CHAPTER - 8

CONCLUSION

The State can not exist without individuals as the king can not rule without his subjects. It is for the protection of the interests of the individual that the State came into existence. The State, being a sovereign authority, may any time turn into tyrannical way and the basic rights of the individuals may be endangered and under these circumstances the Fundamental Rights are the only weapon in the hands of the individual through which they can seek justice against arbitrariness of the State. Therefore, it is suggested that more and more private Institutions and other bodies should be included within the sweep of Article12.

Political theoreticians from ancient times through middle ages and modern times, have provided divergent and sometimes diametrically opposite ideas about the nature, purposes, functions and relationship with the individuals and the State. Opinions differ as to the connotation of the term 'State' since the concept emerged.

There is no denying the fact that it is really a very difficult task to trace the origin of a social phenomenon. For long, Political thinkers have been taking pains in digging out the secrets related to the origin of the State. Some of them believe that the secrets related to the origin of the State lie in the hands of God, whereas others believe that they lie in the social contract. While still others argue in favour of the role played by a single force the family or the process of evolution. The recent researches in the modern sciences, namely, Anthropology, Ethnology and Comparative Philosophy, throw a shade of light on the origin of the State. But it is not sufficient. The emergence of the State is not yet historically determined. In this connection, Professor R.N. Gilchrist has very aptly remarked, "of the circumstances surroundings the dawn of political consciousness, we know little or nothing from history. Where history fails we must resort to speculation." No doubt it is true that the Historical and

Evolutionary Theory has enjoyed enduring popularity, yet it is difficult to find the finality of judgment in this theory. Historical method and evolutionary process tell us the various ways by which governments came into being or perished away.

The function of the state is to make and enforce a legal framework. Its main purpose is the maintenance of law and order. The State as supreme authority claims sole imperium within a territory. It is sovereign. The State is the source of law or at least its very nature is tied up with the existence of law. The law originates with the State.

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

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

The identity of State and legal order is apparent from the fact that even sociologists characterise the State as "politically" organized society. Since society - as a unit - is constituted by organisation, it is more correct to define the State as "political organization". An organization is an order.

The State is a political organization because it is an order regulating the use of force, because it monopolizes the use of force. This however is one of the essential characters of law. The State is a politically organized society because it is a community constituted by a coercive order, and this coercive order is the law.

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

The fundamental Rights of the Constitution are, in general, those rights of citizens, or those negative obligations of the State not to encroach on individual liberty, that have become well-known since the late eighteenth century and since the drafting of the Bill of Rights of the American Constitution - for the Indians no less than other people, become heir to this liberal tradition.

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

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

An important question that faced the sub-committee was that of the propriety of distributing such rights between the Provincial, the Group and the Union Constitutions. Such a possibility had been contemplated in paragraph 20 of the Cabinet Mission's statement. In the early stage of its deliberations the sub-committee also proceeded on the assumption of this distribution and

adopted certain rights as having reference only to the Union and certain others as having reference both to the Union and the constituent units. However, the volume of opinion against such a distribution grew both outside and inside the sub-committee and proved decisive. If they differed from group to group or from unit to unit or were for that reason not uniformly enforceable, it was felt "the fundamental rights of the citizens of the Union would have no value"

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

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

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

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

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

Article 12 gives an extended meaning to the words ' the state' wherever they occur in Part III of the constitution. The term "the State" will include not only the Executive and Legislative organs of the Union and the States, but also local bodies (such as municipal authorities) as well as 'other authorities', which include the 'instrumentalities' or agencies' of the State, or bodies or institutions which discharge public functions of the governmental character.

The scope of this wide definition has been further expanded by judicial interpretation of the term 'other authorities' occurring in Art. 12. This expansive interpretation promotes the expansion of administrative law as more bodies are covered under its scope. It helps in the expansion of judicial review as many more bodies become subject to the writ jurisdiction, and it also makes bodies amenable to the restrictions of fundamental rights.

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

Under Article 12 the word 'includes' indicates that the definition of 'the State' is not confined to a Government Department and the legislature but extends to any administrative action (whether statutory or non-statutory), judicial or quasi-judicial, which can be brought within the fold of the 'State action', which violates a fundamental right. Therefore, the scope of the word 'the state' has been widened through interpreting each and every words used in Article 12. The Supreme Court has shown the vital role for widening the scope of this Article 50 that the Fundamental Rights of the citizen can be better protected against the arbitrary practices of the Government Departments, legislature as well as administrative actions.

