# JUDICIAL ACTIVISM AND BUREAUCRACY : CURBING CORRUPTION AND NON-PERFORMANCE

*Dissertation submitted to the Jawaharlal Nehru University in partial fulfilment of the requirements for the award of the degree of*

MASTER OF PHILOSOPHY

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*Dedicated to my*

*Parents*

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# CERTIFICATE

Certified that the Dissertation entitled **"Judicial Activism and Bureaucracy : Curbing Corruption and Non-performance"** submitted by Sarat Chandra Pradhan, is in partial fulfilment of the requirements for the award of the degree of **Master of Philosophy** of this University. This Dissertation has not been submitted for any other degree of this University, or any other University and is his own work.

We recommend that this dissertation may be placed before the examiners for evaluation.

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# INTRODUCTION

Ever since the unfolding of civilization and its graduation to modernity, human existence has moved from police state to welfare state. Republican values emanating from concepts like the rule of law, judicial review and independence of the judiciary are cherished in any modern democratic polity wedded to good governance. The doctrine of constitutionalism as enshrined in the constitution of India envisages a welfare state where the state is expected to formulate programmes for providing quality life and social security to its people through legislation and administrative action. Under this doctrine of constitutionalism, the judiciary is empowered to mediate between the demands of the Indian state, demonstratively given to waywardness, and the civil sociery, desperately trying to preserve areas of autonomy from government interference.

But in the age of liberalisation and globalisation of the economy, the relationship between the state and civil society is getting redefined in a manner that does not always meet the requirements of equity and fairness. The end result is that the constitutional polity stands alienated from its original constituency-the vast majority of the population. This has reemphasised the need for a reaffirmation of our collective commitment to

good governance so that the vast citizenry does not feel helpless against an inefficient and paralysed structure of government authority, as unrestrained market forces take over.

Studies on Indian politics and the question of "good governance" over the last 20 years reflect a lot about the "decay" of political institutions, both formal institutions of state and informal institutions such as political parties. Notable among them are, Atul Kohli's study on "crisis of governability"[1] and James Manor's study on "parties and party system"[2] . Both these studies argue that the autonomy of institutions,-their corporate substance, organizational complexity, flexibility and strength,-and their capacity to respond to social groups have been eroded. This erosion entails a degeneration in the behaviour of individuals and groups. Corrupt, unconstitutional and wilfully destructive acts have become more common among politicians and bureaucrats.

However, the period of 1990's witnesses, though not a clear and complete stop to this trend of 'political decay', certain countervailing trends, the most important being the tendency towards political regeneration. Being the reverse of political decay, it means the restoration of the capacity of state institutions and political parties to respond

[1] Kohli, Atul, Democracy and Discontents : India's Growing Crisis of Governbility (U. K. Cambridge)1991.

[2] Manor, James, "Parties & Party System" in Atul Kohli (Ed), India's Democracy: An Analysis of Changing State-Society Relations(U.S.A, Princeton) 1986.

creatively to social groups. It also entails changes in individuals' behaviour, so that they are less inclined towards illegality, destructiveness and normlessness, and more inclined towards accomodation, accountability and the observance of agreed norms and procedures. This process has been led by the judiciary in its activist role vis-a-vis Public Interest Litigation (PIL) in improving the relation between political institutions and social groups, between the state and society.

**Concept of Judicial Activism:-**

It would be difficult to give a positive definition of judicial activism, much less a comprehensive one. Because the occasions on which activism may be attempted and the manner and the extent to which it may be indulged, may very according to the exigency, the opportunity and the need of the situation as also the inclination, perception and philosophy of the judge. While the proponents of judicial activism take it as normal assertion of judicial power, a part of judicial review of authority and a result of judicial creativity. They consider it a necessary inbuilt mechanism to uphold the rule of law and the canons of natural justice. For the opponents, judicial activism is a term of abuse. The two sides have their own perceptions, their own reasons, not necessarily independent of their self-interest. Literally the term 'activism' means being active. According to chief justice J.S Verma, the role of the judiciary in interpreting the existing laws according to the nedds of the times and filling the gap appers to be the

true meaning of judicial activities.[3] "Activism" refers to the phenomenon of the courts dealing with the issues, which they have traditionally not touched. Therefore 'judicial activism' should be understood against 'judicial passivism' or 'judicial self- restraint'.

**Bureaucratic Function and Corruption :**

The term 'bureaucracy' means rule by administrative offices, in which actual power is vested in those, who are , from the legal point of view, administrative intermediaries between sovereign and subject.[4] And the characteristic of these administrative intermediaries is what Weber says, rational -legal authority. The rationale behind the growth of bureaucracy owes its origin to the Keynesian welfare state, whose principal objective is to intervene and discriminate in favour of some classes of citizens against others. However once the bureaucracy gets its power of discrimination through delegated legislation, it developes its own vested interests. The end result is often the collapse of administrative neutrality and the growth of corruption. Here 'corruption' is not just taking money alone. Rather it can be defined as deviation from the norms of public duty and law for the purpose of private gain. Threfore it includes administrative inefficiency, incompetence, and inaction.

[3] Verma, J.S, Justice, while delivering a lecture on "Judicial Activism: Regional Perspective" under the aegis of the SAARC Law-India Chapter, March 29,1996.

[4] Suruton Roger, A Dictionary of Political Thought(London, Pan Books, 1983)P.46.

In India, during the decades after independence, the civil service developed in three ways-partners, yes-men & confrontationist[5], yet till 1960, the bureaucracy was largely free from political interference. The destruction of bureaucracy really began under Indira Gandhi, when she demanded its 'committment' to her government and not to the constitution or the people. It gave a lot of wrong signals and politicians started interfering from then on. The police and intelligence agencies were used as tools of oppression and state terrorism, with the active participation of the bureaucracy in forced sterilization campaigns, demolitions, indiscriminate arrests and extortion of funds from business-men and petty traders, by threatening them with imprisonment and worse. Since then , there has been a tendency for the boundaries between the political and the permanent executive to be blurred. Over the years the practice of corruption has become so endemic that it has acquired a veneer of almost complete legality. Professionalism has surrendered itself to favouritism in the services. The entire system appears to be based on money power, influence and a conspiracy of silence. Transparency and accountability are virtually non-existant.We have reached in a new era, but of corruption, venality and brutality, insensitivity where dereliction of duty and insentivity to the needs of the people is hardly surprising. This has made a travesty of popular government and democracy.

[5] Seshan, T.N. The Degeneration of India, (New Delhi, Sage 1996), P.12.

The main function of bureacracy can be broadly grouped into 'Authority' and 'Influence'. Authority means power, mostly delegated by the legislature. The other function of bureacracy is furnishing information, advice and decision making thereby checking ministerial powers. It corrects the risk involved in decisions taken under pressure of popular feelings by off setting and balancing such pressure with a medium where expertise and ascertainable knowledge are the protective envelope of action. It oils the machinery of policies by relating the popular will to what a detached and disintcested experience believes to be practable. Its authority is that of incluence and not that of power. It indicates consequences, but it does not impose commands [6] It has come in the way of implementing socio-economic legislation passed from time to time. Land reform legislations in India is one example : it has suffered due to the conservative and unhelpful attitude of the bureaucracy[7] .

**Judiciary and Other Branches of Government.**

An important set of questions that often confronts constitutional democracies relates to the relationships between the judiciary and the other branches of government.How much power should the judiciary have? How independent should it be ?The underlying concern in all these issues is the control of government in the interest of freedom and liberty of the citizens.

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[6] Khanna, H.R. Justice, The Judicial System, (New Delhi, Indian Institute of public Adminstrative),1980,P.9.

[7] Gopal-Krishna, K.G, "Administration and law," (Journal of Indian Institue of Public Administration, Sept-Dec, 1995, P.95.

There is no liberty if judicial power is not separated from and independent of the legislature and the executive. Oppression and arbitrariness would be the consequece whenever judicial power is joined with executive or legislative power. Judicial independence therefore is the prerequisite for liberty and good governance.

The Indian constituation maintains a high degree of judicial independence. The power of judicial review conferred on Supreme Court and High courts to strike down unconstitutional laws and executive actions, though considered undemocratic by some is a cardinal principle of Indian constitutional law because of its concern to prevent authoritarian government at any cost. But this exercise of power of judicial review by the Supreme Court has raised many controversies in the past. In the early fifties decisions An important set of questions that often confronts constituational democracies relates to the relationship between the judiciary and the other branches of government. How much of power should the judiciary have ? How independent should it be ? . The underlying concern in all these issues is the control of government in the interest of freedom on land reform legislation led to constitutional amendments, with Nehru complaining that judges had stolen the constitution and were impeding progress. In the' 60s, judges were accused of class bias. In 1964, the UP legistature summoned judges to the bar of house thereby creating a constitutional crisis which was solved by a Presidential Reference to the Supreme Court. In the'70s, in Fundamental Rights case the Supreme Court told the sovereign plenary

body which had the power to amend the constitution that it could not alter the basic structure of the constitution. It was the judiciary that struck down Indira Gandhi's election. Even if the Supreme Court is justly criticised for its Habeas Corpus decision during the Emergency, nine High Courts rose to the challenge to check dictatorial high-handedness.

In the immediate post-independence period the preferences of political leadership and of judicial thinking were at variance; this variance degenerated into a clash when the late Mohan Kumaramangalan propounded the doctrine of 'committed judiciary'. The inability or the unwillingless of the two branches of the Government to appreciate the principle of institutional restraint led to an arrogance that finally culminated in the promulgation of Emergency in 1975. It was a while before the judiciary regained its old poise. The post-Emergency era saw a greater concern and vigilance about the rights and autonomy of the civil society; encouraging PIL the judiciary under Justice P.N Bhagwati, was called upon to restrain and restrict a minatory state and its functionaries. But it was extremely careful not to challenge the political leadership.

In the' 90s the role of the judiciary vis-a-vis the power to punish for contempt of court, has scaled new heights. Showing its concern for issues ranging from cleaning the garbage in the city to bureaucratic corruption and non-performance, it has come out with some firm

judgements. It has frequently stepped in to deliver a punch right in the face of rampaging politicians and bureaucrats, and in the process of delivering these judgements, has compelled the executive to perform its statutory duties. This has irked many not excluding parliamentarians and has raised new controversies, though not open confrontation, between judiciary and executive.This trend rasis many questions. Would not such an approach, issuing directions in matters which are purely administrative where court does not possess the requisite administrative expertise and proficiency, disturb the delicate balance of distribution of powers and functions among the three wings of the government ? Would not such an approach strike at the basis of our democratic polity which postulates that governance of the country should be carried on by political executive?

Critics assert that it is no function of the courts to attempt to assume such an awesome responsibility even on a limited scale. The uproar in parliament over the condemnation of politicians by Judge, S. N. Dhingra,[8] the draft PIL Bill prepared by the UF government[9] and attempts to restore the pre-1993 status in appointment of judges[10] are testimony to

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[8] Justice S.N. Dhingara, a judge of designated TADA Court of the Additional Sessions, had made certain observations against Parliament and Mps. These remarks created uproar in parliament.However the matter was set at rest following the expuction of the remarks by the Delhi High Court .

[9] The highlights of the PIL Bill, 1997 are:(a). a mandatory interest free deposit of Rs.1 lakh for every PIL in Supreme Court & Rs 50,000 in the High Court, which shall be refunded at the discretion of Court; (b) a banafide PIL is a person who has some direct personal interest in the litigation, except when its for the enforcement of the rights of a poor person-income does not exceed Rs.6,000; (c). deposits of this fee to be made within thirty days of the enforcement of the Act .

[10] The U.F Government's proposed amendment bill provide for the intiation of the appointment process by the president or by the Chief Justice of the Court concerned. But it declares that "the power of appointment shall vest solely and exclusive ily in the president who shall not be bound by any opinion or consultation obtained" under article 124. This proposal is reverse to the Supreme

the attempts made by executive led legislature to arrest the growing activism of judiciary.

This work is an attempt to study the changing nature and scope of judicial review vis-a-vis PIL in India. But since the judicial review has many aspects and can be analysed from different angles relating to different issues and problems, this work limits its areas of study to the judiciary's relationship with bureaucracy. Under Article 53 & 154 of the constitution , members of the civil service are officers appointed by the President or the the Governor, as the case may be, subordinate to him and responsible, under his orders, to exercise the executive power of the Union or the state. They are not independent entities and are merely agents of the authority in whom is vested executive power. Hence they are delegate having limited power, who may be called upon to justify its acts all the time. As a matter of of principle, therefore, judicial review is always available at least to determine whether the administration has exceeded its jurisdiction. This limited notion of judicial review performs the function of legitimizing administrative action. This value -oriented confrontation of 'administrative efficiency' and 'legitimacy of power' generates tension at two distinct levels-systematic level and functional level. while the problems or tensions at the systematic level. concerned with the reconciling, individual rights and welfare policies, the problems at the functional level

Court in 1993, in the case of Advocates on Record, that "consultation" did indeed place on the government the onus of obatining the "concurrence" of the Chief Justice of India in the matter of judicial appointments.

deals with the inaction , inefficiency, non-performance of the administrative authorities. This work intends to find out the judicial response to these problems vis-a-vis power of judicial review.

