CHAPTER – I

THE PARLIAMENT : ORIGIN AND DEVELOPMENT

The state is the most universal and most powerful of all social institutions. Human life would have become chaos without it. It provided environment for self realization and self development to the individual. There have been multiple theories on its origin, nature and functions but the constituting and essential elements for state remain same in each theory. One of them is ‘Government’ that is a mechanism through which sovereign will of the state finds concrete expression. And to manifest those expressions Government functions in three dimensions – law making, law implementing and adjudicating. These organs of Government function in their specialized areas with coordination and control.

The Government organs functions in any form of government whichever the type of government is: Unitary, Federal, Parliamentary, Presidential Democracy or Aristocracy. In democratic set up these are somewhere intermingled (United Kingdom) and somewhere separated (United States) and somewhere amalgamation of both.

Generally in federal structure the Supreme Court possesses a prime position. Parliament controls Executive, Executive enforces law and policies and Supreme Court protect Fundamental right and Constitution itself. Therefore Supreme Court can review wherever necessary. Sometimes this routine slightly slips from coordination to friction as seen in U.S. and Indian models. In India if Parliament (Constituent Assembly) is the original creator of
constitution, the Supreme Court is creator of Constitution and Fundamental Rights. Constitution determines the pros and cons of these institutions. The relationship between Parliament and Supreme Court in Indian political system does not seem very lucid and flowing straightly. There have been certain reasons when Supreme Court and Parliament confronted and many of the times they worked smoothly. However these institutions are also the result of the constitutional history of a state. People have right to frame the system according to their choice and preference where they live in.

In every democratic set up people have got the right to devise their own system of governance without any interference from outside. They enjoy the inalienable right of framing their own Constitution which is most suited to their genius, ethos and aspirations. Generally, the task of framing the Constitution of a sovereign democratic nation is performed by a representative body of its people. Such a body elected by the people for the purpose of considering and adopting a Constitution is known as the Constituent Assembly.¹

1. THE CONSTITUENT ASSEMBLY: ORIGIN, GROWTH AND DEVELOPMENT

The concept of the Constituent Assembly implied the right of the people to determine their own future and decide the nature and type of the polity under which they like to live.² It is recognized all over the world that people have inherent right to give themselves through representative body and a Constitution which would serve them best. Since the World War I, there had been a demand that people of India should be given the right to frame their own

² Ibid., p. 184.
Constitution. In spite of the passing the Government of India Act, 1919 and the grant of diarchy in the provinces, the urge for Constituent Assembly aggrevated. Consequently it is the outcome of National Movement in India.

The first definite reference to a Constituent Assembly was made by Mahatma Gandhi in 1922. While explaining the meaning of ‘Swaraj’, Gandhiji indicated in 1922 that the Constitution of India would be drafted by Indians. The Nehru Committee drafted, for the first time, a Constitution for India in 1928. The Congress adopted the goal of complete Independence (*Purn Swarajya*) at Lahore Session, 1929. In 1934-35, it took an official turn and the British Government accepted the offer in 1940. It was declared by the British Government that “the framing of a Constitutional scheme should primarily be the responsibility of Indians themselves and should originate from Indian conceptions of the social, economic and political structure of Indian life”.4

The Cripps proposal of March 1942 further proceeded for its establishment. The joint statement issued by the members of the Cabinet Mission and Lord Wavell, the Viceroy and Governor General of India, on 16 May 1946 gave a clear picture of the Constitution making machinery which was to be set up by British Government to frame a Constitution for India.5

**The Constituent Assembly Meets**

On 9 December 1946, the Constituent Assembly (representatives of the people) met in the Constitution Hall, New Delhi for the first time to determine

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4. Ibid., p. 4.
5. Ibid., p. 5.
the future Constitution of their country.\textsuperscript{6} It further declared its firm and solemn resolve to proclaim India as an independent/sovereign republic and draw up for her future governance a Constitution for a union of the territories of British India, the Indian states, and such other parts of India as were outside British India and the States as well as such other territories as were willing to be constituted into the independent sovereign India. The sovereignty of the Constitution would be derived from the people who secure justice, equality and freedom.\textsuperscript{7}

Under the Indian Independence Act 1947 which gave effect to the political settlement of the 3 June plan by dividing the country into two independent Dominions, the jurisdiction of the Constituent Assembly became restricted to that part of India which constitute the ‘New Dominion of India’, a separate Constituent Assembly being set up for the other Dominion’ – Pakistan with the Independence of the country, the Constituent Assembly became a fully sovereign body.\textsuperscript{8}

\textbf{The Objective Resolution}

The real work for which the Constituent Assembly had gathered was to frame a Constitution for free India which, in the words of Nehru, involved ‘the high adventure of giving shape, in the printed and written words to a nation’s dream and aspiration’. Objective Resolution was moved in the Constituent Assembly by Nehru on 13 December 1946.

\begin{itemize}
\item[7.\textsuperscript{7}] Chaube, S.K., “Constituent Assembly and Its Vision of the Future”, M.P. Singh et al. (eds.), \textit{Indian Political System}, Manak Publication, 2005, pp. 43-44.
\item[8.\textsuperscript{8}] Kashyap, Subhash, C., \textit{Jawaharlal Nehru and the Constitution}, Metropolitan Book, New Delhi, 1982, p. 86.
\end{itemize}
Drafting Committee

On 29 August 1947, a Drafting Committee of seven members was set up. Jawahar Lal Nehru, Sardar Vallabhbhai Patel, Rajendra Prasad, Maulana Abul Kalam Azad, Acharya J.B. Kriplani, T.T. Krishnamachari and Dr. B.R. Ambedkar played a very significant role in Constitution making. Dr. Ambedkar was elected as the Chairman of the Committee, Dr. Sachchidanand Sinha was elected as temporary Chairman and later Dr. Rajendra Prasad as permanent President of the Constituent Assembly. Shri B.N. Rau was appointed as legal Advisor to the Constituent Assembly.9

Dr. Rajendra Prasad was not a member of the Drafting Committee but he played an Important role in Constituent Assembly. He was elected the President of the Constituent Assembly and also elected as the first President of the new Republic. Jawahar Lal Nehru was the central figure throughout the deliberation of the Constituent Assembly, he was the Chairman of the Union Constitution Committee. The contribution of Sardar Vallabh Bhai Patel was also significant. He was the Chairman of most of the important Committee appointed by the Constituent Assembly e.g. Committee on Fundamental Rights, Committees on Minorities States, etc.10

Adoption of the Constitution

The Drafting Committee examined the Draft Constitution as referred by the President of the Assembly and submitted their report to him on 3 November

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10. Ibid., p. 23.
1949. The Second Reading of the Constitution was completed on 16 November 1949 and on the next day the Assembly took up the Third Reading of the Constitution, with a motion by Dr. Ambedkar that the Constitution as settled by the Assembly. The motion was adopted on 26 November 1949. Thus on that day, the people of India in their Constituent Assembly adopted, enacted and gave to themselves the Constitution of the Sovereign Democratic Republic of India.11

The Constitution of India was adopted on 26 November 1949 and signed by Rajendra Prasad as the President of the Constituent Assembly. The final Session of the Constituent Assembly was held on 24 January 1950 when it unanimously elected Rajendra Prasad as the first President of the Republic of India. The Constitution of India came into force on 26 January 1950.12 The Constitution as adopted by the Assembly, transformed India into a Sovereign, Democratic Republic with a Federal Structure and Parliamentary form of Government.