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

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

The expression other authorities refers to - Instrumentalities or agencies, of the Government and Government Departments. But every instrumentality of the Government is not necessarily a 'Government Department, The instrumentalities or agencies, even though performing some of the functions of the State, cannot be equated with a government department, if they have an independent status distinct from the State e.g. government companies and public undertakings though for the purpose of enforcing fundamental rights, they could be held to be State. Every type of public authority, exercising statutory powers, whether such powers are governmental or quasi-governmental or non-governmental and whether such authority is under the control of the Government or not, and even thought it may be engaged in carrying on some activities in the nature of trade or commerce e.g., a Board, a University, the Chief Justice of High Court, having the power to issue rules, bye laws or regulations having the force of law or the power to make statutory appointments i.e., the High

court on the administrative side, a public corporation. An authority set up under a statute for the purpose of administering a law enacted by the Legislature, including those vested with the duty to make decisions in order to implement them comes within the sweep of Article 12.

A non-statutory body, exercising no statutory powers is not 'State', e.g., a company. Private bodies, having no statutory power, not being supported by a State act.

A society, registered under the Societies Registration Act, unless it can be held that the Society was an instrumentality or agency of the State or exercised statutory power to make rules, bye-laws or regulations having statutory force and an autonomous body which is controlled by the Government only as to the proper utilisation of its financial grant may be included within the sweep of Article 12.

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

In determining whether a corporation or a Government company or a private body is an instrumentality or agency of the state, the tests which would be applicable are, firstly, whether the entire share capital is held by the Government; secondly, whether the corporation enjoys monopoly status conferred by the State; thirdly, whether the functions of the corporation are governmental functions or functions closely related thereto; fourthly, if a department of the Government has been transferred to the corporation; fifthly, the volume of financial assistance received from the State; sixthly, the quantum of State control; seventhly, whether any statutory duties are imposed upon the corporation and lastly, the character of the corporation may change with respect to its different functions.

Till about the year 1967 the courts in India had taken the view that even statutory bodies like Universities, Selection Committee for admission to Government Colleges were not "other authorities" for the purpose of Article

12. In the year 1967 the case of *Rajasthan State Electricity Board V. Mohan Lal & Ors.*, the Court held that the expression "other authorities" is wide enough to include within it every authority created by a Statute on which powers are conferred to carry out governmental or quasi-governmental functions and functioning within the territory of India or under the control of the Government of India. Even while holding so Shah, J. in a separate but concurring judgment observed that every constitutional or statutory authority on whom powers are conferred by law was not "other authority" within the meaning of Article 12. He also observed further that it is only those authorities which are invested with sovereign powers, that is power to make rules or regulations and to administer or enforce them to the detriment of citizens and others that fall within the definition of 'State' in Article 12: if constitutional or statutory bodies invested with power but not sharing the sovereign power of the State are not "State" within the meaning of the Article.

Almost a decade later another Constitution Bench of this Court somewhat expanded this concept of "other authority" in the case of *Sukhdev Singh & Ors, V. Bhagatram Sardar Singh Raghuvanshi & Anr.* In this case the Court held, the bodies like Oil and Natural Gas Commission, Industrial Finance Corporation and Life Insurance Corporation which were created by statutes because of the nature of their activities do come within the term 'other authorities ' in Article 12.

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

This distinction to be noticed between the two judgments referred to hereinabove namely *Sukhdev Singh & Ors*, and *Sabhajit Tewary*, is that, in the former the Court held that bodies which were creatures of the statutes having

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

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

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

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

What is necessary is to notice the functions of the Body concerned. A 'State' has different meaning in different context. In a traditional sense, it can be a body politic but in modern international practice a State is an organization which receives the general recognition accorded to it by the existing group of

other States. Union of India recognizes the Board as its representative. The expression "other authorities in Article 12 of the Constitution of India is State within the territory of India as contradistinguished from a State within the control of the Government of India. The concept of State under Article 12 is in relation to the fundamental rights guaranteed by part III of the Constitution and Directive Principles of the State Policy contained in part IV thereof. The contents of these two parts manifest that Article 12 is not confined to its ordinary or constitutional sense of an independent or sovereign meaning so as to include within its fold whatever comes within the purview thereof so as to instill the public confidence in it.