**Review of Literature :-**

A brief review of literature would not only give a deeper and powerful insights on the subject but also the lacunae of the literature will open up new vistas of understanding of the subject. So far as the topic of the study is concerned, there are three types of literature, all of which deals with the issue from various angles and standpoints. The first type of literature deals with the judiciary per se. Vijay Laxmi Dudeja's [11] work examines the status of judicial review vis-a-vis the power of parliament particularly in resepect of constitutional amendments. She also relates this issue with another constitutional controversy, i.e. the relationship between fundamental rights and directive principles. Broadly the issue boils down to the social policies of the government and the procedural constraints of the 'due process of law'. All these issues converge on the nature and scope of judicial review. Going further the work of both K.L Bhatia [12] and V. R. Krishna Iyer[13] argues that the efficiency of Indian legal system will be determined by the shape of future judicial activism. If real justice, real democracy and real freedom are to be

[11] Dudeja, V. L, Judicial Review in India, (New Delhi, Radiant), 1988.
[12] Bhatia, K.L., Judicial Activism and Social Change (New Delhi, Deep &Deep),1990.
[13] Iyer, V. R., Krisnha, Judicial Justice : A New Focus Towards Social Justice (Delhi University, Law Centre )1989.

attain ed , the judge's approach to the law and the constitutional must be positive and inspired by high idealism. Both of them agree on the point that the legal institution of a dynamic and a progressive society have to adjust to the changing social and economic realities. The constitution presents a harmonious blending of the need to preserve civil liberties with the urge to raise the economic level of the people. Many an appeal in the name of freedom is the masquerade of a desire to preserve one's previleges and keep them entreanched. The converse likewise is true and it is for that reason, too much stress on political democracy will disregard the economic democracy. Hence a balance has to be maintained.

The second type of literature, includes the work of A..A.Wani [14] and Hemalata Devi[15] . Both of them have extensively discussed the historical origin and growth of administrative process in India and the scope and different grounds of judicial review over administrative action. The welfare philosophy of the state being the raison d'etre of bureaucracy, the device of administrative discretion vis-a-vis delegated legislation gives little scope to judiciary to control over bureaucracy. However, over the period of times the judiciary has reacted positively by devising techniques for the preservation of legal principles of control.

[14] Wani, A.A, Exclusion of Judicial Review: Administrative Efficiency Confronts Legitimacy of Power(New Delhi, Metropolitan)1987.

[15] Hemalata Devi, P., Administrative Discreation and Judicial Review (New Delhi,Mittal.) 1994

The third type of literature includes the writings of bureaucrats, serving and retired-such as T.N. Seshan[16] , N.K. Singh[17] & K.J. Alphons[18].Based on their own experience they have explained that the different arms of the polilitical system, including the bureaucracy are on a slippery down- ward slope. The `core issues' these authers examine include the deterioration of institution, the rise of venality in public lilfe and corruption of nation's religious and cultural heritage, the brutalisation of poor and underpriveleged , criminalisation of politics, politicisation of bureaucracy and the malaise that has spread into every aspect of human life.

The first two types of literature have analysed the successful role of judiciary in solving the problems at systematic level. In other words, they have examined the positive role being played by the judiciary in reconciling fundamental rights and directive principles of state policy. But the lack of any analysis of the role of the judiciary in controlling problems at the functional level is the main lacuna in most of the writings. Though A.A Wani and Hemalatha Devi have attempted to analyse the problems of inaction and inefficiency and judicial response to them, yet most of their findings are concentrated to the pre-1990 phase. The third catagory of writings by active bureaucrats only builds up the idea of deinstitutional process and hence failed to grasp the role of judiciary in the proscess of political regeneration. This work is an attempt to partially fill some of the above gaps.

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[16] Seshan, T.N., The Degeneration of India,( New Delhi, sage )1996.
[17] Singh, N. K., From The Plain Truth : Memories of a CBI Officer (New Delhi, Konark) 1996
[18] Alphons, K.J., Making A Difference , (New Delhi, Viking),1996.

The aim of the study is to examine (a) the extent to which the Indian constitution has incorporated the doctrine of separation of powers; (b) the patterns of judicial control over the bureaucracy from time to time ;(c) the factors that influenced the growth of judicial activism in 1990's and (d) the impact of judicial activism on the larger issue of constitutional democratic governance.

The study combines the descriptive and analytical approaches. Case-law methodology has been adopted for the appraisal of the theme. It appears to be a better approach for the evaluation. Nevertheless only important cases have been examined for keeping establishing the work within manageble limits.

This work is divided into three chapters.The Introduction consists of the framework of research, review of important works done in relation to the topic and the objective of the study. Chapter I deals with the historical origine and growth of the doctrine of separation of powers. It also gives a conceptual clarity of the term ' judicial activism' and briefly discusses the culture of judiciary over the period of times. Chapter II traces the origin and ratitonale behind the group of administrative process. It studies the control of judiciary over the administrative action from the period 1950-1990, through the analysis of important cases. chapter III

examines the factors for the growth of judicial activism in 1990's and its impact on the issue of constitutional democratic governance. The conculsion summarises the research.

# CHAPTER -I

# JUDICIAL ACTIVISM : MEANING, ORIGIN AND IT'S WORKING

## 2.1 Defining the sphere of the Judiciary:

A very strong, independent, impartial and well-organised judiciary plays an importannt role in the democratic system of governance. It not only prevents the arbitrary use of governmental authority but also safeguards the rights and liberties of citizens. Moreover, under the federal form of government, the judiciary has the additional role of guardian of the constitution.[1] This view of judiciary having an independent sphere is an offshoot of the famous doctrine of separation of powers -the legislative power of the parliament and the judicial power of the Supreme Court, which is one of the three broad features of our constitution. The others are : Rule of law i.e, Supremacy of law; and Distribution of powers between various levels of government (i.e. central, states and local)

Montesquieu and Locke in Europe and Madison in U.S.A believed that separation of powers with checks among the three branches of the government will ensure smooth working of the

[1] Dudeja,V.L,*Judicial Review in India*,(Radiant,New Delhi,1988)p.1

legal system. The basic premise of the doctrine of separation of powers is limited role of government, limited expenditure and limited administrative structure.[2]

The doctrine also assumed that legislature will play a leading role and the other two organs i.e. judiciary and administration[3] will be neutral. The logic behind the doctrine was that legislature will take care of the interest of the majority of the population and judiciary will protect minority rights and administration has only to implement the statutes passed by the legislature.

In India the demand for the separation of the judiciary from the executive owes its origin as far back as times of Raja Rammohan Ray as a result of reaction to the British rule which combined the two functions in order to supress the national movement. Because they were concerned not with justice so much as to keep their power by all means fair or foul[4]

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[2] Gopalkrishna,K.C, Administration And Law",*Journal of Indian Institute of Public Administration*, Sept.-Dec.,1995,p.694.

[3] The 'administration', 'executive'and 'bureaucracy' have been used to convey the functions of the executive (second branch of government).The Supreme Court of India has observed in this regard as follows: "It may not be possible to frame an exhaustive definition of what executive function means and implies ordinarily that the executive power controls the residuary governmental functions that remain after legislative and judicial functions are taken away subjects,of courts, to the provisions of the constitutions or of any law".[Ram Jainaya V.State of Punjab,1995, 12 S.C.R 225,p.236]

[4] Garg,B.L,"Problems of the Separation of Judiciary in India",Indian Journal of Political Science,vol.25,1964,p.124.

Soon after Rammohan Ray, a band of devoted workers of whom Mr. Dadabhai Naroji was the most prominent, took up the cause and associations were formed for the purpose in Bengal, Bombay and Madras. With the speread of education the movement gained in volume and momentum and the Indian National congress took up the subject in 1885. The public opinion about this demand was so strong that the Constitutent. Assembly could not resist it in spite of the differences of the opinion between two groups.While one group consisting of Bakshi Tekchand, Rik Sidwa and H.V. Kamath supported the separation, the other group consisting T.T. Krishamachari, K.M. Munshi and B. Das opposed it. In the original ' Draft Constitution' there was no provision for it but due to the pressure of public opinion, Dr. B.R. Ambedkar introduced it on the 24th November, 1948 in the form of an amendment and thus a new Article 39 (A) was proposed to the Draft. Later on, in the final draft the articles were renumbered and Article 39-A thus became Article 50 of the constitution.[5]

**(2.2) Meaning:-**

'Judicial Activism' is not a new phenomenon, way back in 1893, Justice Mahmood of the Allahabad High Court delivered a

[5] Constitutional Assembly Debates,Vol.VII,No13,p.590.

dissenting judgement which sowed the seed for judicial activism in India. It was a case of an undertrial who could not afford to engage a lawyer. So the question was whether the court could decide his case by merely looking his papers. Justice Mahmood held that the Pre-condition of the case being 'heard' would be fulfilled only when somebody speaks.[6] In fact, judicial activism is not a distinctly separate concept from usual judicial activities. The expression 'activism', lexically as well as ordinary parlance, means 'being active', 'doing things with decision' and the expression 'activism should mean 'one' who favours intensified activities[7]. In this sense every judge is, or at least, should be an activist, as Justice Krishna Iyer observed, 'every Judge is an activist either on the forward gear or on the reverse'.

The activity of judiciary can be of two types i.e either in suport of the legislative and the executive pollicy choices or in opposition to them. But it is the latter pattern which is usually understood as judicial activism. The essence of true Judicial Activism is the rendering of decisions which are in tune with the temper and tempo of the times. Hence an activist judge activates the legal mechanism and makes it play a vital role in socio-economic process. Activism on the part of the judiciary furthers the cause of social change or articulates the concept such as liberty, equality or justice. In contrast to the

[6] See Justice J.S Verma's interview with Manoj Mitta in *India Today*,March 15,1996,p.122
[7] Fadia, B.L., *Indian Government & Politics*, Sahitya Bhawan, Agra, 1996, P.833

traditional concept of judiciary as a mere umpire, it works as an active catalyst in the constitutional scheme. Therefore, judicial activism refers to the power of judicial review dealing with the issues which they have traditionally not touched.

Judicial review is not an expression exclusively used in constitutional 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, revision and the like, as precribed by the procedureal laws of the land, irrespective of the pollitical system which prevails. Judicial review, has, however, a more technical significance in public law, particularly in countries having the written constitutions. In such countries it means that the courts have the power of testing the validity of the legislative as well as other governmental actions.[8]

Thus the expression 'Judicial review' can be used both in a narrow sense and in a wider sense. In its narrow sense, judicial review is essentially collateral. It does not go into the merits of the impound decision but examines only its constitutionality or its basic legality. The attack is collateral. Here the contention is not that on merits the impound decision was wrong, but that decision was given either without jurisdiction or that it was contrary to the constitution or

[8] Singh Baldev, "Jurisprudential Basis of Judicial Review in India", *Civil and Military Law Journal*, Vol.30, No.1, Jan.-Mar.,1994,p.44

to the fundamental provisions of a statute under which the administrative authortity was acting.[9]

In its wider sense, judicial review would include even apeals on the merits of decision of the administrative authority or even civil or criminal courts. All the questions of the fact and law i.e., merits of the whole case would be open to review. In fact it is reconsideration of case by a higher court.[10] Hence it is usually a vertical review. In this type of review, dispute under test may be betwen two private parties or between a private party and the state or a public authority, but it is mostly a question of private law. But the narrower view is essentially a question of publilc law. For all practical purposes judicial review has acquired a narrow usage to signify the power of the couts to pass upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce such as they find to be unconstitutional and hence void.[11]

The colleteral judicial review may be fo two kinds depending on the naturre of the state action agains which it is directed. If it is a review of action taken by the executive department or administrative authorities of state, it is called judicial review of



[9] Despande, V.S., *Judicial Review in India*, (New Delhi, Radiant, 1988), p.14.
[10] Supranote 1, p.21.
[11] Corwin, Edward, *The Constitution and What it Means Today*, (Princeton University, 1973) p.p.142-143.

administrative action. If it is a review of a statute of legislative or subordinate legislature it is called judical review of legislation.

Both kinds of judicial review have much in common regarding their origin and rationale, which will be discussed in the next part, but their development has been on different lines. The basic difference is the difference between rule of government and limited government . The former works under parliamentary sovereignty, but the latter postulates constituational limitations of legislative power. Review of administrative action is purely judicial while the review of legislation is semi-political as it has to test the validity of legislative policy on the anvil of the constituation. The former is used very widely because the administrative action touches individuals at many more points that the validity of legislation does. Judicial review of administrative action is an essential part of the rule of law. The area of its exercise is therefore expanding to meet the felt necessities of the times. The more the administrative action of the welfare state expands, the more the scope of its judicial review expands. On the other hand , the judicial review of legislation may or may not be an essential part of the rule of law,depending upon the conditions obtaining in a paritcular country or society.[12]

**(2.3) Origin :-**

[12] Supranotc 9, p.32.

After understanding the meaning of judicial review, it would be relevant to look into its genesis. It is generally asserted that the institution of judicial review originated in United States of America, but a

deeper analysis reveals that this is true only in very a limited sense because historically , the origin of this situation can be traced to English legal history. The genesis of judicial review may be traced in the celebrated pronouncement of Chief Justice Lord Coke in Dr. Bonham case where he asserted that an act of Parliament could be subjected to judicial review and adjudged void by the court. This view was reiterated by the next Chief Justice Hobart in 1615.[13] The doctrine of judicial review, however, did not take root in England because of two reasons : First, the soveregnty of paliament did not brook any rival i.e. the power of parliament is absolute and without control. Second, the spirit of moderation of the British people ensured the 'rule of law' without judicial review.[14] Thus it failed to create any permanent impression in England, the land of Parliamentary soverginty. In this way the modern concept of judicial review is , therefore, considered to have taken birth in the United States.

