh & Ors*, and *Sabhajit Tewary*, is that, in the former the Court held that bodies which were creatures of the statutes having

important State functions and where State had pervasive control of activities of those bodies would be State for the purpose of Article 12. While in *Sabhajit Tewary's* case the Court held, a body which was registered under a statute and not performing important State functions and not functioning under the pervasive control of the Government would not be a State for the purpose of Article 12.

Subsequent to the above judgments of the Constitution Bench a three-Judges Bench of this Court in the case of *Ramana Dayaram Shetty v. The International Airport Authority of India & Ors.* placing reliance on the judgment of this Court in *Sukhdev Singh* held that the International Airport Authority which was an authority created by the International Airport Authority Act, 1971 was an instrumentality of the State, hence, came within the term "other authorities" in Article 12.

The law has not been slow to recognize the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interest in Government larges, formerly regarded as privileges, have been recognized as rights while others have been given legal protection not only by forging procedural safeguards but also by confining or structuring and checking Government discretion in the matter of grant of such larges. The discretion of the government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or its sweet will.

In Article12, the 'State' has not been defined, it is merely an inclusive definition. It includes all other authorities within the territory of India or under the control of the Government of India. It does not say that such other authorities must be under the control of the Government of India. The word or is disjunctive and not conjunctive.

What is necessary is to notice the functions of the Body concerned. A 'State' has different meaning in different context. In a traditional sense, it can be a body politic but in modern international practice a State is an organization which receives the general recognition accorded to it by the existing group of

other States. Union of India recognizes the Board as its representative. The expression "other authorities in Article 12 of the Constitution of India is State within the territory of India as contradistinguished from a State within the control of the Government of India. The concept of State under Article 12 is in relation to the fundamental rights guaranteed by part III of the Constitution and Directive Principles of the State Policy contained in part IV thereof. The contents of these two parts manifest that Article 12 is not confined to its ordinary or constitutional sense of an independent or sovereign meaning so as to include within its fold whatever comes within the purview thereof so as to instill the public confidence in it.

Article 12 must receive a purposive interpretation as by reason of Part III of the Constitution a Charter of Liberties against oppression and arbitrariness of all kinds of repositories of power have been conferred the object being to limit and control power wherever it is found. A body exercising significant functions of public importance would be an authority in respect of these functions. In those respects it would be same as is executive government established under the Constitution and the establishments of organizations funded or controlled by the Government. A traffic constable remains an authority even if his salary is paid from the parking charges in as much as he still would have the right to control the traffic and anybody violating the traffic rules may be prosecuted at his instance.

In *Ajay Hasia's* Case the question for determination arose out of writ petitions filed under Article 32 challenging the validity of admissions to the Regional Engineering College, Srinagar, which was one of 15 Engineering Colleges in India, sponsored by the Govt. of India. The college was run by a Society registered under the Jammu and Kashmir Registration of Societies Act 1893. The question was whether the society was "the State" under Article 12, for only if it was the State could the admissions to the college be challenged as violating Article 14. Bhagwati J. delivering the unanimous judgments of a constitution Bench scrutinized the Memorandum of Association and the Rules of the Society and held that the Society was an instrumentality or agency of the

State and Central Governments and the Society was an authority under Article12.

The fundamental rights may be violated by the State as much directly as indirectly. While in the former case its officials or agencies violate them, in the latter it may let them be violated by others either through its inaction or active connivance. The latter violation may be as injurious as the former. In such cases State cannot escape its responsibility or liability towards the protection of fundamental rights on the plea that they are the actions of private individuals and not of the State.

The 'judiciary', though an organ of the State like the executive and legislature, is not specifically mentioned in Article 12. Does it mean that the 'judiciary' is not meant to be included in the concept of 'the state'? The answer depends on the distinction between the judicial and non-judicial functions of the courts. In the exercise of non-judicial functions the courts fall within the definition of 'the State'.