Article 12 must receive a purposive interpretation as by reason of Part III of the Constitution a Charter of Liberties against oppression and arbitrariness of all kinds of repositories of power have been conferred the object being to limit and control power wherever it is found. A body exercising significant functions of public importance would be an authority in respect of these functions. In those respects it would be same as is executive government established under the Constitution and the establishments of organizations funded or controlled by the Government. A traffic constable remains an authority even if his salary is paid from the parking charges in as much as he still would have the right to control the traffic and anybody violating the traffic rules may be prosecuted at his instance.

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

State and Central Governments and the Society was an authority under Article12.

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

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

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

In *Electricity Board, Rajasthan* v. *Mohan Lal*, the Supreme Court held that the expression 'other authorities' is wide enough to include all authorities created by the Constitution or Statute on whom powers are conferred by law. It

is not necessary that the statutory authority should be engaged in performing governmental or sovereign function. On this interpretation the expression 'other authorities' will include *Rajasthan Electricity Board, Cochin Devasom Board, Co-operative Society*, Which have power to make bye-laws under Co-operative Societies Act, 1911. The Chief Justice of High Court is also included in the expression 'other authorities' as he has power to appoint officials of the Court. The President when making order under Article 359 of the Constitution comes within the ambit of the expression 'other authorities'. In effect, the *Rajasthan Electricity Board's* decision has overruled the decision of the Madras High Court in *Santa Bai's* case, holding a University not to be "the State". And finally, the Patna High Court, following the decision of the Supreme Court, has held that the Patna University is a "State".

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

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

The supreme Court in *Maruti Udyog* case, implicitly recognised that the manufactures could not give preferential treatment to a few customers unless they satisfied the standards of reasonable classification. If so, the same principle should logically apply to Hindustan Motors and Premier Automobiles and any distinction based on public sector and private sector dichotomy would be totally irrational and illogical. Similarly, a person attending a private educational institution and living in a hostel needs to be given not only the negative right not to be forced to participate in any worship or religious instruction but also needs the positive right to practice his religion in a reasonable manner in that institution without any hindrance. Again, the basic interests of a student are not limited merely to getting admission without any discrimination, in the institution he can also claim the right to freedom of expression and association. Indeed, both the teachers and students can claim their basic right of academic freedom. Though the existing decisions are not conclusive one way or the other on the issue, it is respectfully submitted that the elements of state aid, recognition and regulation should be enough to establish governmental means so as to enable the court to hold that private educational institutions are "the State".

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

Art 32 (1) guarantees the right to move the Supreme Court, by appropriate proceedings, for the enforcement of the Fundamental Rights enumerated in the Constitution.

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

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

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

The words "for any other purpose" found in Art 226, enable a High Court to take cognizance of any matter even if no Fundamental Right is involved.

The definition of the State under Art, 12 has a specific purpose and that is Part III of the Constitution, and not for making it a Government or department of the Government itself. This is the inevitable consequence of the other authorities being entities with independent status distinct from the State and this fact alone dose not militate against such entities or institutions being agencies or instrumentalities to come under the net of Art. 12. The concept of Instrumentality or agency of the Government is not to be confined to entities created under or which owes its origin to any particular statute or order but would really depend upon a combination of one or more of relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be, by piercing the corporate veil of the entity concerned.

Judicial Activism connotes that function of the judiciary which represents its active role in promoting justice.

The jurist explores how justice to the individual or group of individuals or to the society in general is ensured through the active participation of the court, particularly as against public agencies.

Theoretically, though, the Judiciary is expected to adjudicate or evaluate the policies promulgated by the Legislative or Executive wing of the government, it, equally importantly, checks excesses committed by the other two branches and enforces the rights of the people in case of default or distortion by the Legislature and executive in the discharge of duties, using the power of judicial review.

Judicial activism has made a number of salutary, wholesome and beneficial effects on the public administration to make it effective and participative. But one must not be overenthusiastic in thinking that courts can remedy all the ills in public life.

