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.