The Supreme Court by an imaginative and innovative interpretation has given an expansive meaning to the term "other authority" and has held that it included corporations, government companies and even registered societies, which functioned as mere surrogates of the government, even though in law they might have a separate and independent existence. The logic applied has been that the directive principles visualised a welfare state with increased and manifold functions and the State could perform these additional functions either departmentally or by creating independent entities and the government could not be allowed to cheat the people of their fundamental rights by merely transferring its functions to other bodies. These other bodies were merely agencies or instrumentalities of the government and as such they were subject to the fundamental rights to the same extent and in the same manner as the government.

In *Electricity Board, Rajasthan* v. *Mohan Lal*, the Supreme Court held that the expression 'other authorities' is wide enough to include all authorities created by the Constitution or Statute on whom powers are conferred by law. It

is not necessary that the statutory authority should be engaged in performing governmental or sovereign function. On this interpretation the expression 'other authorities' will include *Rajasthan Electricity Board, Cochin Devasom Board, Co-operative Society*, Which have power to make bye-laws under Co-operative Societies Act, 1911. The Chief Justice of High Court is also included in the expression 'other authorities' as he has power to appoint officials of the Court. The President when making order under Article 359 of the Constitution comes within the ambit of the expression 'other authorities'. In effect, the *Rajasthan Electricity Board's* decision has overruled the decision of the Madras High Court in *Santa Bai's* case, holding a University not to be "the State". And finally, the Patna High Court, following the decision of the Supreme Court, has held that the Patna University is a "State".

The expression "other authorities ' in Article 12 will thus include all constitutional or statutory authorities on whom powers are conferred by law. It was not at all material that some of the powers conferred on the authority may be for the purpose of carrying on commercial activities for under the Constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Article 19(1) (g). In Part IV, the word "State' has been given the same meaning as in Article 12 and one of Directive Principles laid down in Article 46 is that the State shall promote with special care the educational and economic interest of the weaker sections of the people. The State as defined in Article 12, was thus comprehended to include bodies created for the purpose of promoting the educational and economic interest of the people. The State, as constituted by our constitution, was further specifically empowered under Article 298 to carry on any trade or business. The circumstance that the Board under the Electricity Supply Act was required to carry on some activities of the nature of trade or commerce does not, therefore, give any indication that the Board must be executive from the scope the word 'State as used in Article 12. On the other hand, there are provisions in the Electricity Supply Act, which clearly show that the powers conferred on the Board include power to give direction, the disobedience of which is punishable as a criminal offence. *The Rajasthan Electricity Board* was clearly an authority to which the provisions of Part III of the Constitution were applicable.

The Supreme Court has given a broad and liberal interpretation to the expression 'other authorities' in Article 12, With the changing role of the State from merely being a police State to a Welfare state it was necessary to widen the scope of the expression "authorities" in Article 12 so as to include all those bodies which are, though not created by the Constitution or by a Statute, are acting as agencies or instrumentalities of the Government. In modern times a government has to perform manifold functions. For this purpose it has to employ various agencies to perform these functions. The court has, therefore, rightly taken the view that such juridical persons acting as the instrumentality or agency of the government must be subject to the same restrictions as the state.

The supreme Court in *Maruti Udyog* case, implicitly recognised that the manufactures could not give preferential treatment to a few customers unless they satisfied the standards of reasonable classification. If so, the same principle should logically apply to Hindustan Motors and Premier Automobiles and any distinction based on public sector and private sector dichotomy would be totally irrational and illogical. Similarly, a person attending a private educational institution and living in a hostel needs to be given not only the negative right not to be forced to participate in any worship or religious instruction but also needs the positive right to practice his religion in a reasonable manner in that institution without any hindrance. Again, the basic interests of a student are not limited merely to getting admission without any discrimination, in the institution he can also claim the right to freedom of expression and association. Indeed, both the teachers and students can claim their basic right of academic freedom. Though the existing decisions are not conclusive one way or the other on the issue, it is respectfully submitted that the elements of state aid, recognition and regulation should be enough to establish governmental means so as to enable the court to hold that private educational institutions are "the State".