2. ORIGIN AND GROWTH OF REPRESENTATIVE INSTITUTIONS AND THE PARLIAMENTARY SYSTEM

Parliamentary government and legislative institutions in their modern connotation owe their origin and growth to India’s British connection for some two centuries. Parliament of India and the Parliamentary institutions today had an organic growth on Indian soil. They grew through many relentless struggles for freedom from foreign rule and for establishment of free democratic

institutions, and the successive doses of constitutive reforms grudgingly and haltingly conceded by the British rulers.\footnote{Kashyap, Subhash, C., \textit{History of Parliament of India}, vol. 1, p. 17.}

**Beginning of Parliamentary Control : Regulating Act, 1773**

The Regulating Act of 1773 holds a special significance in the legislative history of India, because it marks the beginning of Parliamentary control over the Government of East India Company. The 1773 Regulating Act demonstrated clearly that the administration of Indian territories was not a personal affair of the company and that the British Parliament had every right to pass laws and instructions in that regard. Before this Act the territory was divided into 3 presidencies – Bengal, Madras and Bombay, this Act is said to have started the process of territorial integration and administrative centralization in India. Though the Act of 1773 had introduced certain improvements in the administration, all the functions – executive, legislative and judicial were being performed by the Governor-General, there was inadequate coordination between the legislative policies of all the presidencies and the legislative power of presidency government was inadequate.\footnote{Ibid., pp. 20-21.}

In fact, the early system of legislation in British India was the result of trial and error method. In any case, during the period 1784-1833 there were no significant development in the direction of further evolution of legislative institutions.\footnote{Ibid., p. 22.}

**The Beginning of Legislative Body : The Charter Act, 1833**

The process under which the Indians demand for more representative legislative bodies on the pattern of the British Parliamentary institutions can
found in Charter Act of 1833 which introduced important change in the system of Indian administration and also in the legislative powers of the Indian government. It established one legislative Council for all the British territories in India. For the first time the Governor General’s Government was known as the ‘Government of India’ and his Council as the ‘Indian Council’. It also introduced an element of institutional specialization in the government by differentiating the law making meeting of the Governor-General’s Council from its executive meetings. The demarcation made by the Act between the executive and legislative functions of the Governor-General’s Council led to the addition of a ‘fourth’ or legislative member and the appointment of the distinguished jurist Lord Macaulay to occupy this position.\textsuperscript{16}

\textbf{Separation of Powers: Charter Act, 1853}

The Charter Act of 1853 made important changes in the Governor-General’s Council, the fourth legislative member was given a right to sit and vote at executive meetings and the Council was enlarged for legislative purposes by the addition of six special members who were styled as “Legislative Councillors”. Thus a big step was taken towards differentiating the legislatures from the executive. The new Council conceived its duties not to be confined only to legislation but, as observed in the Montagu Chelmsford Report (1918), “contrary to the intentions of Parliament, it began to assume the character of a miniature representative assembly, assembled for the purpose of enquiry into redress of grievances”.\textsuperscript{17} The Act of 1853 followed the Principle of Legislative Centralism. The significance of the period (1833-1861) lies in

\begin{itemize}
\item \textsuperscript{16} Ibid., pp. 24-25.
\item \textsuperscript{17} Kashyap, Subhash, C., \textit{Our Parliament}, National Book Trust, New Delhi, 1989, pp. 4-5.
\end{itemize}
affecting demarcation between the legislative and the executive functions of the
government giving rise to a definite trend towards a separate law making
body.\textsuperscript{18}

\textbf{Indian Council Act, 1861}

The Act was said to be the ‘Prime Charter of the Indian legislature’
inaugurating the system of legislative devolution in India. The Act introduced
important changes in the machinery for legislation, both at the Central and
provincial levels. It reconstituted the Council of the Governor General.
Hereafter, it was to consist of five ordinary members. For purposes of
legislation, the Governor-General was authorized to nominate to his Council
“not less than six nor more than twelve” additional members at least one half of
whom were to be non officials. Though there was no statutory stipulation to
appoint Indians as non-official members of the expanded Council, an assurance
was given in the House of Common that Indians would be so appointed and
Council was expressly forbidden to transact any business “other than the
consideration and enactment of legislative measures introduced”, it could
hardly be regarded as being, anywhere near a responsible or representative
legislative body.\textsuperscript{19}

It was merely a legislative committee of the government, by means of
which the executive obtained advice and help in legislation. Thus the days of
legislation by the Executive were practically over, and the making of laws was
no longer considered to be the exclusive business of the executive.\textsuperscript{20}

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19 & Ibid., pp. 34-35.  \\
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Formation of the Indian National Congress

The Indian National Congress was founded in 1885. It initiated the process of gradual relaxation of imperial control and the evolution of responsible government in India. From its very inception, the Congress made gradual introduction of representative institutions in the country as the main plank of its platform. The Congress considered the reform of the Council “as the root of all other reforms”. W.C. Banerjee described the Congress as the ‘National Assembly of India’. The Congress was conceived as ‘the germ of a Native Parliament’. 21

Indian Council Act, 1892

The Indian Council Act, 1892 was in part at least, a step in the direction of responding to the growing Indian demand for representative institutions. The adoption by British Parliament of the Indian Council Act, 1892 with a view to “give the people of India a real living representation in the legislative Council”, was regarded as triumph, for the Congress in so far as the British Government for the first “recognized the representative element in the enlarged Councils”. The Congress had the satisfaction of being “responsible for unifying Indians for the common purposes of their political enfranchisement”. 22

The 1892 Act amended the Indian Council Act, 1861 to reconstitute the Councils of India. The Legislative Council of the Governor-General was further enlarged to consist of “not less than ten or more than sixteen” additional members. Similarly additional members in the Provincial Legislative Councils was also increased. 23

Members of the Legislative Council were also granted the privilege of asking questions, that is of interrogating the government members with a view to eliciting information on important matters. This right, which is one of fundamental rights of any Legislature, was very sparingly used at the time, but its grant marked a definite step forward in the progress of the Parliamentary institution.\textsuperscript{24}

**Indian Council Act, 1909**

The relentless campaign launched by the Congress for greater and more effective representation in running the affairs of the country culminated in the Morley-Minto reform proposal of 1908. The scheme of Morley-Minto Constitutional reforms was given effect to through the Indian Councils Act, 1909. The Act as supplemented by regulation framed under it, made important changes in the Constitution and function of the Indian Legislatures.\textsuperscript{25}

The 1909 Act enlarged the functions of the Legislative Councils. It gave to the members the power to move resolutions on the Budget and on any matter of general public interest and to divide the Council upon them. The resolutions were to take the form of recommendations to the executive government, but the government was not bound to accept them.\textsuperscript{26}

The biggest defect of the 1909 Reform was the creation of separation or Council system of election providing for representation and reservation of seats in the Councils for special interests like Muslims, Chambers of Commerce, Zamindars, etc. This communal system poisoned the future public life of India.

\textsuperscript{24} Ibid., p. 7.
\textsuperscript{26} Kashyap, Subhash, C. *Our Parliament*, op.cit., pp. 8-9.
It was the biggest shock to secular Indian Nationalism after the suppression of the 1857 revolt and was indeed the greatest victory for the British policy of ‘divide and rule’. 27

**Government of India Act, 1919**

The Reform Act of 1919 introduced many important changes in the Indian Constitutional System. At the Centre, the Indian Legislative Council was replaced by a bicameral legislature consisting of a Council of State (Upper House) and a Legislative Assembly (Lower House), each with an elected majority. The first Legislative Assembly, constituted under the 1919 Act, came into being 1921. It had 145 members, 104 of whom where elected (52 by General 130 by Muslim, 9 by European, 7 by Landowners, 4 by Commercial and 2 by Sikh Constituencies), 26 officials and 15 nominated non official. 28

The elected members of both the Houses were chosen by direct election but based on qualifications of property and tax or education, the total electorate for the Council in 1920 was only 17,644 and for the Assembly 904,746, the term of the Council was 5 year and that of Assembly three but Governor General can extend or dissolve either House in special circumstances. 29

The Act of 1919 established partially responsible government in the provinces under the system of ‘dyarchy’ but, did not introduced any element of responsibility at the centre and the Governor General in Council continued to remain responsible only to the Secretary of State for India and through him to the British Parliament. The Indian legislature had no power to amend or any

27. Ibid., p. 8.
29. Ibid., p. 91.
Parliamentary statute relating to British India or to do anything affecting the
authority of the British Parliament. The Act also required that important
matters could be introduced in either House of Parliament only with the
previous sanction of the Governor General. Similarly in the financial field the
final power was given to the Governor General.30

The Indian Legislature under the Act of 1919 was thus only a non-
sovereign law making body and was powerless before the executive in all the
spheres of governmental activity - administrative as well as legislative and
financial.31 The emergence of Central Legislature for the first time gave the
representative of the people a voice in making laws and influencing
governmental policies. Lokmanya Tilak termed the 1919 Reforms as
“dissatisfying, disappointing and a sun without morning”.32

Annie Besant declared the scheme to be “unworthy to be offered by
Britain and received by India”. Under the leadership of Surendranath Banerjee,
some moderates formed separate organisation called National Liberation
Federation. These moderates hailed the Reforms but the Congress at its 1919
Amritsar Session called them inadequate, unsatisfactory and disappointing.33