It was in Marbury vs Madison case, that Chief Justice Marshall of the American Superme Court in the year 1803, judicially

[13] Ibid, p.45.
[14] Basu, D.D, *Commentary of the Constitution of India*, Vol. I, 1955, p.151

adopted the principle of judicial review by declaring, 'constituation is what judge say it is'. This doctrine of Judicial review as formulated by Chief Justice Marshall has been reiterated by the judge of repute linke Taney, Even Hunghes, Harlan Stane, Warren & Burger. Thus it can be concluded that the idea of judicial review sparked in England but was adopted as a jurisprudential concept only in the U.S.A.

The basic issue of judicial review in the modern democratic society inheres within itself the apparent possibility of an anti-thesis between a rigid attidute in reserving the fundamental human liberties and the effective pursuit of a social welfare objective by the legislature in accordance with the dominant socio-economi political factors.[15] Judicial Review under the constituation of India stands as a class by itself. It represents a synthesis of the ideas of several constituations of the world, particularly of UK and USA, processed and adjusted to meet the specific situations arising out of the prevailing socio-economic and political conditions within the country. Under the Government of India act, 1935, the absence of a formal Bill of Rights in the Constituational document very effectively limited the scope of the Courts review power to an interpretation of the Act in the light of the division between the centre and the state units. [16]But in Post-indepedent India

[15] Ray S.N., *Judicial Review & Fundamental Rights*, (Eastern Law House, New Delhi, 1974 )p.1
[16] Ibid, p.4

the judiciary was contemplated as 'an extention of the rights' and 'an arm of social revolution'.[17] Therefore , judicial review was considered to be an essential condition for the successful implementation of fundamental rights and Directive Principles of state policy.

In India, the proper position of the judiciary and its power of judicial review should be understood in the light of the governmental structure adopted by the framers of the constituation. The governemental structure was a via media between the American style of judicial supremacy and the English principle of parliamenttary sovereignty. The framers of the constituation adopted the British model of parliamentary government and made the parliament the focus of

political power in the country, however, they did not make it a sovereign law-making body like its English counter part. Although the power of judicial review is expressly mentioned in the constituation, it is not implied one like that of the constituation of United States. Unlike in the United States, the expression used is 'Procedure established by law' and not 'due process of law'. It has been provided in the context of federal structure with defined and delimited competence of central and state legislature. In the long drawn controversy regarding the concept of individual rights vis-a-vis society's needs, that characterised the

[17] Austin, G., *The Indian Constitution- Cornerstone of a Nation*, (OUP, 1966) p.164.

deliberations of the constituent assembly during the framing of most of the constitution judicial review was circumscribed to a great extent.

**(2.4)Constituent Assembly on Judicial Review**

Members of the constituent Assembly agreed upon one fundamental point, that judicial review under the new constitution of India was to have a more direct basis than in the constitution of USA, where the doctrine was more an "inferred" than 'conferred' powers, and more "implicit" than "expressed" through constitutional provisions. In the report of the Adhoc Committee of the supreme court, it was recommended that 'a supreme court, with juristiction to decide upon the constituational validity of acts and laws can be regarded as necessary implication of any federal scheme'[18].

This was eventually extended to and interpretation of the laws of executive orders on the touchstone of fundamental rights. In the draft constituation of India, this power of jurdicial review to relation in fundamental rights found formal expression in Article 5(2) and Article 25(1) & (2), which, when adopted by the nation's representatives in the constituent Assembly on 26 November 1949 became new Articles 13(2), 32(1) & (2), respectively under the coanstituation of India. However, there was a

[18] Reports of the Adhoc Committee of Supreme Court, 1st Series, p.61.

sharp controversy among the members of the Constituent Assembly over the question of reconciling the conflicting concepts of individual fundamental and basic rights and socio-economic needs of the nation. A compromise had to be struck between the two extreme view-points of individualism and socialism, and judicial review, which was recognised as the basic and indispensble precondition for safeguarding the rights and liberties of the individuals, was sought to be tempered by the urge for building up a new society based on the concept of socio-economic welfare.

The differences of opinion on the acceptance or rejection of the "due process of law" clause, were manifested at least between two leading figures namely K.M Munshi, who wanted its adoption and Alladi Krishnaswami Ayyar who opposed that move. Thus the "due process of law" clause became the "first casuality ". In Article 21 of the new constituation of India (Article 15 of the Draft constituation) , it was replaced by "except accoding to procedure established by law". In a note Article to 15 of the Draft constituation, the Drafting committee justified and referred to Article 31 of the Japanese Constitu tion of 1946.[19]

One reason for limiting the scope of judicial review could be that the framers of the constituation may have fe[redacted]

[19] Constitutent Assembly Debates, 13 December 1948, p.1000.

the unbridled power of judicial policy making could usher in a series of "judicial vagaries" and prevent the national leadership from achiveing its socio-economic goals in pursuance of a welfare state. As G.Austin puts it :The Assembly had created an idol and then fettered at least one of its arms..... the limitations on the court's review power..... however were drafted in the name of social revolution.[20]

Simultaneously, a cluster of provisions were incorporated into the constituational document so as to restrict the rights envisaged in Articles 19,21 &31 to reduce the Supreme Court's powere of judical review to "formal view". Besides this a comparatively flexible amending procedure was adopted to improve the ulitmate will of the popular representative in the matter of remaining constituational limitations. Thus to all intents and purposes the seed of discord between the legistature and the judicary in India was unconsiously sown by the fathers of the constituation. D.D Basu rightly points out : "The factors which fostered growth of judicial supremacy in the USA are either absent or are not so much prominent in our constituational system."[21]

## (2.5) Judicial Review in the Constituation of India

[20] Supranote , 18, p.174.
[21] Supranote, 15, p.160.

The power of judicial review of legislation have been specifically recognised in Article 13,32,131,216 & 137 of the Indian constituation. The courts can strike down a law passed by the parliament or state legilatures if (a) it is beyond their legislative competence as provided in Articles 245,246,248 and other provisions of the constituation; or (b) it violates any fundamental rights as provided in Article 13 ; or (c) it transgresses any other provision of the constituation.

Judicial review over excutive action signifies that if any excutive action is taken without the authority of law it can be struck down; or if any executive action violates any funamental right of an individual , the court can enforce that right by issuing an appropriate writ. Similarly, if the Government has made any rule, order or by-law, which is not within the scope of delegated legislation, such rule, order or by-law may be struck down. Through the power of judicial review, the supreme court can keep a check In arbitariness and illegality which arises out of manifold authority exercising discreationary powers.

**(2.6) Working of judicial Review in India**

The working of the judicial decision-making during last four decades has been marked by two conflicting attitudes of 'judicial self-restraint' and 'judicial activism' at different times. The interpretaion of nature and scope of judicial review in India began with

A. K. Gopalan case. [22]The decision in this case scrup ously avoided the notions of 'natural justice' and 'due process' and constructed the law in favour of literal judicial interpretation in India and provided a firm base for judicial self-restraint. The guidelines set by the Gopalan case were followed by the supreme court in Romesh Thapar case .[23] Champakam Doorajan case [24] where fundamental rights were made sacrosanct Searchlight case,[25] Shankari Prasad case[26], and Sajjan Singh case.[27] This period of 17 years (1950-67) reflected a trend of judicial self-restraint. There was no confrontation between the judiciary and the executive though tensions between the judiciary and the legislatere and the executive were visible. Judicial review during this period failed to strike a happy compromise between the two extremes of legislative penchant on constitutional proteetion of individual liberties.'[28]

This tension, however, turned into confrontation in 1967 when the constitutionality of the 17th Amendment was challenged in the Golaknath case.[29] The court ruled that parliament had no power to amend the constitution embodied in Part-III, thereby overruled the court's earlier decision in the Shankari Prasad and Sajjan Singh cases.

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[22] A. K., Gopaln V. State of Madras, A.I.R 1950 SC 27.
[23] Ramesh Thapar V. State of Madras, A.I.R 1951 SC 226
[24] Champakam Dooraijan v. State of Madras, A.I.R 1951 SC 240
[25] M.S.M Sharma V. Sri Krishna, A.I.R 1959 SC 395
[26] Shankari Prasad V. Union of India, A.I.R. 1951 SC 458.
[27] Sajjan Sing V. State of Rajastan, A.I.R, 1965 SC 458.
[28] Supranote 15, p.70.
[29] I.C. Golaknath V. State of Punjab, A.I.R, 1967 SC 1943.

The next land mark judgment was the famous Bank Nationalisation case,[30] where the court declared the Banking Companies (Acquisition & Transfer of undertakings) Act,1969 void. The era of judicial activism started by the Golaknath case and the Bank Nationalization case was carried forward by the privy purse case[31] The open confrontation between the paliament and the judiciary led to the declaration of the mid term poll in 1971 in which Mrs. Gandhi won with a thumping majority and subsequently the 24th, 25th &29th Amendment Acts were pushed through the parliament.

The constitutional validity of 24th, 25th, 26th & 29th Amendment Acts was challenged in 1973 in Keshvanand Bharati case[32] in which the supreme court reversed the ruling of the Golaknath case and allowed parliament to exercise the power to amend the contitution but not the 'basic structure' of the contitution. The confrontation between the legislature and the judiciary led to an extreme step by the government to bring pressure on the courts to 'soften' them and the concept "Comitted Judiciary" as a means was revealed by Mohan KumarManglam.

Soon the three senior judges of the supreme court Justices Shelat, Hegde & Grover, who were in the Keshavanand Bharti case bench, were superseeded and Justice A.N Roy was appointed as

[30] R. C. Cooper V. Union of India, A.I.R, 1970 SC 564.
[31] Madav Rao Sindhia V. Union of India, A.I.R, 1970 SC 530.
[32] Keshvanad Bharati V. State of Kerala, A.I.R 1973 SC 1961.

the chief justice of India on the retirement of Justice S.M Sikri . This was something like Roosevelt's threat to 'pack the court'. The supression subsequently of Justice H.R Khanna was yet another instance of 'packing the court'.

The decision of Justice J.M .L. Sinha of the Allhabad High Court on 12 June, 1975 in which prime minister Mrs. Indira Gandhi was held guilty of corrupt electoral practices and was disqualified to hold public office for the next six years, led to the declaration of internal emergency on 25 June ,1975 . The supreme court soon struck down Article 329 A(4) added by the 39th Amendment and thus mainted the dignity of jusitce. But the supreme court soon descended from its hight into dare valleys below-where dwells the Habeas Corpus Case.[33] The five separate judgments in this case reflects the height of judicial self-restraint. With the introduction of 42nd Amendment to institutionlise the Emergency, the Power of Judicial review was taken away to establish the complete and total sovereignty of Parliament. However, the tide was turned after the passing of 43rd Amendment on December 1977 by Janata Governemnt, which rest. ed the Pre-emergency position.

Parliament's unlimited power to amend the constitution was challenged in the Minerva Mills case[34] in 1980, which was a set

[33] A.D.M Jabalpur V. Shivkant Shukla (1976) Supp. SCR p.477.
[34] Minerva Mills V. Union of India , A.I.R. 1980 SC 1789.

back to the unlimited powers of Parliament to amend the Constituion when it said that 'basic strucure of the constitution' could not be altered.After the Emergency, judiciary did show some signs of activism but the judgment of the supreme court in the famous Judges Transfer case[35] in 1980 once again raised the question of the relationship between the executive and the juidiciary. Many people fail that those decision deflected " Judicial restraint". However, on several other issues the court ruled in favour of the citizen. The most important dimension of the verdict in the judges case was that it laid down the principles of

litigation in the public interest as opposd litigation for the protection of one's one interst there by enlarged the area of judicial revi .

**(2.7) Institutionlization of PIL**

The 1980's witnessed a new class of litigation in the landscape of constitutional desputation in India. It was self-consciously and officially referred to as "Public Interst Litigation"(PIL)[36] or "Social Action Litigation(SAL)", which differs from traditional litigation in as much as there are no plaintiffs or de fenda nor state/complaint vs. accused; it is less expensive and more effacious.Though PIL is said to be borrowed from U.S.A, yet it differs substantially in both the countries. In the USA, PIL is

[35] S.P. Gupta V. Union of India, A.I.R, 1980 SC 1622.
[36] Dhavan, Rajeev, Law as Struggle : PIL in India, *Journal of Indian Law Institute*, Vol. 36:3, 1994, p.302.

initiated by specialist law firms and much of their resouce investments were from public and private agency, whereas in India the bulk of PIL was espoused by groups as well as individuals.[37]

This concept was initiated by Krishana Iyer, J. In the year 1976 in Mumbai Kamgar Sabha V. Abdullabhai case[38] . In this case Krishna Iyer J. obsereved as follows:

> " text litigation, representative actions, pro bono Publico and like broadened forms of legal proceedings are in keeping with current accent on justice to common man and a necessary disincentive to those who wish to bypass the real issues on merits by suspect relaiance on peripheral, procedural shortcomings.... public interest is promoted by a spacious construction of Locus-standi in our socio economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher costs where the remedy is shared by a considerable number, particularly when they are weaker. Less litigation, consistant with fair process, is the aim of adjective law."