A right without a remedy does not have much substance. The fundamental Rights guaranteed by the Constitution would have been worth nothing had the constitution not provided an effective mechanism for their enforcement.

Art 32 (1) guarantees the right to move the Supreme Court, by appropriate proceedings, for the enforcement of the Fundamental Rights enumerated in the Constitution.

Under Clause (2) of Article 32 the Supreme Court is empowered to issue appropriate directions, orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo-warranto* and *certiorari* for the enforcement of any fundamental rights guaranteed by Part III of the Constitution. By this Article the Supreme Court has been constituted as a protector and guarantor of fundamental rights conferred by Part III. Once a citizen has shown that there is infringement of his fundamental right the court cannot refuse to entertain petitions seeking enforcement of fundamental rights. In discharging the duties assigned to protect fundamental rights the Supreme Court in the words of Patanjali Sastri, J., has to play a role of a sentinel on the *qui vive*.Again, in *Daryo v. State of U.P.*, the Supreme Court took it as its solemn duty to protect the fundamental right zealously and vigilantly.

In *K.K. Kochuni* v. *State of Madras*, the Court held that Article 32 itself being a fundamental right the Court would give relief notwithstanding the existence of an alternative remedy. The Court's power under Article 32 (2) is wide enough to order the taking of evidence, if necessary on disputed questions of fact, and to give appropriate relief to the petitioner by issuing the writ or order so as to suit the exigencies of the case.

Art. 32 differs from Art. 226 in that whereas Art. 32 can be invoked only for the enforcement of Fundamental Rights, Art 226 can be invoked not only for the enforcement of Fundamental Rights but for 'any other purpose' as well. This means that the Supreme Court's power under art. 32 is restricted as compared with the power of a High Court under Art. 226 for if an administrative action does not affect a Fundamental Right, then it can be challenged only in the High Court under Art. 226, and not in the Supreme Court under Art. 32

The words "for any other purpose" found in Art 226, enable a High Court to take cognizance of any matter even if no Fundamental Right is involved.

The definition of the State under Art, 12 has a specific purpose and that is Part III of the Constitution, and not for making it a Government or department of the Government itself. This is the inevitable consequence of the other authorities being entities with independent status distinct from the State and this fact alone dose not militate against such entities or institutions being agencies or instrumentalities to come under the net of Art. 12. The concept of Instrumentality or agency of the Government is not to be confined to entities created under or which owes its origin to any particular statute or order but would really depend upon a combination of one or more of relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be, by piercing the corporate veil of the entity concerned.

Judicial Activism connotes that function of the judiciary which represents its active role in promoting justice.

The jurist explores how justice to the individual or group of individuals or to the society in general is ensured through the active participation of the court, particularly as against public agencies.

Theoretically, though, the Judiciary is expected to adjudicate or evaluate the policies promulgated by the Legislative or Executive wing of the government, it, equally importantly, checks excesses committed by the other two branches and enforces the rights of the people in case of default or distortion by the Legislature and executive in the discharge of duties, using the power of judicial review.

Judicial activism has made a number of salutary, wholesome and beneficial effects on the public administration to make it effective and participative. But one must not be overenthusiastic in thinking that courts can remedy all the ills in public life.

Judicial activism in India encompasses an area of legislative vacuum in the field of human rights. Judicial activism reinforces the strength of democracy and reaffirms the faith of the common man in the 'rule of law'. The judiciary,

however, can act only as an alarm clock but not as a timekeeper. After giving the alarm call it must ensure to see that the executive performs its duties in the manner envisaged by the Constitution.

Judicial activism, however, is not an unguided missile. It has to be controlled and properly channelised. Courts have to function within established parameters and constitutional bounds. Decision should have a jurisprudential base with clearly discernible principle. Limit of jurisdiction cannot be pushed back so as to make them irrelevant. Court has to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution.