The Legislature under the 1919 Reforms

The 1919 Act came into force in 1921. The national congress boycotted
the 1920-21 elections and was thus not represented in the legislatures that came
into being in 1921. Only National liberation Federation took active part in
elections.34

31. Ibid., p. 11.
32. Ibid., p. 12.
33. Ibid., p. 13.
34. Ibid., p.13.
In 1923, Deshbandhu C.R. Das and Pandit Moti Lal Nehru formed the Swaraj Party which advocated fighting elections and entering the Councils. Swaraj Party leaders justified entry into legislatures saying that it was the best course to make the administrative system hollow and ineffective. The Swarajist under the leadership of Moti Lal Nehru defeated the government on several motions of national importance, as a result of the Swarajist efforts, resolutions on ‘National Demand’ were passed. One important development during that period was the evolution of the office of Speaker.\textsuperscript{35}

The limited reforms brought about under the Government of India Act, 1919 proved totally inadequate to satisfy the popular demand for a representative responsible government. The national opinion gathered momentum against a legislature with limited powers, and with every passing year the demand for a fully sovereign Parliament and responsible government become more insistent.\textsuperscript{36}

**Appointment of Simon Commission**

In November, 1927, was appointed the Simon Commission, the British government was forced to appoint the Commission earlier on account of the agitation carried on in India. The Simon Commission was appointed “for the purpose of inquiring into the working of system of government, the growth of education and the development of representative institutions in British India and matters connected therewith” and reporting as to what extent it is desirable to establish the principle of responsible government, or to extend, modify, or

\textsuperscript{35} Ibid., p. 13.

restrict the degree of responsible government then existing therein, including the question whether the establishment of second chambers of the local legislatures, is or is not desirable, the Commission also considered the relations between British India and the Indian States.\(^{37}\)

**The Government of India Act, 1935**

The Act of 1935 aimed at providing a federal structure. The Governor General was to have a Council of Ministers “to aid and advice” him “in the exercise of his functions” except where he was required to exercise his functions in “his discretion” or in “his individual judgement”.\(^{38}\)

According to the Act of 1935, all the provinces were to join the Indian Federation automatically, entry into the Federation was to be a purely voluntary action on the part of each State. At the time of joining the Federation, the ruler of that State was to execute an Instrument of Accession in favour of the Crown. The functions of the Crown with regard to the Indian States were to be performed in India by his representative who in fact was the Viceroy himself.\(^{39}\)

The Act of 1935, also provided for diarchy at the Centre. Certain Federal subjects were reserved in the hands of the Governor-General to be administered by him with the assistance of not more than 3 Counsellors to be appointed by him. The Federal legislature was to be bicameral, consisting of the Federal Assembly and the Council of States. The powers of the Indian Legislature were severely restricted. The Indian legislatures were debarred from making any law affecting the Sovereign or the Royal Family or the

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39. Ibid., pp. 234-235.
succession to the throne of the Crown or any part of India, or the law of British nationality, or the Army act, the Air Force Act, or the Law of Prize Courts. The Act provided for the establishment of a Federal Court with jurisdiction over the States and the provinces. The Act of 1935, abolished the Indian Council of the Secretary of State. The Secretary of State was given advises who may or may not be followed, except in regard to their advice in respect of the services. 40

The Constitution of 1935 was rigid. The British Government alone was given the authority to amend the Constitution. But the most important characteristic of the Act of 1935, was the Provision for Provincial autonomy.

**The First Legislature**

In pursuance of the Indian Independence Act, the Government of India Act 1935 was modified and adapted by the Governor General to make it the provisional Constitution of the Dominion, until some other provision was made by the Constituent Assembly. The legislative power of the Governor General were removed and power was conferred on him to promulgate ordinances only in case of emergency for the peace and good government of the Dominion. The Governor General ceased to be a part of the Dominion legislature. Thus, the Governor General became a mere constitutional head of the country and the sovereignty of the Dominion legislature was complete. 41

The Indian Independence Act 1947, declared the Constituent Assembly of India to be a fully sovereign body and on the midnight of 14-15 August 1947, the Assembly assumed full powers of the governance of the country.

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40. Ibid., p. 236-239.
Section 8 of the Act conferred on the Constituent Assembly full legislative power. It was felt that there should be a distinction between the Constitution making function of the Constituent Assembly and its ordinary function as a legislature.\(^{42}\)

The Mavalankar Committee Report on 29 August 1947, resolved that the business of the Assembly as a Constitution making body should be clearly distinguished from its function as the Dominion legislature and that a provision should be made for the election of a Speaker to preside over the Assembly while functioning in the later capacity.\(^{43}\)

**The Constituent Assembly**

The decision of the Constituent Assembly related to the form of government to be adopted for the country was influenced by the political ground in India and the practice and tradition evolved during the long British Rule.\(^{44}\) Certain conventions of parliamentary democracy like the power of the executive and ministerial responsibility were adopted gradually in India by the Government of India Acts of 1919 and 1935. India had thus become well conversant with the operational traditions, conventions, rules of procedure and practice of parliamentary institutions.

The Constituent Assembly accepted the principle of the parliamentary executive collectively responsible to the popular House of the Parliament. While introducing the Draft Constitution and recommending the parliamentary system in the Constituent Assembly on 4 November 1948, B.R. Ambedkar,

\(^{42}\) Ibid., p. 19.
Chairman of the Drafting Committee said that “The Draft Constitution is recommending the Parliamentary system of executive has preferred more responsibility to more stability”. While some dissentient voices were heard against the concept of the Parliamentary type of government, the overwhelming opinion was in favour of the Drafting Committee’s proposal and finally with the coming into the force the republican Constitution of independent India on 26 January 1950, a full fledged parliamentary system of government with a modern institutional framework and all its other ramifications was established. The Constituent Assembly became the Provisional Parliament of India and functioned as such until after the first General Election based on adult franchise. The Parliament was constituted under the provision of the new Constitution. The first general elections under the new Constitution were held during the year 1951-52, the first elected Parliament with the two Houses – the Rajya Sabha and the Lok Sabha – came into being in May 1952. The Rajya Sabha first constituted in 1952 is a continuing, permanent House, not subject to dissolution.

The Draft Constitution preferred parliamentary system of executive because it has more responsibility to more stability.

3. DUE PROCESS OF LAW

The due process terminology is derived from England where the “due process of law” come to be used as synonymous with the phrase “law of the Land”, which can be traced to Magna Carta (1215) which provided that:

“No free man shall be arrested or detained in prison or deprived of his freedom or outlawed or banished or in any way molested and we will not set forth against him, nor send against him, unless by the lawful judgement of his poors, and by the law of the land”.49

The original significance of the idea underlying these terms was that a person should not be deprived of his life, liberty or property except in accordance with the procedure established by law. The term “law of the land” and “due process of law” were transplanted to American soil by English colonist. These terms appeared in colonial charters and were then carried over into the early state Constitution. Thus the due process idea was invoked to challenged the validity of arbitrary assertions of executive power.50 The Fifth Amendment (1791) to the Constitution of the United States incorporated the due process terminology. The Fifth Amendment provides that “no person shall be deprived of life, liberty or property without due process of law”.51

A uniquely Anglo-American legal concept, due process encompasses determinations that are made in the regular course of the administration of justice by the courts. *The core of the concept is that government should not have the power to deprive a person of life, liberty, or property except by procedures that have been previously established by law and that are applicable to all citizens alike.*52

The due process requirement appears twice in the Constitution, once as a limitation upon Congress (Vth Amendment) as a limitation upon the states fourteenth amendment (1868).53

53. Munro, op.cit., p. 521.
“No state shall 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 laws”.

The 14th Amendment came into existence as a result of constant thinking and necessity. No one in fact was wholly satisfied with the Constitution. It was a patch work of compromises a delicate adjustment of check and balances. The growing dissatisfaction with the Constitution urged the United State’s Supreme Court to create a new Constitutional horizon through Judicial Review. The year 1868 was a critical year in the development of the Constitutional law of America. In America the ‘Due process of law’ became a bulwark against legislation. It imposes a limitation upon all the powers of government legislative, executive and judicial. Thus the due process clause was a great weapon for the enforcement of Judicial Review in America. G.G. Venkat Rao V. says – “Due process is thus a formula which means that a legislation would be struck down as unconstitutional if in the opinion of the Supreme Court it imposes unreasonable restrictions upon vested rights or upon liberty”.  

Munro in his Constitution of United States, observed that ‘due process of law’ in a word means fair play. All legal proceedings which are in public good and which preserve the principle of liberty and justice are held to be in accordance with the requirement as to due process of law.  