Mr Justice Krishna Iyer expressed similar views in a number of cases, not able among them being :(1) Sunil Batra V. Delhi Adminstration, A.I.R 1980 SC 1579:(2) Muncipal Council, Ratlam V. Vardhichan,A.I.R 1980 SC 1922 ; (3) Akhil Bharatiya Soshit Karamchari Sangh (Railway) V. Union of India, A.I.R 1981 SC 298; (4) Azad Rickskar pullers' Union, Amritsar v. State of Punjab,AIR 1981 SC 14.

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[37] George , Rani, PIL and Changing Concept of Locus Standi, *Cochin Union Law Review*, Vol. xII, No.4 Dec. 1988.

[38] Mumbai Kamgor Sabha V. Abdullabhai, A.I.R, 1976 SC 1455

. In Fertilizer corporation Kamgar Union V. Union of India case [39] this concept was further developed by Chandra Chud, C.J. and Krishna Iyer, J . However full scope of PIL vis-a-vis locus standi was enumerated by Bhaga wati, C.J, in judges case of S.P.Gupta v. Union of India[40] .Speaking for the court, C.J., quoted with approval Lord Diplock's Judgment.

> "... It is not, in my view, a sufficient answer to say that Judicial review of the actions of officers or Departments of Central Government is unnecessary because they are accountable to parliament for the way in which they carry out their funtions. They are accountable to parliamet for what they do so for as regards efficiency and policy and of that parliament is the sole Judge, they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."(p.190)

In this Judgment chief justice Bhagawati further held that:

> " we would therefore, hold that any member of public having sufficient interest can maintain an action for Judgment, redress for pulic injury arising from breach of pulic duty or from violation of some provision of the constitution or the law and seek enfocement of such pulic duty and observance of such constitutional or legal provision. This is also absolutely essential for maintaining the rule of law furthering the cause of Justice and accelerating the pace of realization of the constitutional objective law"(p.194).

Under the concept of Public Interest Litigation, the court recognised a unique form of epistolary Jurisdiction through which citizens or groups can activate the court in case of violation of

[39] Fertilizer Corporation Kamgar Union V. Union of India, A.I.R, 1981 SC 344.
[40] S.P Gupta V. Union of India , A.I.R, 1982 SC 149.

fundamental rights not withstanding the traditional law relating to locu s standi[41] ; thereby liberalised the traditional rule of standing. In many cases the court has entertained petitions without court fees and the technical requirement of presenting writs, having a petitioner and even without the aid of lawyers. It started hearing applications/complaints even on the strength of letter by any person, social worker or voluntary organisation brining public injustice before it and gave a new definition to the concept of locus standi.

By adopting this pragmatic approach the Judiciary, in the process of developing public interest litigation, has transformed the organic law of the nation into a source of inexhaustible new rights particularly of those who are the victimes of state lawlessness. Bhagalpur Blinding case[42] and Sheela Bose case[43] are the cases which exposed the inhuman treatment of prisoners in police custody besides other instances such as gang rape of women by policmen in Bihar, Killing of Civilians by PHC in Meerut and lock up deaths in Andhra Pradesh are horrifying incidents of state lawlessnes.

[41] Upendra Baxi V. State of U.P, 1981 (3) SCALE 1136; Bandhua Mukti Morch V. Union of India, A.I.R, 1984 SC 802; Neeraja Chaudhary V. State of M.P, A.I.R, 1984 SC 1092; Laxmi Kant Pandey V. Union of India , A.I.R, 1986 SC 272.

[42] Khatri V. State of Bihar, A.I.R, 1981 SC 928.

[43] Sheela Bose V. State of Maharashtra , A.I.R, 1983 SC 378.

In Olga Tellis case,[44] the supreme court held that right to life includes right to livlihood and deprivation of right to livelihood except according to Just and fair procedure established by law can be challenged as violation of article 21. In several other cases such as Asiad Workers case[45] , Ramkumar Mishra case[46] , and Mukesh Advani case[47] , the court stressed that the central government must ensure observance of various social welfare and labour laws enacted by the parliament for the purpose of securing to workmen a life of basic human dignity in compliance with the directive principle of stae policy.

To conclude, the first phase of India PIL had been concerned with the conditions in which men, women and children were incarcerated in prison and other places of detention. However this did not result in the court developing a criminal due process, even though it made rapid strides in advaning a much more rigorous review of administrative action.[48] With increasing confidence, the court concerned itself with question of social justice including the exploitation of labour, and conditions of work and pay of unorganised workers. Spurred further, they examined question of land constituents of poor peasants and enviornmental issuses.

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[44] Olga Tellis V. Bombay Muncipal Corporation, A.I.R, 1986 SC 180.
[45] Peopel's Union for Democratic Rights V. Union of India . A.I.R, 1982 SC 1473.
[46] Ram Kumar Mishra V. State of Bihar, A.I.R, 1984 SC 537.
[47] Mukesh Advani V. State of M.P, A.I.R, 1985 SC 1363.
[48] Supranote 37, p.309.

Hence judiciary in its activist role vis-a-vis PIL has taken a goal-oriented approach in the interest of justice by simplifing highly technical and anchronistc procedures. By enlarging the scope of article 32 and by accelerating the process of socio-economic revolution, it has brought justice to the doorstep of the weak, the unorganised and expolitative section of society and therefore, has revolutionised constitutional jurisprudence in the 1980's.

# CHAPTER II

## JUDICIAL CONTROL OVER BUREAUCRACY (1950-1990)

### 3.1 Origin and Growth of Administrative Process

The growth of administrative process has been a Universal phenomenon of contemporary society, although both the speed and manner of its development have varied greatly from country to coun .y[1]. The rationale behind this growth is the change in the scope and character of government from negative to positive, that is from laissez-faire to the welfare state which has made the society of 20th century exceedingly complex and thereby multiplying the governmental functions. Present state functions as a protector, dispenser of social service, industrial manager, economic controller, and arbitrator. It takes care of citizens from craddle to grave. This welfare theory and the consequent positive governmental actions has necessitated conferment of substantial slices of legislative and judicial powers on the administrative authorities and tribunals. In this context the administrative process is the complex methods by which administrative agencies carry out their tasks of adjudication, rulemaking and related functions. The administrative process thus defined is contrasted with the judicial process and legislative process[2].

[1] Fazal, M.A, Judicial Conrol of Administrative Action in India and Pakistan, 1969, P.5.
[2] Ibid. p. 5

In India, the emergence of the administrative process was precipitated by a rapid expansion of governmental activities in various fields during British rule. In the post-independence era the inevitability of the process was accepted by the constitution -makers. Thus, Article 19 of the Indian constitution, while guarnteeing to all citizens the right to practice any profession, or to carry on any occupation, trade or business, subjects this right to 'reasonable restrictions' which may be imposed by the state in the interests of the general public under Article 19 (b). Article 39 of the Indian constitution in the chapter 'Directive Principles of State Policy' enjoins the state to direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. These constitutional provisions have sanctioned the operation of administrative adjudicatory authorities which have been set up under the specific statues.

The post-independence years have seen the emergence of a plethora of administrative tribunals, board & agencies, widely different from one another in constitution, powers and procedure, some approximately closely to the courts in strict sense of the term, others being a nearerresemblance to informal committes or interviewing boards. Some of the adjudicatory bodies functioning in different fields are, the Railway Board, Regional transport Authorities, Tax Appellate tribunal, Central Board of Revenue, MRTP

Commission, Collector of Customs, Compensation Tribunal, Director of Eoforcement, Rent Controllers, Central Board of Film Censure etc.

The rationale behind the conferring of adjudicatory powers on administrative bodies is that these bodies are manned by persons having expert knowledge. Expedious disposal and cheapness is the chief characterstic of administrative adjudication. These bodies avoid procedural technicalities and take a functional rather than legalistic approach. Thus the basic value served by administration is 'efficiency'. The creation of adjudicatory authorities has also been accompanied with efforts to exclude judicial review of administration vis-a-vis 'exclusionary clauses.' Whatever be the rationale behind these 'exclusionary clauses', which give the administrative the power to handle certain functions finally, the common law tradition militates against such finality.[3] Therefore, the crucial question is : How and to what extent is the administrative process to be subjected to judicial control ? How to impart the standards of justice to bureaucratic determination ?

## 3.2 Scope of Judicial Review of Administrative Action :

### 3.2.1 Rule of Law vs Role of Administration :

Indian constitution was framed on the bedrock of the Diceian rule of law. Rule of law being the basis of judicial review, the courts have consistently maintained that they have exclusive jurisdiction to decide as to

[3] Juffe, L.L., Judicial Control over Administrative Action, p. 320.

what the law is. Rule of law is the protection against arbitrary behaviour and despotic government. This is why the supreme court speaking through Justice Pathak observed.:

"It must be remembered that our entire constitutional system is founded on the rule of law and in any system so designed it is impossible to conceive of legitimate power which is arbitrary in character and travels beyond te bound of reason."[4]

Under the rule of law, whether the system of checks and balances appropriately operates is ultimately to be scrutinised by the courts and in order that the system of the Rule of law is maintained, the court has to strike down every arbitrary act and require the excessive of power to conform the requirements of law.[5] The rule of law rejects the conception of a dual states in which governmental action is placed in a privileged position of immunity from control of law. Such a notion of priveleged position of officials is foreign to our basic constitutional concept.[6] The rule of law postulates the pervasivess of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere.[7] In the Habeas Corpus case,[8] in a powerful dissent note Justice Khanna observed that rule of law is the antithesis of arbitrariness and it is the mark of a free society. Even in absence of Article 21 in the constitution, the state has no power to deprive a person of

[4] Suman Gupta Vs. State of J & k, A.I.R, 1983 SC 1235 at 1238.
[5] Kartik Enterprises Vs. O.E.S Board, A.I.R. 1980, Ori. 3 at 10.
[6] Settlement Commissioner Punjab Vs. Om Prakash, A.I.R, 1969 SC 33
[7] Smt. Indira Gandhi Vs. Raj Narain, A.I.R, 1975, SC 2299.
[8] A. D. M Jabalpur Vs. Shivkant Shukla, A.I.R,1976, SC 1207.

his life or personal liberty without the authority of law. In a purely formal sense even the organised mass murders of Nazi regime quality as law. But it cannot disguise reality of the matter that hundreds of innocent lives have been taken because of absence of rule of law. A state of negation of rule of law would not cease to be such a state because of the fact that such a state of negation of rule of law has been brought about by a statue.

But Diceian concept of rule of law has been characterised by many as idealistic, rosy optimism reflecting the whig tradition of minimum interferance. The need for reformation of Diceian doctrine to meet the pragmatism of the twentieth century welfare state was felt by the International Commission of Jurists in 1959 at New Delhi.[9] Thus, the doctrine of rule of law has been broadened to include social and economic goals. Under this background although there has been a debate on whether economic planning is consistent with the doctrine of rule of law, yet no contemporary analysis of rule of law, yet no contemporary analysis of rule of law can ignore the minimum postulates of socio-economic justice which are a part of the established Punlic philosophy in all democratic countries.[10] Therefore, the development of a planned society necessarily means a reorientation of traditional legal approach to reconcile national planning and administrative discretion with the greatest

[9] A.A. Wani, Exclusion of Judicial Review : Administrative Efficiency Confronts Legitimacy of power, 1987,P.1

[10] Ibid, P.22.

amount of legal safeguards, but it does not mean the abrogation of the rule of law.[11]

### 3.2.2 Judicial Review of Administrative Action Through Constitution :

The constitution envisages provisions for judicial review of administrative action. The supreme court and the high courts are empowered to issue any direction, order or write to protect a citizen against arbitrary administrative action.[12] The Supreme Court has been invested with plenary jurisdiction over all tribunals. [13]The High Courts are empowered to issue writs to any authority, against a department of the government, statutory authority or even a non-statutory authority if it has to function under a statutory position.[14]

### 3.23 Law Commission's Recommendations, 1955

In 1955, the Law Commission of India, which was appointed to examine the question of review of administrative bodies rejected the idea of a 'system of administrative courts'. It's recommendations were clearly the result of commisions view that the existing jurisdiction of the supreme court and the High courts enable them to examine, to a limited extent, the actions of administrative bodies.[15] It further recommended that (i) the existing

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[11] Ramaswamy , " The Rule of Law in a Planned Society In India" 1959, P.31

[12] Constitution of India, Art 32, 226.

[13] Ibid, Art.136

[14] Ramana Vs. International Airport Authority, A.I.R, 1979 SC.1628; Premji Bhai Parmar Vs. D.D.A. A.I.R, 1980 SC.730

[15] Law Commission of India (Fourteenth Report),Vol.2 ,P.670

jurisdiction of the Supreme Court and the High Courts to review administrative actions should be maintained unimpaired; (ii) decisions should be demcareated into (a) judicial and quasi-judicial decisions on appeal ar revision should lie on questions of law. An administrative division of the High Court may be established, if necessary. This is precisely the suggestion that was rejected by the Franks committee; (iv) in case of administrative decisions provisions should be made that they should be accompanied by reasons; (v) the tribunals delivering administrative judgements should conform to the principles of natural justice and should act with openness, fairness and impartiality; (vi) legislation providing for a simple procedure embodying the principles of natural justice for the functioning of all tribunals may be passed; (vii) appropriate legislation shoule be enacted to provide tribunals to operate in the manner indicated above.