Judicial activism in India encompasses an area of legislative vacuum in the field of human rights. Judicial activism reinforces the strength of democracy and reaffirms the faith of the common man in the 'rule of law'. The judiciary,

however, can act only as an alarm clock but not as a timekeeper. After giving the alarm call it must ensure to see that the executive performs its duties in the manner envisaged by the Constitution.

Judicial activism, however, is not an unguided missile. It has to be controlled and properly channelised. Courts have to function within established parameters and constitutional bounds. Decision should have a jurisprudential base with clearly discernible principle. Limit of jurisdiction cannot be pushed back so as to make them irrelevant. Court has to be careful to see that they do not overstep their limits because to them is assigned the sacred duty of guarding the Constitution.

Judicial activism is a delicate exercise involving creativity. Great skill is required for innovation.

The liberalization of *locus standi* and the conceptualization of Public Interest Litigation in the area of personal liberty was possible in India by judicial activism of certain judges of the Supreme Court, particularly justice Krishna lyer and justice Bhagwati. The Court, by using post *Maneka* tools, contributed for jurisdictional liberalism to humanize our judicial system.

The Supreme Court was anxious to see that the fundamental rights were available to the poor and the destitute in India in theory as well as in practice.

This way court broke the old traditional theory and embarked upon unorthodox and unconventional strategies for bringing justice to the poor and the Court moved even on a letter addressed to the Court. In *Sunil Batra,* the Court treated a letter written by Batra from the Tihar Jail to one of the judges of the Supreme Court as a writ petition for *habeas Corpus*.

The practice of entertaining letters as petitions, which was initiated and followed on an *ad hoc* basic by some of the justices was ultimately institutionalized by justice Bhagwati in the *Judges Appointment and Transfer Case*. It laid down that where legal injury was caused or legal wrong was done to a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position could not approach the court for judicial

redress, any member of the public acting bonafide could bring an action in court seeking judicial redress. This theme was further developed by Bhagwati, J., in *Asiad case,* where the Court treated a letter written by a social action group as writ petition.

In *Sheela Barse's* case, the Court treated a letter from a journalist as writ petition, complaining of custodial violence to women prisoners while confined in police lock up. In another letter the shocking situation of Bihar State administration was brought to the notice of the Supreme Court, where certain prisoners had already been in jail for a period of over 25 years without any justification.

The Court is now thinking about the limits and 'Caution' in utilizing the extraordinary strategy of PIL technique. However, in the matter of seminal importance, e.g., public health and environment the Court has shown its deep concern in expanding the PIL process.

It is submitted that the use of PIL should be limited for the incapable, poor and illiterate people who are unable to enforce their rights.

Judicial review is an essential component of the rule of law, which is a basic feature of the Indian Constitution. Every state action has to be tested on the anvil of rule of law and that exercise is performed, when occasion arises by reason of a doubt raised in that behalf in the courts.

Judicial institutions have a sacrosanct rôle to play not only for resolving *inter-se* disputes but also to act as a balancing mechanism between the conflicting pulls and pressure operating in a society. Court of law are the products of the Constitution and the instrumentalities for fulfilling the ideals of the state enshrined therein. Their function is to administer justice according to the law and in doing so, they have to respond to the hopes and aspirations of the people because the people of this country, in no uncertain terms, have committed themselves to secure justice-social, economic and political-besides equality and dignity to all.

In human affairs, there is a constant recurring cycle of change and experiment. A society changes as the norms acceptable to the society undergo

a change. The judges have been alive to this reality and while discharging their duties have tried to develop and expound the law on those lines while acting within the bounds and limits set out for them in the Constitution.

The progress of the society is dependant upon proper application of law to its needs and since the society today realises more than ever before its rights and obligations, the judiciary has to mould and shape that law to deal with such rights and obligations.

In many of its decisions, the Supreme Court of India started a new era of compensatory jurisprudence in Indian legal history. The question of compensation for violation of the fundamental right was considered by the court, for the first time, in the *Khatri* case, involving police atrocities. The question was whether the state was liable to pay compensation to the blinded prisoners who were blinded by the police force acting not in their private capacity but as police officials. The court conceded that the state is liable for compensation but it did not pronounce on the issue of compensation as the fact of blinding was disputed. Even though the fact of blinding was difficult to prove, it is submitted, that the court should have awarded compensation to the victims.