According to Lord Denning,

“So by due process of law I mean the measures authorized by the law so as to keep the streams of justice pure: to see that trial and inquiries are fairly conducted; the arrest and searches are properly made; that lawful


remedies are readily available; and that unnecessary
delays are eliminated” 56

The evolution of the Constitution due process provision through court’s
decision is analogous to the growth of a tree. The roots are embedded in the
common law of England and the early English colonies in America. The trunk
represents the Constitution, and its major branches are the rights guaranteed by
the Bill of Rights (1791), with the Fifth Amendment and later the 14th
Amendment significant offshoots. Grated onto the 14th Amendment link are
portions of the due process guarantees in the Bill of Rights 57

In Murray’s Lesse V. Hoboken Land and Improvement Co. (1855), the
Supreme Court defined due process to include legal procedures that did not
conflict with the Constitution’s prohibition, or with the accepted practices in
England at the time the colonies were established. Although the Court had
earlier reasoned that the guarantee of the Bill of Rights were not applicable to
the states, ratification of the fourteenth Amendment in 1868 changed that
view 58

In Allegeyer v. Louisiama (1897), the court held that a state law fining
anyone for insuring property in the state with a company that had not complied
with state law – in this case, a New York company – was an unConstitutional
interference with the Fourteenth Amendment’s protection of liberty 59

“The liberty mentioned in [the Fourteenth Amendment]”, noted the
Court, “means not only the right of citizen to be free from the mere physical

56 . Ibid., pp. 604, 605.
57 . Maddex, Robert L., op.cit., p. 145.
58 . Ibid., p. 145.
59 . Ibid., p. 146.
restraint of his person, as by incarnation, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, or for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purpose above mentioned”.  

Fourteenth Amendment, refers to the law of the land in each state, which derives its authority from the inherent and reserved powers of the State, exerted within the limit of those fundamental principles of liberty and justice which lie at the base of all civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

It is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every Act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person of a particular case, but, in the language of Mr. Webster, in his familiar definition, “the general law, a law which hears before it condemns, which proceeds upon inquiry, and render judgement only after trial”, so “that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society”, and thus excluding, as not due process of law, Acts of

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60. Ibid., p. 146.
attainder, bills of pain and penalties, Act of confiscation, Acts reversing judgements, and Acts, directly transferring one main estate to another, legislative judgements and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power is not law.\textsuperscript{62}

The enforcement of these limitations by judicial process is the device of self governing communities to protect the rights of individual and minorities as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.\textsuperscript{63}

**Due process is not stationary**

Due process of law is not a stereotyped thing. A true liberty permits adaptation to new circumstances. Therefore any legal proceeding which is in the furtherance of the public good, and which preserves the liberty and justice, must be held to be due process of law. Due process was framed to afford protection against gross legislative unfairness; it was not intended to become a barrier to the reasonable regulation of individual liberty or of private property in the interest of social and individual justice. The Courts have used the concept of ‘Due process’ to greatly expand citizens protection from arbitrary and unjust actions of the government that may infringe individual liberties. Two major ways in which the court analyze due process have evolved: procedural and substantive.

\textsuperscript{62} Ibid., p. 602.  
\textsuperscript{63} Ibid., p. 602.
Procedural due process emphasizes the judicial procedures by which rights are determined in individual cases; civil or criminal procedure may be involved. Although criminal charges may jeopardize life and liberty as well as property through fines, for example civil law actions too may involve large devastating property losses. Such civil actions occur when the government sues a person, a person sues the government or on person sues another in a court of law or when government administrative proceedings are carried out, entitlements such as social security is created by the government or actions are taken against students by public school official; all require a certain level of due process to give aggrieved parties a chance to defend themselves before forfeiting a benefit or receiving punishment.  

Substantive Due process

It addresses the substances of a law, rule, or regulation itself as it impinges on Constitutional guarantees. A state or federal law may be enacted in complete accordance with the Constitution and legislative procedures yet violate fundamental Constitutional restraints. *Lochner V. New York* (1905), began finding such legislation unconstitutional as an infringement of the due process protection of liberty and property rights under the Fourteenth Amendment (1868). Later, when the federal government began passing legislation to combat the effects of the Great Depression in the 1930s, the court also at first struck down these laws on the grounds that they infringed due process rights.

64. Maddex Robert L., op.cit., p. 146.
The basis for substantive due process comes from the notion, of Declaration of Independence (1776), that “Governments are instituted among men, deriving their just powers from the consent of the Governed…” Therefore, in a society based on equality and popular sovereignty, laws that infringe on citizens, basic and fundamental liberties are suspect for being unfair or unjust and may be invalidated as unconstitutional.65

Due process of law as required by Fifth and Fourteenth Amendments and as developed by the Courts is a potent weapon in the fight of individuals against governments oppression and tyranny. The simple logic that citizen should not forfeit their life, liberty, or property except by laws and procedures that are Constitutional, known before hand, and applicable to all persons is finally beginning to prevail in one small corner of human history.

4. PROCEDURE ESTABLISHED BY LAW

The Indian Constitution contain due process clause under purview of Article 21. Though the words used in Art. 21 are different but they carry the same sense as provided under 14th Amendment of American Constitution.66

The Art. 21 of Indian Constitution says that:

“No person shall be deprived of his life or personal liberty except according to procedure established by laws”.

The phrase “procedure established by law” seems to be borrowed from Art. 31 of the Japanese Constitution. These Article of the Japanese Constitution have not been incorporated in the Constitution of India in the same language. In

65. Ibid., p. 147.
66. “…nor shall any state deprive any person of life, liberty or property, without due process of law…”
the Japanese Constitution these rights claimed under the rules of natural justice are not given by the interpretation of the words “procedure established by law” in their Art. 31.\textsuperscript{67}

The rights guaranteed in Art. 21 is available to ‘citizens’ as well as ‘non citizens’. It can not be confined to a guarantee against the taking away of life; it must have a wider application. 5\textsuperscript{th} and 14\textsuperscript{th} Amendments of the U.S. Constitution says that no person shall be deprived of his “life, liberty or property without due process of law”, in \textit{Munn v. Illinois}\textsuperscript{68}, Field J. spoke of the right to life in the following words:

“By the term ‘life’ as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of all arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world”.

In the same case Bhagwati, J. held : “We think that the right to life includes the right to live with human dignity and all that goes along, with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing with fellow human beings”.\textsuperscript{69}

The legislative history of Art. 21 is this: Draft Art. 15, as originally passed by the Constituent Assembly, provided that “No person shall be deprived of his life or liberty without due process of law…” The Drafting Committee suggested two changes in this Article: (i) the addition of the word

\textsuperscript{67} CAD, vol. VII, pp. 844-85.
\textsuperscript{69} Ibid., p. 165.
“personal” before the word liberty and (ii) the substitution of the expression “except according to procedure established by law”, for the words “without due process of law”. The reason for the first change was that “otherwise liberty might be construed very widely so as to include even the freedoms already dealt with in Art. 13” (now Art. 19). The reason for the second change was that “the substituted expression was more specific (Art. 31 of the Japanese Constitution, 1946)”.

Procedural Established by Law – Meaning and Interpretation

The expression ‘procedure established by law’ means procedure laid down by statute or procedure prescribed by the law of the state. Accordingly, first, there must be a law justifying interference with the person’s life or personal liberty, and secondly the law should be valid law, and thirdly the procedure laid down by the law should have been strictly followed. The executive in the absence of any procedure prescribed by law sustaining the deprivation of personal liberty shall act in violation of Art. 21 if it interferes with the life of personal liberty of the individual.

The ambit of protection given by the American Constitution in relation to personal liberty is wider than under the Indian law. The American Constitution provides that a person cannot be deprived of his liberty without due process of law’. The word ‘due’ is interpreted as meaning just ‘proper’ or ‘reasonable’, according to Judicial Review. Therefore, the Courts can pronounce whether a law affecting a person’s life, liberty or property is

70. Seervai, H.M., op.cit., p. 970.
71. Kagzi, Jain, M.C., op.cit., p. 171.
reasonable or not and may declare a law invalid if does not accord with its notion of what is just and fair in the circumstances.