Judicial activism is a delicate exercise involving creativity. Great skill is required for innovation.

The liberalization of *locus standi* and the conceptualization of Public Interest Litigation in the area of personal liberty was possible in India by judicial activism of certain judges of the Supreme Court, particularly justice Krishna Iyer and justice Bhagwati. The Court, by using post *Maneka* tools, contributed for jurisdictional liberalism to humanize our judicial system.

The Supreme Court was anxious to see that the fundamental rights were available to the poor and the destitute in India in theory as well as in practice.

This way court broke the old traditional theory and embarked upon unorthodox and unconventional strategies for bringing justice to the poor and the Court moved even on a letter addressed to the Court. In *Sunil Batra,* the Court treated a letter written by Batra from the Tihar Jail to one of the judges of the Supreme Court as a writ petition for *habeas Corpus*.

The practice of entertaining letters as petitions, which was initiated and followed on an *ad hoc* basic by some of the justices was ultimately institutionalized by justice Bhagwati in the *Judges Appointment and Transfer Case*. It laid down that where legal injury was caused or legal wrong was done to a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position could not approach the court for judicial

redress, any member of the public acting bonafide could bring an action in court seeking judicial redress. This theme was further developed by Bhagwati, J., in *Asiad case,* where the Court treated a letter written by a social action group as writ petition.

In *Sheela Barse's* case, the Court treated a letter from a journalist as writ petition, complaining of custodial violence to women prisoners while confined in police lock up. In another letter the shocking situation of Bihar State administration was brought to the notice of the Supreme Court, where certain prisoners had already been in jail for a period of over 25 years without any justification.

The Court is now thinking about the limits and 'Caution' in utilizing the extraordinary strategy of PIL technique. However, in the matter of seminal importance, e.g., public health and environment the Court has shown its deep concern in expanding the PIL process.

It is submitted that the use of PIL should be limited for the incapable, poor and illiterate people who are unable to enforce their rights.

Judicial review is an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every state action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by reason of a doubt raised in that behalf in the courts.

Judicial institutions have a sacrosanct role to play not only for resolving *inter-se* disputes but also to act as a balancing mechanism between the conflicting pulls and pressure operating in a society. Court of law are the products of the Constitution and the instrumentalities for fulfilling the ideals of the state enshrined therein. Their function is to administer justice according to the law and in doing so, they have to respond to the hopes and aspirations of the people because the people of this country, in no uncertain terms, have committed themselves to secure justice-social, economic and political-besides equality and dignity to all.

In human affairs, there is a constant recurring cycle of change and experiment. A society changes as the norms acceptable to the society undergo

a change. The judges have been alive to this reality and while discharging their duties have tried to develop and expound the law on those lines while acting within the bounds and limits set out for them in the Constitution.

The progress of the society is dependant upon proper application of law to its needs and since the society today realises more than ever before its rights and obligations, the judiciary has to mould and shape that law to deal with such rights and obligations.

In many of its decisions, the Supreme Court of India started a new era of compensatory jurisprudence in Indian legal history. The question of compensation for violation of the fundamental right was considered by the court, for the first time, in the *Khatri* case, involving police atrocities. The question was whether the state was liable to pay compensation to the blinded prisoners who were blinded by the police force acting not in their private capacity but as police officials. The court conceded that the state is liable for compensation but it did not pronounce on the issue of compensation as the fact of blinding was disputed. Even though the fact of blinding was difficult to prove, it is submitted, that the court should have awarded compensation to the victims.

The jurisprudential basis of the principle to award compensation was laid down by the court in *Nilabati Behera v. State of Orissa*, where it held that the defence of sovereign immunity was not applicable to a claim in public law for compensation. Verma, J., delivering the judgment for the court, opined that the proceeding for compensation under Article 32 and 226 was a public law remedy to which sovereign immunity did not apply. Even though it could be available as a defence in private law in an action based on tort. Thus, the compensation to the victims whose rights have been violated would depend upon the nature of proceeding one chooses to pursue. It is submitted that the above decision did not clarify the position when the claim of compensation was raised in appeal cases and the extent of sovereign immunity to prevent the victims from compensation in a private law suit. Therefore, in order to prevent an exodus of litigations availing writ jurisdiction in the place of a civil suit, the

very defence of sovereign immunity should be scrapped. The same principle of compensation should be applicable to public law and private law remedies.