### 3.24 Four Grounds of Review of Administrative Action

The judicial reivew of an administrative action, order or act on the ground that the action is malafide or that the reasons for making the order are extraneous or they have no relevance to the interest intended to be promoted by the law can be made amongst others on any of the following grounds : (1) Excess de pouvoir i.e., an authority can neither act in excess of its given authority not it can fix the dimensions of the given statutory power by constructing a statutory provision according to its own thinking, administrative

expediency or policy;[16] (2) procedural Irregularities i.e., an authori ty must act administratively and may act in accordance with the already announced policy, under instructions given by and direction of the government etc. In its attempt to carry out the purpose of the law and to implement the policy of the administration, it is expected to act with a sense of responsibility and fairness. Disregard to the rules of Practice and procedure defeats a plan of malafide as well; [17](3) Detourement de Pouvoir i.e., on the ground of diversion of power from its real use, that is, its use for a purpose of contemplated by law - its abuse[18]; (4) Void for Unconstitutonality i.e., any action under the law shows to be unconstitutional for being inconsistent with any of the constitional limitations and the part III of the constitution in particular is per se illegal.[19]

### 3.25 Models of Judicial Review :

The existence of judicial review of administrative action is conceded through its scope and extent varies. There are three models of such judicial review : the adjudicatory model, the control model and the participatory model. The basic difference among these models centre around the role of courts performing review functions.

The Adjudicatory model : This model of judicial review is closed to the role of courts in resolving, conflicts among private parties patterned in a triangle with

[16] R.L Arora Vs. State of UP, A.I.R. , 1962, P.429.
[17] I.G., Joshi, V. State of Gujarat, AIR, 1968.
[18] Pratap Singh V. State of Punjab, A.I.R 1969.
[19] State of M.P Vs. Baldev Prasad , A.I.R, 1961, Exclusion of judicial Review : Administrative Efficiency Loafronts, legitimacy of power, New Delhi, 1987-, p. 33.

the court forming the apex among two contending parties.[20]Here the role of the court is marginal one that of an umpire. It is not a participant. It enters the arena as an impartial and independent arbiter of the context about the legality of exercise of bureaucratic power. It examines the claims only in qualitative terms. Either the action has the quality of legality or lacks it. In this model, the legality/ merit dichotomy constitutes the mainspring of judicial self-perception of the role. The merits of a matter are not for the court. The courts have no title to enter the domain of 'policy' for they are conceived of no better than lines man to match for transgressions of bounds set by legislative mandate.

The control model : Preoccupation with legality do not necessarily result in justice. Faced with the choice of endorsing bureaucratic powers lacking democratic legitimacy, the courts have moved towards evolution of certain basic standards of administrative behaviour which would minimise arbitrariness and rationalise exercise of admnistrative discretion. Here the courts no longer visualise themselves as mechanical umpires performing boundary maintaining functions. They seek to impose a modicum of behavioural norms on the administration which serve the basic values of rationality impartiality and conformity. The form is regulated while the content is for administration. This takes judicial review beyond legatlity towards ensuring a formal rationalty through generation of standards of administrative behaviour.

Participatory Model : The movement from a formal to a substantive notion of rule of law with the inclusion of socio-economic goals, requires the courts to look beyond more umpiring of exercise of administrative discretion to the

[20] Supernote 9, p. 33.

'justice' of the suggestive solutions arrived at by the exercise of such discretion. The courts become , in this role, actual participants in the human search for social justice amidst regimes of scaracity.

In this model the courts go beyond boundary maintenance and even formal norms of just administrative behavour. The courts actively participate in the movement towards a just society demolishing the barrier between judicial review and bureaucratic discresion.

### 3.3 Contempt of Courts :-

Article 129 & 215 of the constititon vests the power to punish for contempt of court orders on Supreme Court and High courts respectively. Accordingly the Contempt of Court Act, 1971 has been enacted for the defiance of court order. It is the constitutional obligation of the executive branch of the government to obey all judicial orders, irrespective of the embrassment or inconvenience it might cause to administration or to any authorities. For not doing so, the government as well as individual officers acting on behalf of the government can be held liable for contempt. However, the power ot punish for contempt of order of the court is limited to a maximum sanction of six months or a fine of Rs. 2000 or both.

Further the contempt of court can be divided into two-criminal contempt and civil contempt, and the difference between these two lies in the nature of relief sought. The purpose of criminal contempt is to vindicate the

authority of the court. A civil contempt is much like any other civil action; it alleges a duty and a breach of that duty, and requests relief in the form of compensation or, more often, compliance with the courts order. Of course, the distinction offer time, is unclear, and the same facts may give rise to both criminal and a civil contempt. The same facts may justify a court resorting to coercive and punitive measures.

## 3.4 Working of the judicial control over Bureaucracy (1950-1990)

Every democratic state which embarks upon the adventure of achieving the ideals of a welfare state, has to face a duel between the claims of individual liberty and social good. In the rationale settlement of this duel the law has to assist democracy. [21]Therefore legislature freely confers discretionary powers to bureaucracy /adminstrative authorities with little regard to the dangers of abuse. This device of exclusionary clauses is resorted to render judiciary less effective. However the courts have reacted by de vising techniques for preserving the legal principles of control.

The problem is how to wield power without forgetting justice. The real problem is that of technique and the formulation of effective rules which will provide reasonable protection against arbitrary power without jeopardizing the social objectives. The core of democratic society lies in reconciliation of the power of the state with the freedom of the individual.

[21] P.B. Gajcadragadker, Law, Liberty & Social Justice, 1965, p. 64.

[22]Judicial review fosters balance between rule of law and legislative aspirations. Judiciary by means of judicial review prescribes administrative behaviour. In India, the working of judicial review over administration has passed through three phases. Originating as review of jurisdiction, it matured as review of procedure and culminated as review of substance. During this process, the courts have performed many notable exploits.[23]

Administrative authorities are creatures of statutory law circumscribing their areas of operation. Courts have always asserted a right to determine the proper jurisdiction of administrative authorities and to contain them within that jurisdiction. If the powers conferred by statutes are exceeded, the purported exercise is Ultra vires and void. Courts have refused to be prevented by exclusionary clauses is case of want or excess of jurisdiction.[24] Whenever an authority acts without judisdiction or in excess of it, certiorari lies to quash its decisions.[25] In the absence of an express statutory provision for judicial review of an administrative action, if any administrative determination affects the rights of a citizen, the courts treat it as a judicial act and subject to the suprevisory jurisdiction of the superior courts with the additional requirements of 'duty to act judicially'. In Khushaldas Advani[26] case, the court held that the requisition order of the government was based on its

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[22] M. Hidyatnath, Justice, Democracy in India and the Judicial Process, 1966, p. 74.
[23] A.A. Wani, Exclusion of Judicial Review; Administrative Efficiency Confronts Legitimacy of Power, 1987, p. 40.
[24] Bharat Kala Bhaadar Ltd., vs. Municipal Committee, AIR, 1966 Sc. 249.
[25] Ebahim Aboobakkar Vs. Custodian General, AIR, 1959, B.C. 1911. Madana Cal Vs. Excise Taxation Officers, AIR, 1961 Sc.1965.
[26] Province of Bombay Vs., Khushaldas Advani, AIR, 1950, SC 222.

subjective statisfaction and it was not required to act judicially. In Ghanashyam case, the court held that the inference as to whether an authority has duty to act judicially, will depend on the express provisions of the statute, read along with the nature of the rights afected, the manner of the disposal provided, the objective criterion, if any, to be adopted, and the effect of the decision on the person affected.

The general trend of decisions in 1950's reflects judicial passivism of that era. Realising that much of the substance of justice lies in fair procedure by developing the principles of natural justice, the courts have devised a kind of code of fair administrative procedure. The judicial activism in India commenced with the rejection of 'duty to act judicially' in Benapani Dei case.[27] Speaking for the court, Justive Shah observed :

> "Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed; it need not be shown to be supperadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power".

Initially the courts clung to the traditional distinction between administrative and judicial acts, thereby confining the application of natural justice to the latter class of acts. The review was confined to jurisdictional errors. The vanishing point of the dichotomy between quasi-judicial and adminstrative function is Kraipak case,[28] in which the court ruled that if the

[27] State of Orissa Vs. Dr.(Miss) Benapani Dei, AIR, 1967, 1269.
[28] A. Krai PakVs. U.O.I., AIR, 1970, S.C. 150.

purpose of natural justice is to prevent miscarriage of justice, there is no reason why these rules should be made inapplicable to administrative enquiries.

Substantive laws can be endured if they are fairly applied. Best protection against arbitrary action consists in the adherence to sound procedures. Hence the court started injecting requirements of fair procedure into the system of administration. In Gullapalli Rao case[29], the formulation of an opinion by the state transport undertaking under Sec. 68 C of the Motor Vehicles Act, 1939 was held to be a quasi-judicial function, in spite of the presence of discretion. In Maneka Gandhi case,[30] the court reiterated that duty to act judicially may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on rights of the person affected. In order to reconcile the need for swift administrative action with that of fairness, the court stressed post-decisional hearing[31]. The present judicial activism against the abuse of power is reflected in current judicial instance on observance of rules of fairness irrespective of the nature of functions discharged by an administrative authority.[32]

Widening the scope of judicial review courts insist upoon the use of administrative procedures consonant with concepts of justice and fair play. There would be no decision within the meaning of the enabling state where the

[29] Gullapalli Nageshwara Rao. V. A.P State Road Transport Corporation, A.I.R., 1959, S.C 308.
[30] Menaka Gandhi Vs. Union of India, AIR, 1978, S.C. 597.
[31] Liberty Oil Mills Vs. Union of India, AIR, 1984, S.C 1271.
[32] G. Sarana Vs. Lucknow University, A.I.R, 1976, S.C, 2458.

authority acts contrary to the essence of justice. The substantive exercise of power by administration is controlled by courts by insisting that powers should not be exercised arbitrarily, capriciously, unreasonsbly or for improper purposes.The discretion must be guided by law. As observed by the supreme court.:

> "There is a well recognised distinction between an administrative power to be exercised within defined limits in the reasonable discretion of designated authority and the vesting of an absolute and uncontrolled power in such authoroty. One is power controlled by law countenanced by the constitution, the other falls outside the constitution altogether".[33]

In requiring statutory powers to be exercised reasonably, in good faith, and on proper grounds, the courts still claim to be working within the principle of ultra vires. The courts have extended review power to the extent of controlling the substance of administrative determination. The courts have stressed the desirability of giving reasoned decision. The decision of an adjudicatory authority would be invalidated for failure to give reasons for it. [34]In Travoncore Ray ons case[35] the court stressed that administrative appllate authority should give reasons whenever it reaches the same conclusion as that of inferior authority but for different reasons for an administrative action has been treated mandatory.[36] In Rampul Distillery Co. case,[37] the court held that

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[33] Supra note, 5 at 1238.
[34] State of Gujarat Vs. Krishna Cinema, AIR, 1971, S.C 1650. Sciences Engineering & Manufacturing Co., Vs. UOI, AIR, 1976, S.C 1785.
[35] Travancore Rayons Ltd., Vs. Union of India, AIR, 1971, S.C 826.
[36] Narayan Das Vs. State of M.P., AIR, 1972, S.C 2086.

while exercising its investigating power under section 326 of the companies Act, 1956, the central government should hold the enquiry in a manner consistent with the rules of natural justice, consider all relevant matter and ignore irrelevant matters, and reach a conclusion without bias or predilection or prejudice. The powers conferred on an administrative authority must be exercised ont he considerations relevant to the purpose for which, it is conferred. The action of the authority will be Ultra Vires and bad, if the authority takes into account wholly inrrelevant or extraneous considerations while exercising its powers.[38]

The courts insist that authorities should act within jurisdiction, in complicance with the atatutory processual requirements and in good faith. They have evolved behavioural norms for administration. Without violating the express, legislative commands, courts require those who carry out those commands to observe certain rules of justice and fair play.[39] Therefore what is clear from the working of the process of judicial review is that if social control and absence of arbitrary power are the objectives to be simultaneoiusly achieved, then the legal concepts must be given a new content valid in the context of modern state. This progmatic approach of the court is reflected in the word of justice Krishna Iyer who observed :

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[37] State of U.P. Vs. Lalai Singh, AIR, 1977, S.C 202.
Rampal Distillery Co. Vs. Company Law Board, AIR, 1970, S.C. 1789.

[38] Dinlop India Ltd., Vs. Union of India, AIR, 1977, S.C 597, Ashadevi, Vs. Shivraj, AIR, 1979, S.C 447.

[39] P.K. Tripathi, 'Rule of Law, Democracy & Frontiers of Judicial Reviw', p. 17.

> "Law is means to serve the living and does not beat its abstract wings in the jural void. Its functional fulfillment as social engineering depends on its sensitized response to situation, subject-matter and the complex of realities which require ordered control".[40]

Thus primarily the court was simply an umpire, to maintain boundaries of 'legitimacy' of powers of bureaucracy. The process matured into controlling and shepherding the functioning of bureaucracy. To meet the ends of 'justice', the process of judicial review has culminated in judicial participation in the decision making of administration. We find more and more judges expressing the perception of their roles in terms of delivery systems of substantive justice. In Kraipak case[41], Justice Hegde observed :

> "With the increase of power of administrative bodies it has become necessary to provide guidelines for the just exercise of their power"

In D.P. Maheswari case[42], for the court, Justice Chinnappa Reddy observed :

> "Tribunals entrusted with the task of adjudicatory labour disputes where delay may lead to misery and jeopardise industrial peace should decide all issues in the disputes at the same time without trying some of them as preliminary issues."