The meaning of the expression ‘due process of law’ was explained by Dr. Ambedkar in the Constituent Assembly\(^{72}\) “that the due process clause in my judgement would give judiciary the power to question the law made by the legislature on the ground whether that law is in keeping with certain fundamental principle relating to the rights of individual. In other words the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of authority of the legislature, but also on the ground whether it was in excess of authority of the legislature, but also on the ground whether the law is a good law apart from the question of the powers of the legislature making the law. The law may be perfectly good and valid so far as the authority of the legislature is concerned. But it may not be good law, that is to say, it violates certain fundamental principles, and the judiciary would have that additional power of declaring the law invalid”.

The Draft Constitution of India included the expression “without the due process of law” instead “except according to the procedure established by law” but the later expression found place in the Indian Constitution. Sir Alladi Krishna Swami Iyer explained the reason that the expression ‘due process’ itself as interpreted by the English Court connoted merely due course of legal proceedings according to the rules and forms established for the protection of rights, and a fair trial in the court of justice according to the modes of proceeding applicable to the case. Sir Alladi Iyer argued that this clause may

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serve as a great hardship for all social legislation, for the ultimate relationship between employee and labour, for the protection of children and for the protection of women. It may prove fairly alright if only the judges move with the times and bring to bear their on particular issues.\textsuperscript{73}

\textbf{‘Right to life’ and ‘Personal Liberty’ Interpretation, Liberal approach}

The meaning of “personal liberty” is in harmony with the meaning given to it in English Constitutional law. In Halsburys laws of England the law has been stated thus:

“Right to personal liberty: The right to personal liberty and immunity from wrongful detention is enshrined in Magna Carta and is enforceable by the writ of habeas corpus and action for false imprisonment. A person may be arrested by warrant issued by a justice or, in certain circumstances without a warrant. If a person is arrested without a warrant, he must be informed of the reason for his arrest and, if retained in custody, he must be brought before a Magistrates’ court as soon as is practicable, closely connected with the right to personal liberty is the right to be protected against unfair or oppressive police methods in the interrogation of suspects”.\textsuperscript{74}

According to Diecy,

“The right to personal liberty as understood in England means in substance a persons’ right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification”.\textsuperscript{75}

According to Lord Atkin,

“In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a

\textsuperscript{73} De, D.J., op.cit., pp. 606-607.
\textsuperscript{74} Seervai, H.M., op.cit., p. 985.
British subject except on the condition that he can support the legality of his action before a court of justice”.

A.K. Gopalan v. State of Madras, petitioner A.K. Gopalan, a communist leader, was detained under the Preventive Detention Act, 1950. The petitioner challenged the validity of the Preventive Detention Act and his detention thereunder on the following grounds (1) that it violated his right to move freely through out the territory of India which is the very essence of personal liberty guaranteed in Art. 19. The detention under this Act was not a reasonable detention under Cl. (5) of Art. 19 and hence the Act was void; (2) that the Act was in conflict Art. 21 of the Constitution in as much as it provided for deprivation of the personal liberty of a man not in accordance with a ‘procedure established by law’ it was argued that the word ‘law’ in Art. 21 should be understood not in the sense of an enactment but as signifying the universal principles of natural justice and a law which did not incorporate these principles could not be valid; (3) that the expression “procedure established by law” meant the same thing as the phrase “due process of law in the American Constitution”.

The petitioner argued that the expression ‘procedure established by law’ was synonymous with the expression ‘due process of law’ of the American Constitution. It was contended that the Indian Constitution gives the same protection with the only difference that while the due process clause has been interpreted in America to cover both substantive and procedural law, only the protection of procedural law is guaranteed in India. The contention was that the omission of the word ‘due’ made no difference to the interpretation of Art. 21;

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77. AIR 1950 SC 27.
the word ‘established’ was not equivalent to ‘prescribed’ but had a wider meaning; the word ‘law’ did not mean enacted law, but it meant Principle of natural justice required that (1) no one shall be a judge in his own cause, (2) no one shall be condemned unheard.

There were 6 judges in the Gopalan case. Kania C.J. and Fazal Ali, Sastri, Mahajan, Mukherjea and Das JJ dismissed the petition by 4:2 Majority it declared Preventive Detention Act valid, except section 14. There was no judgement of the Court, or any majority judgement. Each member of the Bench delivered a separate judgement:

The court held that the word ‘due’ was absent in Art. 21. This was a very significant omission for the entire efficacy of the procedural due process concept emanated from the word ‘due’. Secondly, the draft Constitution had, contained the words ‘due process of law’ but these words were later dropped and the present expression adopted. This was strong evidence to show that the Constituent Assembly did not desire to introduce into India the concept of procedural due process. The judicial decision in the U.S.A., on what was reasonable had varied from judge to judge, statute to statute, time to time and subject to subject. Thirdly, the American doctrine generated the doctrine of police power to restrict the ambit of due process, i.e. the doctrine of governmental power to regulate private rights in public interest. Fazal Ali J. disagreed with the majority and delivered a strong dissent in the name of liberty and freedom cherished by the man. Liberty was defined by him in a wider sense personal liberty. The juristic conception of personal liberty and freedom of movement connoted the same. Detention was a form of restriction
of movement, and therefore was synonymous with deprivation of liberty of movement. Preventive detention operated on freedom of movement directly and immediately, although its operation on other rights was indirect consequential. Therefore it was covered by Article 19(1)(d). This guaranteed the right of freedom of movement in its widest sense. The right guaranteed under it was really a right to personal liberty; and so preventive detention was deprivation of that right. Preventive detention dealt with in Art. 22 deprived a person of his personal liberty referred to in Art. 21, and was a violation of the right of movement dealt with in Art. 19(1)(d). This was because, no single Article was a code by itself and independent of others. Article 21-22 were not independent of Art. 19. Preventive detention should not be dealt with on the same footing as punitive detention. Infringement of Art. 19(1)(d) must satisfy the test of reasonableness procedure established by law must include the principles that no person could be condemned without a hearing by an impartial tribunal. The word “law” used in Article 21 did not mean only the enacted law. This was clear from the fact that though no statute laid down the complete procedure to be adopted in contempt cases. He was aware that some judges have expressed a strong dislike for the expression “natural justice” on the ground that it was too vague and elastic. He said that these were known principles with no vagueness about them and existed as all systems of law respected and recognized them. They could not be disregarded merely because, they were in the ultimate analysis found to be based on “natural justice”.

Gopalan was characterized as the ‘high-water mark legal positivism’, courts approach was very strict and coloured by the positivist theory of law. The way Art. 21 was interpreted made it important against legislative power
which could make any law, however drastic, to impose restraints on personal liberty without being obligated to lay down any reasonable procedure for the purpose. It was not for the Court to judge whether the law provided for fair or reasonable procedure or not some of the arguments adopted by the majority to reach the result could not stand close scrutiny. For instance, the concept of natural justice declared by the Court as vague and uncertain, is not unknown in India. Then, the majority characterized the concept of due process as vague and variable. The fact however remains that the Indian Constitution incorporates the very same concept to some extent in Art. 19 in the form of reasonableness of restrictions imposed on the rights guaranteed by Art. 19(1). The argument that ‘due process’ and ‘police power’ concepts go together in reality applies only to ‘substantive due process’ and not to ‘procedural due process’ and it was the later, not the former, which was sought to be imported in Art. 21. There is not much vagueness about the essentials of procedural due process because it basically means “fair hearing”. The concept of fair hearing is ingrained in the jurisprudence of any civilized country and it does not have to depend for its efficacy on any term like due process. The Court could have interpreted Art. 21 somewhat liberally and purposefully and read natural justice therein.

*Maneka Gandhi v. Union of India*\(^78\)

Maneka’s Gandhi passport was impounded by the Central Government under the Passport Act. S. 10(3)(c) the Act authorizes the passport authority to impound a passport if it deems necessary to do so in the interest of the sovereignty and integrity of India. Maneka’s Passport was impounded in the

\(^{78}\) AIR 1978 SC 597.
interest of the general public. Maneka filed a writ petition challenging the order on the ground of violation of her fundamental rights under Art. 14 and also of 19(1)(a) and (g) and Art. 21. Finally S. 10(3)(c) was void as conferring as arbitrary power as it did not provide for giving a hearing to the holder of the passport before it was impounded. The reasons for the order were, however disclosed in the affidavit filed on behalf of the government which stated that the petitioner’s presence was likely to be required in connection with the proceedings before a Commission of inquiry. Regarding the opportunity to be heard the Attorney-General filed a statement that the petitioner could make a representation in respect of impounding passport that the representation would be dealt with expeditiously in accordance with law.