In course of time, the Supreme Court has been expanding the horizon of the term "other authority" in Article 12. A large number of bodies statutory and non-statutory, have been held to be 'authorities' for purposes of Article 12. Even if the entire share capital of a company is subscribed by the government, it cannot yet be treated as a government department. The company has its own corporate personality distinct from the government. Such a government company can still be treated as an authority under Article 12. Government Companies, such as Bharat Earth Movers Ltd., Indian Telephone Industries Ltd., in which the Government holds 51% share capital, and which are subject to pervasive government control, have been held to be "other authorities" under Article 12.

In *U.P. State Coop. Land Development Bank Ltd. v. Chandra Bhan Dubey*, the court held that, U.P. State Co-operative Land Development Bank Ltd. was a cooperative society but it was under pervasive control of the State Government and was an extended arm of the Government. It was thus an instrumentality of the State.

Article 12 should not be stretched so as to bring in every autonomous body which has some nexus with the government within the sweep of the expression "State". A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State Control. The State Control, however vast and pervasive is not determinative. The financial contribution by the State is also most conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is "State".

It is submitted that whatever may be said about the distinguishing features of *Praga Tools Corporation* and *Tewary* one thing is clear that after

Sukhdev Singh the Supreme Court has adopted a very liberal approach in interpreting the expression "other authorities". Looking to the tests laid down by Bhagwati, J. in *International Airport Authority* case, this aspect is clearly established and the question whether the Corporation is created by or under a statute, or is a government company or a company incorporated under the Companies Act; or is a Co-operative Society or a Society registered under the Societies Registration Act is not at all germane and every such authority would be "other authority" within the meaning of Article 12 of the Constitution.

It is also very clear that after *International Airport Authority* and *Ajay Hasia,* the Supreme Court did not really follow the ratio laid down in *Tewary Case* and tried to distinguish the said judgment by restricting it to "the facts and features" of that case, or by observing that "much water has flown down Jamuna" since the dicta in that case or even by describing the discussion of Article 12 in *Tewary* case was decided by a Constitution Bench of five Judges and all subsequent cases, wherein the point was raised were decided by Judges and thus, they could not overrule the decision rendered in *Tewary* case. In all probability, the Supreme Court might have overruled *Tewary* case, but for this limitation . The Supreme Court was also conscious of this fact. This is clear from the following observation of Bhagwati, J. in *Ajay Hasia* case. "This being a decision given by a Bench of five Judges of this Court is undoubtedly binding upon us". Under these circumstances, in subsequent cases, the Supreme Court had to distinguish *Tewary* case rightly or wrongly. It is, however, submitted that in view of further and later development of law, *Tewary* case is really no longer good law as it does to lay down correct principle and requires to be reconsidered and the Supreme Court should not feel shy in specifically and expressly overruling it by constituting a large Bench.

Suggestions can be made in this work that firstly, constitutional guarantee has its own importance and similar guarantees by an ordinary law cannot be compared with the same. The working of the Indian democracy shows that the need has been felt for giving constitutional status even to the system of local government both in the villages and towns. Secondly, in many matter like

protection of ecology and prevention of pollution the Supreme Court is already being approached directly through public interest litigation. Article 21 is considered to be satisfied if the Union of India or State Government is added as a co-respondent along with private industry and corporation. Thirdly, it is an age of expanding dimensions of public law litigation including constitutional law litigation. In many areas where formerly private law remedy was considered sufficient, public law remedies through the invocation of writ jurisdiction of the Supreme Court and High Courts are sought and obtained. It is neither possible nor desirable to reverse this trend. If the traditional procedure and existing division of work between the courts at various levels do not fit in the present scenario, the need is for fresh planning and readjustment. This brings us to the last point, that is, of judicial reform.