The need to arrive at substantively just solution to overpressing human problems drives the courts beyond boundary maintenance and even formal norms of just administrative behaviour. It renders them active

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[40] Board of Mining Examination Vs. Ramjee, AIR, 1977, S.C 965.
[41] Supernote 29, at 155.
[42] D.P. Maheswari Vs. Delhi Administration, AIR, 1984, S.C, 153.

participants in the movement towards a just society demolishing the barriers between judicial review and administrative discretion.

During this process courts have evolved techniques to minimise bureaucracy triumphant otherwise likely to flourish under the shelter of frequent legislative endeavour, to preclude judicial review of administrative action. The process has been further accelerated with the introduction of Public Interest Litigation which was discussed in the previous chapter. Departing from its traditional role of judicial possivity and self- restraint to that of judicial creativity vis-a-vis PIL, judiciary has expanded the reach ambit of basic human rights and brought about synthesis and harmony between the fundamental rights, which by and large represent civil and political rights, and the directive principles of state policy, which by and large reflect social and economic rights. The rules of natural justice has been extended to new and un-known situations where they had no formal application. The scope of Article 21 has been expanded with the inclusion of other basic human needs.

What conclusion the working of judicial control over administration during this period draws is that judiciary vis-a-vis PIL has succeeded in resolving the problem at the systematic level, i.e, in reconciling the individual right and welfare policies. In other words, judiciary by broadening its areas which were traditinoally regarded as out of bounds for it, has abled to bring a harmony between fundamental rghts and directive

principles of state policy. But as far as the problems at the functional level, which was discussed in introduction, are concerned, judiciary has advocated a very cautious approach in entertaining the claims advanced through PIL in 1980s.

In Umed Ram case,[43] speaking on behalf of a theee-judge bench, Justice Mukherji held that the judicial directions were permissible in case of executive inaction or slow action only within limits because "interferance with administration cannot be metriculous in our constitutional system of seperation of powers". In this case the court was called upon to decide the validity of the directions issued by the High court of Himachal Pradesh in a PIL initiated by the harijan residents of a locality alleging the absence of a usuable road in their locality resulting in deprivation of their means of livelihood.

He acknowledged that access to road was an aspect of right to life in article 21 and "as far as possible, society has constitutional obligation to provide roads for communications", for the residents of the hilly area. It was, however, for the executive and the legislature to provide access to road[44]. Justice Mukherji held that in PIL it was enough for a court to draw the attention of the executive to a Public need and indicate a feasible course of action. It was beyond the judicial functions to oversee the implementations of judicial directions. Accordingly, he disapproved the order of the High Court in directing the engineer to report back to the court about the progress made by the

[43] Umed Ram, Vs. State of Himachal Pradesh, AIR, 1986, 2 Sec, 68.
[44] Ibid, p. 75.

construction of the road. The High Court was asked to leave it to the judgement of priorities and initiatives both to the executives and the legislature to pursue the matter. He warned the High Court that ' judicial review of administrative action or inaction where there is an obligation for action should be with caution and not in haste.[45]"

Likewise in Tamas case[46], the court held that the matter whether the Doordarshan serial Tamas was misjudged or wrongly judged and allowed to exhibit on the national network was a matter for the executive and the film censure board to decide and a court would be slow to interfere with the conclusions reached by the authorities specifically constituted for the purpose.

In Hindi, Hitrakshak Samiti case[47], a PIL sought a direction to the government for holding medical entrance examination in Hindi and regional languages on the plea that the denial to do so will entail the violation of article 29(2). Rejecting the contention, Justice Mukharji observed :

"Citizens of India are not to be governed by the judges or judiciary. If the governance is illegal, or violative of the rights and obligations, other questions may arise but whether ... it has to be a policy decision by the Government or the authority and thereafter enforcement of that policy; the court should not be and we hope would not be an appropriate forum for decision."

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[45] Ibid, p. 80.
[46] Ramesh V. Union of India, 1988(1) SCC, 668.
[47] Hindi Hitrakshak Samiti, Vs. Union of India, 1990(2) SCC 352.

In B. Krishna Bhatt case,[48] a PIL sought a direction to the government to enforce the policy of prohibition under the Article 47 of the constitution. The court observed that the directive principles were aimed at 'securing certain values or to enforce certain attitudes in the law-making and in the administration of law'. The directive principle, could not in the very nature of things be enforced in a court of law. The courts were not expected to compel the executive or the legislature to adopt a particular policy.

If this is the approach then the question arises can the courts achieve socialistic goals just by simply announcing theories of justice in their pronouncements? It wŏld be feckless to contend that mere acknowledgement of basic needs as a fundamental right would transform the entire value system prevading the Indian society and polity, It is one thing for the court to acknowledge the basic needs of food, housing, work, education etc. as legal right. It is, however, quite another thing to enforce these reconceptualised rights through judicial orders. In many cases, during this period the court orders have not been complied with. The 'Undertrails' case [49], is one of them where the direction of the court in solving the problems of prisoners has been hardly implemented. During this period the extent of resistance by the administration remained considerable. When it had decreed that there should be a scheme to absorb rickshaw pullers, who were forced to earn living through the degrading

[48] B. Krishna Bhatt, Union of India, 1990 (3) SCC 65.
[49] Hussainana Kannan Vs. Union of India, AIR 1979, S.C. 1300.

method of human cycling other humans over long distances for paltry sums, the court could do little to ensure that the scheme was implemented[50]. Then what will happen if the authorities concerned disobey the court order like in Banwari Ashram case[51], where neither the special bureaucracy nor the observer commission have been successful in fulfilling the courts order. Of course the Contempt of Courts act of 1971, is there but the power for contempt of court order is limited to a maximum sanction of six months in prison or a fine of Rs. 2000 or both . This occurs after a long procedure where abject apoligies and long explanations result clemancy. During the period from 1950, to 1990, the interpretation of this power by the judiciary has been very liberal. In S. Mulgakar case[52], Justice Krishna Iyer observed :

> "The court being the guradian of people's right, it has been held repeatedly that the contempt jurisdiction should be exercised with scruphlous care and only when the case is clear and beyond reasonable doubt"

Further he observed :

> " we ought never to forget that the power to punish for contempt large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would it help to sustain the dignity and status of the court, but may sometimes, affect its adversely."

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[50] Azad Rickshaw Pullers Vs., Amritser, AIR, 1981 SC 14. Justice Krishna Iyer, the author of the ruling, amended in an interview (in Sept. 1990) that "non-implementation was the Achilles heel of PIL".

[51] Banwari Seva Ashram Vs. State of U.P., AIR, 1987, S.C 374.

[52] S. Mulgaskar Vs. UOI, 1978, (3), SCC 339.

In Parashar case[53], Chief Justice Chandrachud pointed that in as much as in contempt cases, the judges also acts as prosecutor, the courts must be reluctant to resort to such proceedings so that people do not have any impression that the judges are acting in their own defence.

In state of Bihar vs. Kripal Shankar and others case[54], allowing the states appeal and discharging the contempt orders passed by the High court against the judicial commissioner, the secretary cum-legal Remembrancer, the Additional Irrigation Commissioner, the supreme court held that the limits of judicial power must be delienated while dealing with files of the government and also of the public service commission, a high constituonal authority; It is necessary to have mutual respect among the various wings of the administration, in the process of disposal of justice.

Further Justice Khalid observed :

> "In a democracy, it is absolutely necessary that its steel frame in the form of civil service is permited to express, itself freely uninfluenced by extraneous considerations. It might well be that even orders of the court come in for adverse remarks by officers dealing with them confronted with different situations to straignt way obey such orders .... it is neccessary for courts to view such notings in the proper perspective". (P 30)

The interpretation of these cases shows that the supreme court has liberalised the laws of contempt of court in true spirit of co-operation and respect among constitutional functionaries. Therefore it is futile to hold that article 21 includes all graces of human civilization, the right to hygiene, food, pollution free

[53] M.R. Parasharar, Vs. Farooq Abdullah, AIR, 1984, SC 615.
[54] State of Bihar V. Kripaly Shakkar & others, 1987, (3), SCC 34.

environment, education etc. and then to hold that the realisation of these claims depends on the active and willing co-operation of the government and its officials. In such an event, the judicial acknowledgement of needs as rights would only appear to be mere moonshine[55]. Therefore the problem at the functional level has to be seen in the wider context of political economy of India since independence, which has resulted in evolving a vicious cycle involving the politicians, the bureaucrat and the white collar criminals with the police chipping in, the vicious circle was complete[56]. In an executive-dominated legislature, where executive controls it through party discipline in liberal democracies, the administrative neutrality has been collapsed. Moreover, with the power of discrimination bureaucracy has developed its own vested interests through their own prejudices and predilections. And in these fronts the judicial interventions in the administrative process have been 'sporadic' and peripheral'.

[55] Paramanand Singh, Justice Sabyasachi Mukharji's Perception of Judicial Function in PIL - A Tribute, 1991, p. 51.

[56] Justice A.H. Ahmadi, The Problems and Prospects of Indian Democracy : An Evaluationof its working for Designing the Process of Change for Peaceful Transformation, 1996, p. 14.

## CHAPTER III

# JUDICIAL ACTIVISM AND BUREAUCRACY (1990s)

3.1 Trends of Judicial Activism : -

The period of 1990's witnesses a refreshing phase of judicial activism, though some reservations are expressed in some quaters Of late, the Lordships have been rather overworked. Some even suggest they are overactive. To give few examples : one day they find themselves having to send to jail a senior civil servant; next day there is a matter of malpractices in blood banks to be sorted out. One week the telcom tender controversy is to be looked into; next week the Prime Minister has to be told to do something about the Cauvery Water Dispute between Karnataka and Tamil Nadu. And, in between there is the ever irrepressible T.N. Seshan to be ticked off. Hence the talk of Judicial activism that too, in a tone of concern.

Confining this work to its original limitations and studying the cases empirically, concerned with the above purpose, the Jain Hawala Case [1] seems to be the most stunning example of judicial activism vis-a-vis Public Interest Litigation in 1990's. Never in the past had the

[1] Vineet Narain & ors. Vs. Union of India & Anr., 1992(2)SCC194.

country's Premier Investigating agency - the Central Bureau of Investigation (CBI) which was created in early sixties under the special Police Establishment Act - done the kind of tightrope walking as it has been doing now while handling the multicrore jain hawala case. What really turned the probe into a tightrope walk was not just the intervention of the Supreme Court in the matter, seen by a vast majority as a salutory piece of judicial activism aimed at upholding the supremacy of the rule of law, rather the way it has intervened by freeing the CBI from the clutches of political authority, setting the agenda for it, overseeing the investigation, monitoring its progress on a periodical basis and evolving new mechanisms to put the screws on the CBI, thereby ensuring the performance of its statutory duties. In this case, the court, through the Justice J.S. Verma observed :

> " In this proceeding we are not concerned with the merits of the accusations or the individuals alleged to be involved, but only with the performance of the legal duty by the government agencies to fairly, properly and fully investigate, into every such accusation against every person, and to take the logical final action in accordance with law." (p.201)

In the same case, in another order [2], the court said :

> " to eliminate any impression of bias and avoid erosion of credibility of the investigations being made by the CBI and any reasonable impresion of lack of fairness and objectivity there in, it is directed that the CBI would not take any instruction from, report to or furnish any particulars there of to any authority personally interested in..... this direction applies even in relation to any authority which exercises administrative control over the CBI by virtue of the office he holds, without any exception." (para 5).

[2] Ibid.,1992(3) SCALE (Sp) 15.

The message of the court was unequivocal : the CBI would have to investigate every accusation made against each and every person irrespective of his status. And it could not close the case against anybody without first satisfying the court. Though more than a dozen hearings spread across a year with a combination of legal innovation and crusading zeal, the court has forced the nations premier investigating agency - which operates under the Prime Minister - to stop dragging its feet and, instead, get cracking on the case. In the process, the Judiciary has sparked off " an unprecedented churning in the nations polity, which promises to result in an across-the -board political cleansing as well as greater accountability."[3]

In the fodder scam case[4] while giving an order on a PIL, the court observed :

> "The delicate topic of ensuring implementation of the rule of law by the CBI and other goverment agencies, while taking care to avoid the likelihood of any prejudice to othe accused at the ensuring trial because of any observation made on the merits of the accusation in the present proceeding, has to be performed with the dexterity and fact needed in the conduct of such a Proceeding". (Para 11).

The above order requiring proper performance of the duties by the CBI. was also reitreated by the Judiciary in Anukul Chandra Pradhan vs. Union of India case.[5]

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[3] Mitta, Manoj & Jha, Rajkamal, "J.S.Verma : Mr. Justice",1996, p.p.112-113
[4] Union of India & ors. Vs. Sushil Kumar Modi & ors.,1996 (1) SCALE, p.432.
[5] Anukul Chandra Pradhan Vs. Union of India & ors., 1996(7) SCALE, p.438

As we discussed in earlier chapter the discretionary power of Public authorities including bureaucracy, which are mostly delegated to them through difficult departmental acts and exclusionary clauses, gives judiciary little scope to control over the public authorities. Over the period of times this discretionary power has given rise to arbitariness and hence misuse of power on the part of the public authorities in perfoming their statutory functions without following any policy or norm. This has happened, what is to be known as 'housing scam' where the out-of-turn allotments of more than 8, 700 government houses were made through discretionary quota, which far too exceeded its limit of 70 per cent, for extraneous considerations. Far from the discretion being used on merit of individual cases, particularly relating to the ones on medical grounds, the Directorate of Estates indulged in blatant misuse of this discretion.