The jurisprudential basis of the principle to award compensation was laid down by the court in *Nilabati Behera v. State of Orissa,* where it held that the defence of sovereign immunity was not applicable to a claim in public law for compensation. Verma, J., delivering the judgment for the court, opined that the proceeding for compensation under Article 32 and 226 was a public law remedy to which sovereign immunity did not apply. Even though it could be available as a defence in private law in an action based on tort. Thus, the compensation to the victims whose rights have been violated would depend upon the nature of proceeding one chooses to pursue. It is submitted that the above decision did not clarify the position when the claim of compensation was raised in appeal cases and the extent of sovereign immunity to prevent the victims from compensation in a private law suit. Therefore, in order to prevent an exodus of litigations availing writ jurisdiction in the place of a civil suit, the

very defence of sovereign immunity should be scrapped. The same principle of compensation should be applicable to public law and private law remedies.

In course of time, the Supreme Court has been expanding the horizon of the term "other authority" in Article 12. A large number of bodies statutory and non-statutory, have been held to be 'authorities' for purposes of Article 12. Even if the entire share capital of a company is subscribed by the government, it cannot yet be treated as a government department. The company has its own corporate personality distinct from the government. Such a government company can still be treated as an authority under Article 12. Government Companies, such as Bharat Earth Movers Ltd., Indian Telephone Industries Ltd., in which the Government holds 51% share capital, and which are subject to pervasive government control, have been held to be "other authorities" under Article 12.

In *U.P. State Coop. Land Development Bank Ltd. v. Chandra Bhan Dubey*, the court held that, U.P. State Co-operative Land Development Bank Ltd. was a cooperative society but it was under pervasive control of the State Government and was an extended arm of the Government. It was thus an instrumentality of the State.

Article 12 should not be stretched so as to bring in every autonomous body which has some nexus with the government within the sweep of the expression "State". A wide enlargement of the meaning must be tempered by a wise limitation. It must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State Control. The State Control, however vast and pervasive is not determinative. The financial contribution by the State is also most conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body, and rendering of an important public service being the obligatory functions of the State may largely point out that the body is "State".

It is submitted that whatever may be said about the distinguishing features of *Praga Tools Corporation* and *Tewary* one thing is clear that after

Sukhdev Singh the Supreme Court has adopted a very liberal approach in interpreting the expression "other authorities". Looking to the tests laid down by Bhagwati, J. in *International Airport Authority* case, this aspect is clearly established and the question whether the Corporation is created by or under a statute, or is a government company or a company incorporated under the Companies Act; or is a Co-operative Society or a Society registered under the Societies Registration Act is not at all germane and every such authority would be "other authority" within the meaning of Article 12 of the Constitution.

It is also very clear that after *International Airport Authority* and *Ajay Hasia,* the Supreme Court did not really follow the ratio laid down in *Tewary Case* and tried to distinguish the said judgment by restricting it to "the facts and features" of that case, or by observing that "much water has flown down Jamuna" since the dicta in that case or even by describing the discussion of Article 12 in *Tewary* case was decided by a Constitution Bench of five Judges and all subsequent cases, wherein the point was raised were decided by Judges and thus, they could not overrule the decision rendered in *Tewary* case. In all probability, the Supreme Court might have overruled *Tewary* case, but for this limitation . The Supreme Court was also conscious of this fact. This is clear from the following observation of Bhagwati, J. in *Ajay Hasia* case. "This being a decision given by a Bench of five Judges of this Court is undoubtedly binding upon us". Under these circumstances, in subsequent cases, the Supreme Court had to distinguish *Tewary* case rightly or wrongly. It is, however, submitted that in view of further and later development of law, *Tewary* case is really no longer good law as it does to lay down correct principle and requires to be reconsidered and the Supreme Court should not feel shy in specifically and expressly overruling it by constituting a large Bench.