The following courses may be adopted alternatively or simultaneously to mitigate the danger of overcrowding likely to arise as a result of widened dimension and reach of the fundamental rights. First, it is time that the course suggested in article 32(3) of the Constitution is put to use and the district court get the authority to issue the writs for enforcement of fundamental rights. It is quite likely that the Supreme Court and High Court Bar Associations would protest but that is both understandable and unavoidable. Second, it appears that the territorial system of organization of courts and their hierarchical system do not exactly tally with organization of the administrative system in the country. At the administrative level the country is divided into state, which are subdivided into divisions, and these are further sub-divided into district. On the other hand, when we look at the judicial organization, we find that the Supreme Court is the apex court with the High Courts and district courts in the states. There is no exact judicial counterpart of the divisional court for each division with all the powers of the present High Court. The High Courts in turn may be given all the powers of the Supreme Court except those under article 131, 136, 139-A and 143 and the Supreme Court may be left with the jurisdiction obtained only under these articles. This reform, if implemented, would also solve the problem of the High Courts having many benches in different parts of the states. Last but not the least is that many more specialized tribunals on the

pattern of central administrative tribunal may be established with the power to enforce the Constitution in those specified matters.

The expansion in the definition of State is not to be kept confined only to business activities of Union of India or other State Governments in terms of Article 298 of the Constitution of India but must also take within its fold any other activity which has a direct influence on the citizens. The expression 'education' must be given a broader meaning having regard to Article 21- A of the Constitution of India also Directive Principle of the State Policy. There is a need to look into the government power subject to the fundamental Constitutional limitations which requires an expansion of the concept of State action.

All the suggestions mooted above are of a general nature and would require a lot of thinking before they are given concrete shape. But one thing is definite that the rapidly growing might of the private industrial sector needs to be subjected to the responsibility of observing constitutional norms contained in the chapter of fundamental rights. Much thought has been given by many writers in other countries as to how to put the economic power of giant industrial corporations in control. Legislative regulation and administrative control have been exercised but without success. India's own recent experience in this respect shows that it resulted in retarded and sluggish economic growth. It has been suggested that the emergence of countervailing forces in the form of labour unions, consumer associations and retailer unions would serve the purpose. The experience of other countries in this respect shows that these new groups have themselves been a source of tyranny over individuals. The practice of closed shop system of labour unions readily illustrates this. Some may argue that the growth of industrial capitalist economy presupposes some ruthlessness in its initial stages and therefore, India should not think of putting any curbs on it even in the nature of enforcement of fundamental rights. But it is not possible to react everything today what happened in Europe and North America a few centuries back. Still others might say that capitalism has undergone many refinements and we can safely trust and depend on the corporate conscience.

But that looks more like a voice of despair. Therefore, the only solution lies in this that India must take note of the reality that the might of the private corporate sector is comparable to that of public authorities and it must be put under the constitutional discipline of fundamental rights. That it would give rise to some additional litigation is frankly admitted. But this is a necessary consequence in any system where people are made conscious of their rights and interests and the emerging disputes are resolved in a principled manner through the system of courts. The exact methodology to be adopted for dispute resolution in this way and the system of judicial organisation is a question of detail where some adjustment and modification is always possible in the light of experience.

Thus, by analysing various cases on the subject matter mentioned in this work the conclusion can be made that the various decisions of the Supreme Court on Fundamental Rights have established that the Court have looked at the Constitution as a living document and have gone beyond the literal interpretation of words occurring in the specific Articles on fundamental rights. This is the correct manner of interpreting the Constitution as unlike statute, which defines present rights and obligations, a Constitution provides a continuing framework for exercise of power by different organs of the State. A Constitution is always drafted not only to take care of the present but also to take care of the future of a Nation.

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