Responding to a writ petition ,[6] filed by Shivsagar Tiwari, the Supreme Court not only frowned upon the unfair and unhealthy practice of out-of-turn allotments but ordered a probe by CBI. The Court through Justice B.L Hansaria observed :

> "A breach of statutory duty does give rise in public law to liability which has come to be known as 'misfeasance in public office' and which includes malicious abuse of power. Therefore misuse of power by a public official is actionable in tort Secondly, public servants

[6] Shivsagar Tiwari Vs. Union of India & ors. (1996)6 SCC 558

> become liable in damages for malicious deliberate or injurious wrongdoing ..... that a publilc functionary has to use its power for bone fide purpose only and in transparent manner" (para 16)

The court further said that after the CBI report, the court wold find out the oficials involved in the racket and fix responsibility. Another case known as Lal Kothi Case[7] exposes the blatant misuse of official position by the administrative authorities, which in this includes the then commissioner, Jaipur Development Authority and the then Zonal Officer, Lal Kothi Scheme, to favour a few influential and highly placed individuals. Here Land Acquisition Officer while awarding compensation, granted plots to the owners, sub-awardees or nominees in the scheme itself. Following the decision in Radhey Shyam case,[8] the court held that Land Acquisition Officer has no jurisdiction to make any such allotment and, therefore, the same was void abinitio. Justice K. Ramaswamy observed in the case :

> "the policy of the Government has put for public good, public welfare and national interest and the public policy can not be a camouflage for abuse of the power and trust entrusted with a public authority or public servant for the performance of public duties....the policy of the Government to allot plots out of the land acquired dose not have the stamp of public policy but rather it is a policy to feed corruption and to deflect the public purpose and to confer benefits on a specified category".(p.135)

The court further observed :

> "The minister as chairman of J.D.A holds public office though he gets constitutional status and performs functions under constitution, law or

[7] The Secretary, Jaipur Development Authority, Jaipur, Vs. Dulat Mal Jain & ors.1996(7), SCALE 135.

[8] Jaipur Development Authority Vs. Radhey Shyam & ors. (1994) 4 SCC 370.

> executive policy. The acts done and duties performed are public acts or duties as holder of publlic office. Therefore, he owes certain accountability for the acts done or duties, performed..... the people who hold public office must perform public duties with the sense of purpose and a sense of direction, under rules or sense of priorities." (para 12).

Like corruption, non-performance of mandatory duties by the administrative authorities has become so routine in day to day life that it has ceased to excite public curiosity and repulsion but the Supreme Court judgement in capital clean case, [9] on a PIL filed by noted legal activist Dr. B.L Wadehra, who had sought the apex court's intervention in safe disposal of garbage and toxic wastes of hospitals and nursing homes, has once again jolted and pricked the people's conscience. Coming down heavily upon all civil authority of Delhi, it asked them to either fulfill their statutory duty of keeping the city clean or make way for private agency. The court through Justice Kuldip Singh observed :

> "Residents have constitutional as well as statutory right to live in a clean city and authorities concerned have a mandatory duty to collect and dispose of garbage/waste generated from various sources in the city. Non-availability of funds, inadequacy or inefficiency of staff, insufficiency of machinery etc. cannot be pleaded as grounds for non-performances of their statutory obligationos". (P.594)

Directing MCD and NDMC to have the city scavenged and cleaned everyday; to the government and the authorities concerned to construct and install incineraters in all hospitals with 50 beds and above

[9] Dr.B.L. Wadehra Vs. Union of India and ors. (1992) 2 SCC 594.

under their administrative control; to AIIMS to install sufficient number of incinerators; to the government to appoint Muncipal Magistrat for trial of offenders under the Corporation Act, the court approved an experimental scheme of MCD and NDMC of distribution of polythene bags for garbage disposal to the citizens of selected localities. The court observed :

> " Statutory authorities like MCD and NDMC have been created to control this problem. It is not for this court to keep monitoring these problems. The officers who are manning these institutions must realise their responsibilities and show the end result". (para 12)

These cases, not only demonstrate the danger involved in entrusting unbridled powers in administrative authority at the functional level leading to abuse of office and corruption on account of lack of counter check, but also makes it clear that the purpose of the beholder of public office or the concerned authorities must be genüine in a free democratic society governed by the rule of law to further socio-economic democracy. And for this the court has time and again given importance to the performance of mandatory duties of administrative authorities.

**(4.2.) Trends in Contempt of Court and the Polemics involved in the triangular relationship between Judiciary, Bureaucracy and Political Executive :-**

The contempt of court Act, 1971 has been enacted for the defiance of court order. Although the scope of the power for contempt of court is very li mited, and occurs after a long procedure where

unconditional apologies may change the directives of the court, yet the judicial interpretation of contempt power as we analysed in the previous chapter, has been very liberal between the year 1950 to 1990. During this period the courts have exercised this power very cautiously, wisely and with great circumspection. But the period of 1990's marks a departure to this trend with very frequent use of this power on numerous occassions, thereby sustaining the dignity and status of the court. Within a span of five days in September 1995, six civil servants were convicted for contempt of court by different courts (three in Tamil Nadu, one in Kerala and one in Karnataka) and four sentenced to imprisionment or to pay a fine[10].

Among all these case the Vasudevan case[11] was the first-rate one, where the supreme court sentenced J. Vasudevan, Principal Secretary, Urban Developement, Government of Karnataka, to one month's imprisonment. In that he wilfully disobeyed an order dated 26.7.1993 in I.A No. 3 in civil appeal no 797/93 to promote T.R. Dhananjaya to a supernumerary post of Additional chief Engineer in the Banglore Muncipal Corporation. Delivering the order the court observed

> "When the order was passed, what remained for the respondent was only implementation of the order passed by this court in furtherance of the action taken thereunder by the corporation. It is now clear that instead of ilmplementing the order, an attemplt has been made to circumvent the same and deny the benefits to the petitioner ..... so we are left with no option but to hold that the resoondent has deliberately and wilfully, with an intention to defeat the orders of the court, passed the impunged order"(para12).

[10] Reports by N.R.Madhava Menon,. "The Vasudevan Case -I" , 1956. p.10.
[11] T.R. Dhananjaya Vs. J.Vasudevan, 1995 (5), SCALE 245.

In Vineet Kumar Mathur V. Union of India[12] and others case, the court's order regarding 'obtaining' 'consent' from the U.P. pollution control Board for that the plant has attained the prescribed level of anti-pollution standards, for operating plants was defied by Brig. Kapil Mohan and Sri Yogesh Kumar, Managing Director and Chief Executive officer respectively of Mohan Meakins Ltd. On the basis of a letter written by Shri Vineet Kumar, the court came to the conclusion that both the respondents and contemnors are guilty of contempt. It observed:

> "Mohan Meakirs (and some other industires) and U.P.P.C.B together enacted a charade - one saying within one day of closure that it had achieved the prescribed standards and the other granting the consent with a stipulation that the prescribed standards shall be achieved by the end of the year 1993 ..... we cann't also accept the unconditional apology tendered by the respondents. The violation is a knowing one, deliberate and pre-planned. It indicates a certain defiant attitude on the part of contemnors ....."(para 10)

The most innovational thing that court has done in this case is that it has differentiated the technical meaning of contempt of court from its meaning in real sense. Differentiating the meaning it imposed a compensatory fine of rupees five lacs to be deposited in the court within a period of four weeks. Further the court observed :

> " In such deposit being made, the contempt proceedings shall stand dropped. In default of such deposit, each of the respondents shall undergo simple imprisonment for a period of one month. The amount, if deposited, shall be utilized for purpose connected with the cleaning of

[12] Vineet Kumar Mathur Vs. Union of India & ors 1996(1) SCALE 504,

Gomti river, for which orders will be passed after the deposit is made." (para -11)

These cases have raised many issues and the polemics involved in the triangular relationships between judiciary, bureaucracy and poliltical executive. A bureaucrat is not an autocrat. He has to act in accordance with administrative rules and norms on lthe subject. While it is his obligation to obey and cary out court-orders, he can not at the same time throw overboard the administrative rules and norms and become oblivious to them. In the Vasudevan case, the state government had admitted in its interlocutory application that it was responsible for the non-implementation of the court order. Simply because the state is represented through a Departmental Secretary, is it fair to hold him alone responsible when, according to the rules of Business framed under lthe constitution, he does not have full authority to carry out the order ? Hence a clear distinction has to be kept in view between wilful defiance of a court order and the inability of an official to carry out the court order because of administrative difficulties[13]. Furthermore, distinction has also to be kept in view between a writ of habeas corpus or an order prohibiting the doing of something. While the disobedience of the former order would clearly attract the provisions of the contempt of court, the latter might require consideration of other factors[14].

[13] Khanna, H.R. ' Judicial Activism-II',- 1995 p.8.
[14] Ibid, p.8

These issues are genuine, indeed. Would not a fine or at best a day's token imprisonment meet the ends of justice while conveying the message to the bureaucracy that its constitutional duty is to obey court orders in letter and spirit? Should not the expression of regret and tendering of an unqualified apology without delay be given due weightage for more lenient sentences in contempt cases ? The stand taken by the judges in all these questions which are relaxed to the punishment awarded and the summary procedure adopted in the imposition of sentence seems to be negative. Because the willful defiance of judicial orders, and cultivated ignorance of the clearly reiterated norms and principles of fairness which underline these, is not the exceptional but the staple form of governance in India[15]. For example, not just judicial decisions but the enacted law prohibit third degree of torture; yet custodial violence, rape, and death continues apace with near absolute impunity[16]. Furthermore, defiance of judicial orders dilutes the authority of courts, and with it the public confidence in adjudication in both its form as an articulation of state and societal power. The courts, as it has been said by legal intellectuals, ad nauseam, wields neither the power of the pursue or of the sword. Hence the judiciary, acting alone and all by itself, can not provide effective responses to the growing lawlessness of the state. The power of contempt of court in its technical sense being too thin and fragile a reed to afford support to the majesty of the rules of the law or the dignity of the court, as

[15] Baxi, Upendra, 'Judicial Activism, Legal Education and Research in Globalising India'.Annual Capital Foundation Lecture, 1996, p.14.
[16] Ibid,p.14.

Chief Justice Ahmadi said, 'the effectiveness should be a decisive criterion'[17] in further growth of the power of contempt of court.

### (4.3.) New Dimensions of Judicial control over Bureaucracy.

As far as the control of judiciary over bureaucracy is concerned, the movement from the principle of *ultra vires* to the system of substansive justice vis-a-vis prcedural justice has been a long way. Although in 1990's it continues to address the question of substantive justice with people-judiciary cooperation vis-a-vis Social Action Litigation (SAL), yet the focus of its emphasis has been shifted. The problems at the functional level 'corruption' and 'Non-performance' of mandatory duties of the administrative authorities, have been the new dimensions of judicial control over bureaucracy; around which the larger question of accountability and responsibility revolve round. To categorise them as new areas and dimensions of judicial control docs not mean that pre-1990 phase never witnessed judicial proceedings on these issues. But the frequeancy and intensity with which judiciary is responding to these questions, the type of approach and the extraordinary procedural that it has evolved in the process in handling a number of cases that mark a difference between the pre-1990 and post-1990 phase.

[17] Ahmadi, A. M., C. J, at the inagural speech at a workshop on "Judicial Profess, Social Legitimacy & Institutional Viability ", The Institute of Advanced Legal Studies, Pune, Dec. ,16, 1995.

In Shiv Sagar Tiwari v. Union of India case,[18] quoting Edmund Burke, Justice Hansari observed.

> "Among a people generally corrupt, liberty can not long exist. An arbitrary system, indeed, must always be a corrupt one. There never was a man who thought he had no law but his own will, who did not soon find that he had no end, but his own profit "(para-1).

Further quoting the Encyclopedia of Democracy by Seymous Martin Lipset, the court defined corruption as follows :

> "Corruption is an abuse of public resources for private gain. It is known that bribes open the way for access to the state for those who are willing to pary and can afford to pay. The situation leaves non-corrupt citizen with the belief that one counts only if one has the right personal contract with those who held power and also allow persons with money power to get things done to their advantage through backdoor". (para-3).

In this raising the question of accountability the court has made it clear that being the head of the department one becomes, responsible for the actions, acts and policies of his departments. He becomes principally accountable and answerable to the reaple. While his powers and duties are regulated by the law of the land, the legal and moral responsibility or liability for the acts and omissions rest solely with the person.

Similarly in B.L. Wadeara vs. Union of India and others case[19], emphasising on the non-performance of mandatory duties by Municipal

[18] Supernote 6,at 560.
[19] Supernote 9 at 594.

Corporation to collect and dispose of the garbage waste, it has threatened the officials either to perform or quit thereby making way for private agencies. In Union of India & ors. vs. Sushil Kumar Modi and ors. case[20], referring to a judgement of Lond Canning the court observed :

> "A question may be raised as to the machinerry by which one could be compelled to do one's duty. On priniciple it seems that once a duty exists there should be a means of enforcing it. This duty can be enforced, either by action at the suit of the Attorney-General or by the Prerogative order of mandmous..."