The leading opinion in *Maneka Gandhi* case was pronounced by justice Bhagwati he held that the procedure contemplated in Art. 21 could not be unfair or unreasonable.

Justice Bhagwati said “the principle of reasonableness which legally as well as philosophically is an essential element of equality or non-arbitrariness pervades Art. 14 like a brooding omnipresence”. Thus, the procedure in Art. 21, must be ‘right and just and fair’ and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Art. 21 would not be satisfied.

Hence, any procedure which permitted impairment of individual’s right to go abroad without giving him to a reasonable opportunity to be heard could not but be condemned as unfair and unjust. The order withholding reasons for impounding the passport was therefore not only in breach of statutory
provisions (Passport Act) but also in violation of the rule of Natural justice embodied in the maxim “*audi alteram partem*” (No person shall be condemned unheard). Although there are no positive words in the statute (Passport Act) requiring that the party shall be heard. The power of conferred under section 10(3)(c) of the Act on the passport authority to impound a passport is a quasi judicial power. The rule of natural justice would therefore be applicable in the exercise of this power. Natural justice is a great humanizing principle intended to invest law with fairness and to secure justice. Fairness in action, therefore, demands that an opportunity to be heard should be given to the person affected. A provision requiring of such opportunity to the affected person can and should be read by implication in the Passport Act, 1967. If such provisions were held to be incorporated in the Act by necessary implication, the procedure prescribed for impounding passport would be right, fair and just and would not suffer from the voice of arbitrariness or unreasonableness. It must therefore, be held that the procedure ‘established’ by the Act for impounding a passport is in conformity with the requirement of Art. 21 and is not violative of that Article.

According to Krishna Iyer J. “the spirit of man is at the root of Art. 21”, “personal liberty makes for the worth of the human person” and “travel makes liberty worthwhile”. Thus, no person can be deprived of his right to go abroad except according to procedure established by law. It would now mean that the procedure must satisfy certain requisites in the sense of being fair and reasonable. The procedure “can not be arbitrary, unfair or unreasonable”. The court now has the power to judge the fairness and justness of procedure established by law to deprive a person of his personal liberty. The court reached this conclusion by holding that Art. 21, 19 & 14 were not mutually exclusive, but were interlinked.
Thus in *Maneka Gandhi’s case* the court gave a new dimension to Art. 21, it held that the right to ‘live’ is not merely confined to physical existence but it includes within its ambit the right to live with human dignity.

According to Bhagwati J., Art. 21 “embodies a Constitutional value of supreme importance in a democratic society”. Iyer J. has characterized Art. 21 as “the procedural Magna Carta protective of life and liberty”.

*Kharak Singh V. State of U.P.*[^79^], the petitioner *Kharak Singh* was a class ‘A’ history sheeter and such under surveillance of the Meerut police. In that case validity of certain police regulations which, without any statutory basis, authorized the police to keep under surveillance persons whose names were recorded in the “history sheet” maintained by the police in respect of persons who are or are likely to become habitual criminals. Surveillance as defined in the impugned regulation included secret picketing of the house, domiciliary visits at night, periodical inquiries about the person, an eye on his movements, etc. The petitioner alleged that this regulation violated his fundamental right to movement in Art. 19(1)(d) and ‘personal liberty’ in Art. 21. The respondent urged that the impugned police regulations did not infringe the petitioners fundamental rights. In particular, the respondent submitted that they were saved under Cl. (5) of Article 19 as being “in the interest of the general public”.

The Court held that the ‘domiciliary’ visits of the policemen affected the petitioner’s personal liberty; and issued a writ of *Mandamus* directing the discontinuance of them. It further held that Regulation 236(b) which authorized such visits was not a law for purposes of the Procedure established by law

[^79^]: AIR 1963 SC 1295.
clause of Art. 21. The rest of the submission based on Art. 19(1)(d) were rejected by a 4:2 majority. Ayyangar J. speaking for the majority, said that what would infringe a person's freedom of free movement and personal liberty was “both direct and tangible” interference with a person’s mode of life.

The learned judge observed:

“We feel unable to hold that the term was intended to bear only this narrow interpretation, but on the other hand, consider that “personal liberty” is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the “personal liberties” of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom “personal liberty” in Art. 21 takes in and comprises the residue”.

However, the learned judge said that mere keeping a watch and a record of his movements, or visiting him might cause some personal sensitiveness, but would not constitute any violation of his personal liberty or freedom of movement by those visiting him.

For the minority Subba Rao, J. held:

“No doubt the expression ‘personal liberty’ is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression ‘personal liberty’ in Art. 21 excludes that attributes. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental rights of life and personal liberty have may attributes and some of them are found in Art. 19. If a person’s fundamental right under Art. 21 is infringed, the state can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in
Art. 19(2) so far as the attributes covered by Art. 19(1) are concerned”.

He held that right to privacy “is an essential ingredient of personal liberty” and that the right to personal liberty is “a right of an individual to be free from restriction and or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures”.

5. SUPREMACY OF PARLIAMENT IN ENGLAND

In England, Parliament is “legally” omnipotent. “It can do anything and can achieve any result which can be achieved by man made laws”. Chief Justice Edward Coke wrote in the 17th century:

“The power and jurisdiction of Parliament is to transcendent and absolute that it cannot be confined either for causes or persons within any bound. It can, in short, do everything that is not naturally impossible. What Parliament do, no power on earth can undo”.

Diecy in 1885, reiterated the view that:

“The sovereignty of Parliament is, from a legal point of view, the dominant characteristic of our political institutions. The principle of Parliamentary sovereignty means that Parliament has, under the English Constitution the right to make or unmake any law whatsoever, and further that no person or body is recognized by the law of England as having, a right to override or set aside the legislation of Parliament”.

It means that authority of Parliament can not be limited even by its own legislation. Sovereignty of Parliament means three things.

81. Ibid., p. 30.
82. Ibid., p. 30.
83. Ibid., p. 31.
Firstly, Parliament can make, amend or repeal any statute. In short, it has unlimited law-making power. Secondly, Parliamentary sovereignty means that Parliament possesses unlimited constituent power. Thirdly, there is no Judicial Review in Great Britain, no law passed by Parliament, whether Constitutional or statutory, can be declared *ultra vires* by the courts.

### 6. RULE OF LAW

Great Britain has no written Constitution Parliament can alter any Constitutional principle by passing an ordinary law. There is neither a Bill of Rights nor do the courts exercise Judicial Review over laws passed by Parliament, but the rights and freedoms of the people are safe in England as anywhere else.

The Protector of people’s liberties in Great Britain is the Rule of law. Laski, writes that[^84]:

> “We have sought to avoid not merely the obvious dangers of unfettered executive discretion in Administration: we have sought, also, to assure that the citizen shall have his rights decided by a body of men whose security of tenure is safeguard against the shifting currents of political opinion”.

Rule of law means Constitutional form of government which exercises power according to law. Another sense in which “rule of law” may be used is to refer to the general duty binding “all citizens in a Parliamentary democracy to obey the law, unless and until it can be changed by due process”[^85].

[^84]: Ibid., p. 34.
An essential part of the rule of law, is a system of rules for preventing the abuse of discretionary power. The rule of law requires that the courts should prevent its abuse.86

**Diecy’s Doctrine of Rule of Law**

Rule of law protects the people against arbitrary authority in three ways.87

1. No one can be punished except for breach of law: “a man may be punished for breach of law, but he can not be punished for nothing else”.

2. Equality before law: “Equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts”.

This implies that no one is above law with the sole exception of the Monarch who ‘can do no wrong’, every one in Great Britain is bound to obey the same law.

3. Rights and Freedoms of people are guaranteed not by a Constitutional code but by the ordinary law: The freedom of individual, such as personal liberty, freedom of speech assembly etc. are safeguarded by ordinary laws and remedies are also available against those, whether public or private persons, who unlawfully interfere with these liberties.

Dicey’s doctrine is inconsistent with the legislative supremacy of Parliament. He reconcile the two notion by saying that parliamentary sovereignty favours the rule of law because the will of Parliament can be

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expressed in terms of Act, which must be interpreted by the Courts; and the rule of law favours Parliamentary sovereignty. In some aspect his theory is connected with the doctrine of the separation of powers, it also implies morals restrictions on the legislative activity of Parliaments.