Suggestions can be made in this work that firstly, constitutional guarantee has its own importance and similar guarantees by an ordinary law cannot be compared with the same. The working of the Indian democracy shows that the need has been felt for giving constitutional status even to the system of local government both in the villages and towns. Secondly, in many matter like

protection of ecology and prevention of pollution the Supreme Court is already being approached directly through public interest litigation. Article 21 is considered to be satisfied if the Union of India or State Government is added as a co-respondent along with private industry and corporation. Thirdly, it is an age of expanding dimensions of public law litigation including constitutional law litigation. In many areas where formerly private law remedy was considered sufficient, public law remedies through the invocation of writ jurisdiction of the Supreme Court and High Courts are sought and obtained. It is neither possible nor desirable to reverse this trend. If the traditional procedure and existing division of work between the courts at various levels do not fit in the present scenario, the need is for fresh planning and readjustment. This brings us to the last point, that is, of judicial reform.

The following courses may be adopted alternatively or simultaneously to mitigate the danger of overcrowding likely to arise as a result of widened dimension and reach of the fundamental rights. First, it is time that the course suggested in article 32(3) of the Constitution is put to use and the district court get the authority to issue the writs for enforcement of fundamental rights. It is quite likely that the Supreme Court and High Court Bar Associations would protest but that is both understandable and unavoidable. Second, it appears that the territorial system of organization of courts and their hierarchical system do not exactly tally with organization of the administrative system in the country. At the administrative level the country is divided into state, which are subdivided into divisions, and these are further sub-divided into district. On the other hand, when we look at the judicial organization, we find that the Supreme Court is the apex court with the High Courts and district courts in the states. There is no exact judicial counterpart of the divisional court for each division with all the powers of the present High Court. The High Courts in turn may be given all the powers of the Supreme Court except those under article 131, 136, 139-A and 143 and the Supreme Court may be left with the jurisdiction obtained only under these articles. This reform, if implemented, would also solve the problem of the High Courts having many benches in different parts of the states. Last but not the least is that many more specialized tribunals on the

pattern of central administrative tribunal may be established with the power to enforce the Constitution in those specified matters.

The expansion in the definition of State is not to be kept confined only to business activities of Union of India or other State Governments in terms of Article 298 of the Constitution of India but must also take within its fold any other activity which has a direct influence on the citizens. The expression 'education' must be given a broader meaning having regard to Article 21- A of the Constitution of India also Directive Principle of the State Policy. There is a need to look into the government power subject to the fundamental Constitutional limitations which requires an expansion of the concept of State action.

All the suggestions mooted above are of a general nature and would require a lot of thinking before they are given concrete shape. But one thing is definite that the rapidly growing might of the private industrial sector needs to be subjected to the responsibility of observing constitutional norms contained in the chapter of fundamental rights. Much thought has been given by many writers in other countries as to how to put the economic power of giant industrial corporations in control. Legislative regulation and administrative control have been exercised but without success. India's own recent experience in this respect shows that it resulted in retarded and sluggish economic growth. It has been suggested that the emergence of countervailing forces in the form of labour unions, consumer associations and retailer unions would serve the purpose. The experience of other countries in this respect shows that these new groups have themselves been a source of tyranny over individuals. The practice of closed shop system of labour unions readily illustrates this. Some may argue that the growth of industrial capitalist economy presupposes some ruthlessness in its initial stages and therefore, India should not think of putting any curbs on it even in the nature of enforcement of fundamental rights. But it is not possible to react everything today what happened in Europe and North America a few centuries back. Still others might say that capitalism has undergone many refinements and we can safely trust and depend on the corporate conscience.

But that looks more like a voice of despair. Therefore, the only solution lies in this that India must take note of the reality that the might of the private corporate sector is comparable to that of public authorities and it must be put under the constitutional discipline of fundamental rights. That it would give rise to some additional litigation is frankly admitted. But this is a necessary consequence in any system where people are made conscious of their rights and interests and the emerging disputes are resolved in a principled manner through the system of courts. The exact methodology to be adopted for dispute resolution in this way and the system of judicial organisation is a question of detail where some adjustment and modification is always possible in the light of experience.

Thus, by analysing various cases on the subject matter mentioned in this work the conclusion can be made that the various decisions of the Supreme Court on Fundamental Rights have established that the Court have looked at the Constitution as a living document and have gone beyond the literal interpretation of words occurring in the specific Articles on fundamental rights. This is the correct manner of interpreting the Constitution as unlike statute, which defines present rights and obligations, a Constitution provides a continuing framework for exercise of power by different organs of the State. A Constitution is always drafted not only to take care of the present but also to take care of the future of a Nation.