Despite the supremacy of Parliament, theories of the rule of law may be significant in at least three ways. First, they may influence legislators. The substantive law is approximate to the “rule of law” but this only at the will of Parliament. Secondly, their principle may provide canon of interpretation which give an indication of how the law will be applied and legislation interpreted. English courts lean in favour of the liberty of the citizen, especially of his person: they strictly interpret the statute which diminish that liberty and presume that Parliament does not intend to restrict private rights in the absence of clear words to the contrary. Thirdly, the rule of law may be a rule of evidence: everyone is *prima facie* equal before law. A person, whether an executive officer or not, may have peculiar rights, power, privileges or immunities; but, if so, he must prove them.

**7. COMPARISON BETWEEN INDIAN AND BRITISH PARLIAMENT**

The Constitution of India established a Parliamentary form of government both at the Centre and the State. In this respect the maker of Constitution have followed the British model. The reason for this is that Indian were accustomed to this type of government. The essence of the Parliamentary form of government is its responsibility to the legislature.  

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The key stone, the dominant characteristic, of the British Constitution is the doctrine of ‘sovereignty’ or ‘supremacy’ of Parliament. This means that Parliament has the ‘right to make or unmake any law whatever’; that it can “legally legislate on any topic whatever which, in the judgement of Parliament, is a fit subject for legislation”, that no person or body in England has a right to override or set aside a law of Parliament, that courts have no jurisdiction to declare an Act of Parliament void, or unconstitutional, and there is “no power which, under the English Constitution, can come into rivalry with the legislative sovereignty of Parliament”. The Constitution of England is not written and there is nothing like a fundamental law of the country. Therefore, the power of Parliament to legislate is legally unrestricted and it can change even a Constitutional principle by the same ordinary process as it enacts ordinary law, England has a responsible government with an elected House of common which reflects contemporary public opinion, social morality or consciousness. Parliament does not therefore ordinarily do anything which a large number of people oppose. But from legal point of view there is no restraint on the British Parliament to make any law and the validity of law is not subject to any higher principles or morality, national or international law. England has no doctrine of unconstitutionality of Parliamentary legislation and a law enacted by Parliament cannot be questioned in a court on any ground.  

The Indian Parliament differs from its British counterpart in a substantial manner. Politically speaking the Indian and British Parliaments are both subject to similar restraints as both have parliamentary form of government. But legally speaking, whereas the powers of the British Parliament are undefined, 

89. Ibid., p. 74.
those of Indian Parliament are defined, fettered and restrained India’s Constitution is written; it is the fundamental law of land; its provisions are enforceable by the Courts and it cannot be changed in the ordinary legislative process. The Indian Parliament has therefore to function within the Constitution from which its legislative power emanate. By Art. 245(1), the legislative power of Parliament has been specifically made ‘subject to the provisions of the Constitution’. The fundamental law contains many rules and restrictions which Parliament has to observe in its working. For example, there are restrictions regarding the subjects on which Parliament can legislate, and a law made beyond the assigned subjects is bad; and a law made in contravention to fundamental rights is unconstitutional.

The Indian Parliament is the creature of the Constitution. Therefore, a Parliamentary law to be valid must conform in all respects with the Constitution. The Courts decide whether an enactment made by Parliament is Constitutional or not, courts may also scrutinize the legislation and ascertain if a Constitutional restriction transgressed by Parliament in enacting a law.90

Contrasting the British Parliament with a legislature like the Indian Parliament, Dicey called the former as “sovereign” and the later as “subordinate” or non sovereign. Parliament is the source of all central legislation because legislative power of the union has been assigned to it.91

8. DELEGATED LEGISLATION

The making of general rule is a function of Parliament. When Parliament delegates that function its called delegated legislation. The term is used of (a)

90. Ibid., p. 75.
91. Ibid., p. 75.
the exercise of a legislative power delegated by Parliament, or (b) the rules or regulations passed as the result of exercise of a delegated legislative power.\textsuperscript{92}

**Growth of Delegated Legislation**

The Report of the Committee on Minister’s Power gives examples of delegation of legislative powers in the sixteenth, seventeenth and eighteenth centuries. The bulk of delegated legislation however, been enormously increased to meet the needs of the modern state. So long as the state existed mainly for the purpose of preserving order by repelling external aggression, administering justice and preventing crimes, Parliament was able to provide the necessary legislation. Nowadays social welfare and economic problems of a national and international form as important a part of the business of government as the older function of preserving the peace and security of the realm. As a result Parliament tends to lay down general principles and to entrust to Ministers the task of forming the regulation and necessary for their amplifications.\textsuperscript{93}

In every democratic country in modern times relatively only a small part of the total legislative output is enacted by the legislature, and a large bulk of its issued as delegated legislation, in the form of rules, regulations or by-laws. These are made by various administrative authorities under power and conferred on them by the Legislature.\textsuperscript{94} The Executive has no general power to supplement the laws passed by the legislature. However, the power enjoyed by the executive for that purpose is derived from delegation made in various

\textsuperscript{93} Ibid., pp. 325-326.
\textsuperscript{94} Jain, M.P., op.cit., p. 76.
enactments. This type of activity is known as delegated legislation or subordinate legislation.

In England delegated legislation by Ministers of Crown takes one of two forms: (a) the statutory order in Council, (b) the departmental regulation. Both are called statutory instruments; they were formerly known as statutory rules and orders. For both the department concerned is responsible.  

The expression “delegated legislation” is used in two senses. In one sense, it means the exercise of power of rule-making delegated to the Executive by the Legislature. In the other sense, it means the output of the exercise of that power viz. rules, regulations, orders etc.

Causes of Delegated Legislation

There are many factors which necessitate delegated legislation (1) Parliament is a busy body it has to pass a very large number of laws every year in order to carry out the policies of the Government. It were to devote all its time in entering into minor details. As the Parliament cannot afford that, it merely passes Bills in a skeleton form and gives the executive the power to make rules to supplement the Act. That leads to delegated legislation (2) Another reason is that many rules which have to be made to carry out the policy of the Act are of a technical nature and require consultation with experts. (3) The main provision of social legislation require to be amplified to meet unforeseen exigencies and to facilitate adjustments to new circumstances which may arise frequently. Parliamentary process involves delay. Hence it is found

96 . Mahajan, V.D., op.cit., p. 313.
convenient to delegate powers under the Act to the executive to frame the necessary rules to meet the situation and circumstances. (4) In some cases, public interest require and that the provision of law should not be known until the time fixed for it to come into operation. Hence this power has to be delegated to the Executive to be exercised at the proper time. (5) An emergency may arise on account of war, insurrection, floods, epidemics etc. against which the executive must be given the power to act immediately. This also requires, the delegation of powers to the Executive.97

Limitations of Delegated Legislation

The limits of delegated legislation have been set out in the various decisions of the Courts after the new Constitution came into force. It has been held that the legislature cannot delegate its essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law with sufficient clearness, and what can be delegated is the task of subordinate legislation which by very nature is ancillary to the statute which delegates the power to make it effective. The courts cannot interfere in the discretion vested in the legislature in determining the extent of the delegated power in a particular case.98

In England no such type of question arises because Parliament is supreme in England and it can delegate any amount of law making power. In U.S.A. (United States of America) there is written Constitution, so the powers of Congress are not uncontrolled. Also the doctrine of separation of power stands up in the way of mix up of legislative and executive powers.

97. Ibid., p. 313.
Control of Delegated Legislation

There are two types of control over delegated legislation:

1. Judicial control

2. Parliamentary control

**Judicial Control:** The Courts have power to consider whether the delegated or subordinate legislation is consistent with the provisions of the ‘enabling Act’. Their validity can be challenged on the ground of *ultra vires* i.e., beyond the competence of the legislature. The courts can declare the parent Act unconstitutional on the ground of excessive delegation or violation of fundamental rights or if it is against the scheme of distribution of legislative powers under Art. 246 of the Constitution. The parent Act may be Constitutional but the delegated legislation emanating from it may come in conflict with some provisions of the Constitution and hence it can be declared unconstitutional.99

**Parliamentary Control:** It is the primary duty of the Legislature to supervise and control the exercise of delegated power by the Executive authorities. Parliamentary control over the delegated legislation is exercised at three stages. The first stage is the stage when power is delegated to the subordinate authorities by Parliament. This stage comes when the Bill is introduced in the Legislature. The second stage is when the rules made under the statute are laid before the house of Parliament through the committees on subordinate legislation. The committee on subordinate legislation scrutinizes the rules framed by the executive and submits its reports to the legislature if the rules are

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99. Ibid., p. 577.
beyond the permissible limits of delegation. These rules are laid before the legislature and debated in the legislature. 100

**Publication of Delegated Legislation**

There is a very sound safeguard against the misuse of the delegated legislation by the executive authorities. This safeguard was incorporated in the Act in Britain and in United States of America. In India such type of Act have not been passed, but the safeguard of publication of delegated legislation is available under judicial decision. The Supreme Court has held that unless the delegated legislation is published it cannot be enforced. 101

**9. SEPARATION OF POWERS : ARTICLE 50**

“Power corrupts a man and absolute power corrupts absolutely”, is the reason on which Montesquieu based his theory of separation of power. The doctrine of separation of powers requires that the functions of legislation, administration and adjudication should not be placed in the hands of one body of persons but should be distributed among distinct or separate bodies of person. 102

It is customary to divide the powers of government into three, legislative, executive, and judicial separation of powers may mean three different things: (a) that the same persons should not form part of more than one of the three organs of government, e.g. that ministers should not sit in Parliament; (b) that one organ of government should not control or interfere with the exercise of its function by another organ, e.g. that the judiciary should be independent of the

100. Ibid., p. 577.
101. Ibid., p. 577.
If the Executive and the Legislature are the same person or body of persons, there must be a danger of the legislature enacting oppressive laws which the Executive will administer to attain its own ends. If the one body or person could exercise both executive and judicial powers in the same matter, he would have arbitrary power which would amount to complete tyranny, if legislative powers also were added to the single power of that person or body. Montesquieu did not mean that legislature and Executive ought to have no influence or control over the acts of each other, but only that neither should exercise the whole power of the other.  

Montesquieu’s theory exerted a powerful influence on the framers of the American Constitution. Madison who took a leading part in the making of American Constitution implemented the principle of separation of power in the American Constitution, because James Madison noticed the danger in the conjunction of powers in the same hands, he was of the opinion that the accumulation of all powers legislative, executive and judiciary in the same hands may justly be pronounced the very definition of tyranny. 

The doctrine of separation of powers in its rigid form is not to be found in the Indian Constitution. In the United States, all legislative power is vested in the Congress. The executive power is vested in the President and the

104. Ibid., p. 20.
judicial power is vested in the Supreme Court. \textsuperscript{105} It means that there ought to be separate organs for each, working together, but none of them should be dependent on, and discharge the function belonging to the other.

Under the Indian Constitution, only the executive power is vested in the President while provisions are simply made for a Parliament and judiciary without expressly vesting the legislative and a judicial powers in any person or body. Moreover, the system of parliamentary Government in India combines the legislature and executive. The members of the cabinet who are at the head of the executive are also members of Parliament and control the same. \textsuperscript{106}

Although the Indian Constitution does not recognize the doctrine of separation of powers in its absolute form, the functions of the different parts of privileges of Government are sufficiently differentiated and hence it can be said that the Indian Constitution does not contemplate the assumption by one organ or part of the state, of functions that essentially belong to another. However, the executive can exercise the powers of subordinate legislation and those powers are delegated to it by the legislature, it can also exercise judicial function in a limited way. \textsuperscript{107}

The Indian Constitution does not accept the strict separation of powers, it provide for an independent judiciary, there is high court in every State and Supreme Court for the whole of India. It can very well be said that Constitution does not contemplate assumption by one organ or part of the state, of functions that essentially belong to another.

\textsuperscript{105} Mahajan, V.D., op.cit., p. 60.  
\textsuperscript{106} Ibid., p. 60.  
\textsuperscript{107} Ibid., pp. 60-61.
In short, even if Montesquieu’s conception of separated powers is found to be impracticable, one can nevertheless agree that it is essential for the rule of law that judiciary remains independent and impartial.

**Checks and Balances**

The value of the separation doctrine lies in providing checks and balances against abuse of powers. The theory of checks and balances suggests that the powers may slightly overlap, each holding the others in place, counteracting, offsetting and balancing.\(^{108}\)

The framers of the American Constitution intended that the Balance of Powers should be obtained by checks and balances between separate organs of government. But in England there is no rigid separation of power there is intermingling between three organs of the government.\(^{109}\)

**Control of Parliament over Executive**

In any representative democratic government, whether Parliamentary or presidential, the legislature is the supreme organ of the government as it consist of the representatives of people. It reflects the will of the people and acts as a custodians of the interests of the people. Hence, it exercise control over administration to hold it accountable and responsible. However, the system of legislative control over administration in a parliamentary form of government (India and U.K.) differs from such a control in a presidential form of government (U.S.A.).\(^{110}\)

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Parliamentary System

The Parliamentary system of government prevalent in India is based on the principle of collective responsibility. It means that the ministers are responsible to the Parliament for their policies and action. Thus, the legislative control over administration under such a system is only indirect, that is through ministers. The officials (administrators) cannot be held responsible to the Parliament directly. They take shelter behind the principle of ministerial responsibility and remain anonymous. In other words, it is the minister who assumes responsibility for the actions of the administrators working under his ministry department. 111

The Parliament exercises control over administration through the executive in following ways.

i) General control over the policies and actions of the government through questions, discussions, motions and resolutions.

ii) Financial control through budget and audit.

iii) Detailed control over financial, administrative and legislative matters through Committees. 112

Law Making: The Parliament lays down the policies of the government by making or amending or cancelling the laws. The Parliament makes laws in a skeleton form and authorizes the executive to make detailed rules and regulation and within the framework of the parent law. This is known as delegated legislation or executive legislation. 113

111 . Ibid., p. 43.
112 . Ibid., p. 45.
**Question Hour**: The first hour of every Parliamentary sitting is slotted for this. During this time, the MPS (Member of Parliament) ask question and the ministers usually give answers. The questions are of three kinds, *viz.* starred, unstarred and short notice.114

**Zero Hour**: The time gap between the question hour and the agenda is known as zero hour.115 It provides a method of raising important matters that have developed suddenly and agitated the mind of the people in general or some section of it.

**Half an Hour Discussion**: It is meant for raising a discussion on a matter of sufficient public importance which has been subject to a lot of debate and the answer to which needs elucidation on a matter of fact.116

**Calling Attention**: It is a notice introduced in the Parliament by a member to call the attention of a minister to a matter of urgent public importance, and to seek an authoritative statement from him on that matter.117

**Adjournment Motion**: It is introduced in the Parliament to draw the attention of the House to a matter of urgent public importance. This motion needs the support of 50 members to be admitted.118

**Short Duration Discussion**: The members of the Parliament can raise such discussions on a matter of urgent public importance.119 It is to be accompanied

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117. Das, Gupta, op.cit., p. 17.
118. Indian Lok Sabha, Rules of Procedure and Conduct of Business in Lok Sabha (New Delhi, Lok Sabha Secretariat, 1962), Chapter ix, Rules 56 to 63 lay down the method, restrictions and other conditions regarding the Adjournment Motion.
119. Ibid., Rule 193.
by an explanatory note stating reasons for raising discussion on the matter and must be supported by at least two members.

**No-confidence Motion** : It should be supported by fifty members. The administration is therefore on a severe test at such a time, and its collective accountability through the government of the day for a single part of the administration may damage the prestige of the government and may even bring about its fall.\(^{120}\)

**Censure Motion** : It can be moved against an individual minister or a group of ministers or group of ministers or entire Council of ministers, it is moved for censuring the Council of ministers for specific policies and action.\(^{121}\)

**Budgetary System** : The Parliament controls the revenues and expenditures of the government through enactment of the budget. It is the ultimate authority to sanction the raising and spending of government funds.\(^{122}\)

Finally this can be concluded that the efforts to introduce a Parliament in Indian political system had started before independence. The institutional process passed through different stages as Constituent Assembly, Regulating Act 1773 Charter Act 1833, Separation of Powers Act 1853, Indian Council Act 1861, Indian Council Act 1892, Indian Council Act 1909, Government of India Act 1919, Government of India Act 1935 etc. It derived ‘Due Process of Law’ from American model that imposes limitations on the Parliament. The Indian Constitution contains procedure established by law from Japan model that has been incorporated in Art. 21 right to life and liberty.

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Eventually, the Indian political system is parliamentary form of Government both at Centre and States because the Indian were accustomed to that system during British India. However Indian Parliament is substantially different from British one. The Indian Parliament is parliamentary democracy and based on collective responsibility. The Executive is responsible to the Parliament for its policies and actions. Parliament controls it in different ways.