These cases reflect the increasing awareness on the part of the judiciary of the urgent need to address the issue of "accountability". It sends the message that the business of the government can not be divorced from the dictates, of "accountability" which is very cornerstone on which modern states practicing the ideology of democracy have evolved and are premised. In whatever way one defines democracy, the immutable principle is that, those who have been empowered by the people must, as all times, portray responsiveness. Responsiveness, thus, entails efficiency and effectivenss in the diversity of promised results and this is premised on the basic principle of accountability.

Subsumed in the concept of accountability is a myriad of legal, moral and ethical obligations that come with the occupancy of public

[20] Union of India & ors. Vs. Sushil Kumar Modi & ors.,1997(1) SCALE 432.

office[21].Hence when we talk about 'accountability' in the public service we can not but consider the question of bureaucratic responsibility. This requires public servants to subordinate their personal preferences and judgements to the dictates of the democratic process and perform acording to the constitutional and legal directives pertaining to their areas of authority[22]. This accountability is of two types - internal accountability and external accountability. Internal accountability means that at each level in a hierarchial organisation, public officials are accountable to those who supervise and control their work. On the other hand, external accountability means answerbility for action carried out and performance achieved to other recevant and concerned authorities, outside his department and organisation. Here comes the accountability and responsibility of administrative authorities to the judicioary.

Over the years the public disclosure of widespread questionable, negative and illegal activities of bureaucracy, together with the perennial problems of inefficiency, corruption, inaction and red-tapism have led to a decline in the confidence of the public on the administrative authorities. The judiciary through new devicess and new mechanisms with some legal innovations has tried to restore the confidence of the people on the system by making the authorities to act and perform their statutory duties.

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[21] Ahmad Sarji Bin Abdul Hamid, 'Accountasility in the Public Service' , 1992, p.106.
[22] Ibid, p. 107.

In the Hawala case, it freed the CBI from the political authority. By directing that the CBI should discharge its statutory functions in accordance with the laws without taking orders from its political masters, it ensured accountability of everyone whatever be his or her position. It directed the CBI to report periodically on the progress of the investigations to the apex court, instead of to the government. To do this, the court resorted to a highly potent legal weapon : in camera session, used typically in highly sensitive cases where open access can jeopardise the trial. Actually the close-door hearings were to put screws on the CBI. It forced not only the CBI chief but to all concerned departments of the government, to personally attend every hearing. Though the step was a symbolic one, it galvanised the agency into action. It came up with an unprecedented order, which purists question, to facilitate investigation against senior public servants without waiting for the usual clearness. According to administrative rules no agency can investigate public servants of the level of joint secretary and above without the government's consent. The court viewed this as a procedural formality that was clogging up the progress. Hence it tossed it out of the window by observing that "we direct all the concerned authorities to cooperate with and render full assistance to the CBI--- no further concurrence of any authority would be required bny the CBI for this purpose"[23]

[23] Vineet Narain Vs. Union of India and ors. 1996(2) SCC199.

In number of other cases, it is the court that has appointed different committees to look into the matter of administrative inefficiency, and what it calls 'dereliction of duty' and suggest necessary steps to be taken for rectifying the loopholes In Common Cause v. Union of India and others case[24], where the petition filed by the way of PIL, was high- lighted the serious deficiencies and short-comnigs in the matter of collection, storage and supply of blood through the various blood centres operating in the country, the court appointed a comittee to examine the necessary steps which may be required for further strengthening the existing frame-work about licensing of blood banks and obtaining blood donatin s. And on the basis of the committee report, it ordered to set up an autonomous representative body at the national level, which to be called National Council on Blood Transfusion. Similar is the case of M.C. Mehta v. Archeological Survey of India and ors.[25], where court after pursuing the report of the Advocates Committee appointed by it, directed for declaration of the poet Ghalib's tomb as a national protected monument.

Not only this but also in many cases, it has initiated specifying the officers who should constitute the investigation in a given case and restrained them from reporting to their departmental heads with a view to nullify all the attempts to scuttle or sabotage the investigation process.

[24] Common Cause Vs. Union of India & ors. ,1996(1) SCALE 32.
[25] M.C. Mehta Vs. Archeological Survey of India & ors. ,1996(8) SCALE (Sp). 11.

The last though not the least, innovation of judiciary has been the interpretation of Contempt of Court Act. As noted earlier, in the Vineet Kumar Mathur V. Union of India and others case, the courrt differentiated the guilty of contempt of court in a technical sense and the difference being a heavy punishment in earlier case, going far beyond the parameter of Contempt of Courts Act, has enlarged the scope of using contempt of court.

Therefore, by setting the agenda for administrative authorities, monitoring most of the cases, keeping in the view the nature of the different proceedings and the manner in which the exercise is to be performed the judiciary in the process has started looking not for what these authorities have done but for what they have not done, thereby ensuring the performance of their statutory duties. Since public-interest cases often relate to situations unforeseen by the law, the court is left to its own devices. What justice J.S. Verma says that it is an extraordinary situation that has called for an extraordinary remedy and the innovations of devices has never an adhoc manner. Rather these are provided within the parameters of the law.[26] In fact, it is because the apporach of the judiciary has a rationale and a legal basis, it has credibility and has been accepted by people at large.

[26] Verma, J. S. Justice in an interview with Manoj Mitta, India Today , March 15, 1996, p.121.

Moreover, the sequisition of executive time-by requiring Chief Secretaries and the high and mighty of civil service to be present during hearings, cooling their heels till the case is called out, adjourned from day to day till the final moments of hearing- entails strategies of sustained learning of the rule of law values in administration, even more than contempt proceedings which stimulate anti-people solidarities, provide yet another set of strategies[27]. To be huddled in court rooms, like ordinary litigants, for days on end will provide a substantial anti-dote to arrogance of bureaucratic power[28]. Above all, it creates a mentality of taking judiciary seriously.

### 4.4 Continuance of Earlier Role of 'Judicial Self-Restraint'

To characterwise the 1990's phase, as a new phase of judicial activism vis-a-vis PIL, does not mean that the judiciary has totally abdicated its earlier role of 'self-restraintism'. In P. Cherrigo Koya v. Union of Indian and others case[29], the Kerala High Court held that the decision to shift the J.N. College from Karavathi island of Lakshadeep to Kadanat was 'in a way a policy decision and not contrary to public interest'. Dismissing a PIL by a resident of Karavathi, the court explained that the scope of judicial review was limited to examining decisions which directly affected individuals, or private rights, duties and interests. Justice K.G. Balakrishan observed :

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[27] Supranote, 15, p.15

[28] Ibid,p.15.

[29] P.Cherriyokoya V. Union of India & ors. ,A. I. R 1994, Ker. 27.

"The exercise of power whether legislative or administrative willl be set aside if there is manifest error in the exercise of power.... is exercised on the basis of 'facts wich do not exist, which are patently erroneous, such exercise of power will stand vitiated." (Para 20).

In Nishatganj Vyapar Mandal v. State of U.P. case[30], the Lucknow bench of the Allhabad High Court was not inclined to entertain the protests of N.V.M. against the decision of the railways to construct a flyover in the lacality. The court ruled that the decision was an administrative matter and that the court would not sit in appeal over the decision. In Dahanau v. B.S.E.S. case[31], the court ruled that it is primarily for the governent to strike a just balance between two competing objectives. The courts role is restricted to examine whether government has taken into account all relevant aspects, and can interfere only where the government has overlooked any material considerations. In Mahajan v. J.M.C. case[32], the court held that it will not interfere with an order of an administrative authority or the government, where the order rests on its statutory discretion. Unless the order is arbitrary or capricious or is ultra vires of statutory rules. Thus the exercise of a statutory power must not be ultra vires.

Moreover, the following two important decisions of judiciary in matters of New Economics Policy that was initiated by Government of

[30] Nishatgang Vyapar Mandal V. State of U.P, A.I.R. 1994 , All 84.
[31] Dhanau V. B.S. E. S., (1991)2 SCC 539.
[32] Mahajan V. J. M. C , (1991)3 SCC 43.

India, under GATT agreement clearing reflect the judicial 'self-restraintism". In P.B. Sawant v. Union of India and others[33]. Bombay High Court dismissed a PIL seeking mandamous restraining the government relating to the Dunkel proposal, without first obtaining the sanction of parliament first obtaining the sanction of parliament and state legislature. InDelhi Science Forum & others v. Union of India and ors. case[34], on a PIL whether the central government which has the exclusive privelege of establishing, maintaining and working telegraphs, which includes telephones has authority to pass with the said privilege to non-governmental companies for consideration on the basis of tender submitted by them, the court, while dismissing the petition held that policies can not be tested in court of low. The courts can not express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policies should have been adopted or not. Further justice N.P. Singh obsrved :

> "Privatisation is a fundamental concept underlying the questions about power to make work economic decision... what is the mechanisms of accuntability to ensure that the decision regarding privatization is in public interest? All these questions have to be answered by a vigilant parliament. Courts have their limitations...." (para-5)

## 4.5 Factors of the Growth of Judicial Activism :

Undoubtedly the culture within the judiciary has changed remarkably in the last few years. Though the 1980's witnessed the branch out of the judiciary into newer areas under Justice P.N. Bhagawati vis-a-vis

[33] P. B. Sawant V. Union of India and ors., A.I.R 1994 Bom. 323.
[34] Delhi Science Forum & ors. V. Union of India & Anrs. 1996 (2) SCALE 218.

PIL, yet in pre-1990 judges were refrained from entering into public and political controversy. Today they are more willing than before to engage on debate outside the court room. Hence the allegations of 'judicial assertiveness' air all around.

There are many factors and reasons for the growth of judicial activism in the country over which some eminent jurists had voiced their doubts earlier. The permanent executive has demonstrated its persistent failure and lack of inclination to apply the rules without fear or favour. Many of its actions have failed to stand judicial scrutiny and have been found to be politically motivated, as it serving the private interests of its political masters is the sole purpose of the government machinery. Such flagrant misuse of authority has robbed the citizens of their rights guaranteed by the constitution of India under which the higher judiciary has both a right and a bounden duty to uphold the cause of the faceless common man who, pitted against the high and mighty, has no other lawful recourse. To check the prevailing conditions of anarchy and anomie the judiciary is only meeting its constitutional obligations by stepping in where necessary[35].

The second important factor that has enabled the judiciary to intervene is the lack of credibility of the executive as well as legislature. Gone are the days when the houses of parliament and the state legislatures saw the intellectu al giants debating grave issues of public concern. Instances of lamentable and unworthy conduct by members of the floor of the house

[35] Sinha , S.K., "Judical Activism: A Ray of Hope", 1996,P.9.

are too many to recount. Unprincipled floor crossing, mostly motivated by purely private interests has further eroded their moral credibility to an extent that people are not ready to believe that there can be an honest politician.

Constant pre-occupation of the 'honourable' members with power politics has prevented them from paying attention to exercising their own constitutional rights of legislation and control over executive and various other institutions. There are long gaps between sessions which are either too short to transact adequate business or seen helpness in the planned disruptions of the proceedings; this inevitably leads to walk outs and sometimes many days pass without any business being transacted. Another worrying feature is the decline in the level of debate within houses in terms of both quality and content. Consequently, the primary function of the parliament, which is of enacting laws, has suffered. Sometime, the legislative meets just to complete the constitutional formality. Last 25 years have seen an ordinance raj both at the centre and in the states.

This failure on the part of legislative bodies to discuss threadbare important matters of policy and public interest, as well as, explaining the philosophy for introducing new legislations or amending existing ones, has resulted in the people being deined the vital information needed to appereciate the policies and programmes of the government.

Thus, the people's right to information remains unfulfilled and it makes them curious about certain policy decisions taken at higher levels. They, therefore, seek other methods of satisfying their curiosity. One such method being a knock at the court's door[36].

The face of the executive has been smeared with all kinds of multi-billion rupee scams. Politics has been criminalised and this 'criminalisation of politics, corruption, communalism and castism are the primary evils [37] that have weakened our democratic policy. Most instances of gross misuse of authority and unbashed corrupt practices go unreported and unchallenged. In the few cases, where some one dares to set the law in motion allegations of delaying, scuffling or abruptly closing the investigation are only too common and often not without substance. Even when an investigation is completed under constant public or judicial pressure in rare cases, it is seldom impartial. The results of the investigation are often not published, no follow up action is taken and ultimately either all guilty persons are allowed to get away with it or some relatively unimportant person is made a scapegoat for a minor lapse. The big fish and the real culprits are invariably allowed to escape punishment. Against this dismal scenario a responsible and responsive judiciary could

[36] Ahmadi, A. M Justice, "The Problems & Prospects of Indian Democracy: An Evaluation of Its Working for Designing the processes of Change for Peaceful Transformation", 1996.P.6

[37] Hon. President Shankar Dayal Sharma, while addressing the Nation on Republic Day ( 1996) referred and identified these evils that have afflicted our Nation.

not have acted otherwise than by taking the bull by the horns in the defence of the cause of the hapless common man.

Though the post-emergency era saw a expansionist role of judiciary vis-a-vis SAL, yet the court had taken a minimalistic view of its role not to challenge the political leadership. The apex court's task was easier under the westminister model whose very logic enjoined the Prime Minister to take on the role of the supreme arbiter in the continuous and thorny process of political conflict, resolution, a task made even more stricty because the federal arrangement imposed its own constraints on a Prime Minster's area of autonomy.

Suddenly it was different when Mr. P.V. Narasimha Rao became the Prime Minister. For the first time the country had a Prime Minister who did not enjoy a working majority in the Lok Sabha, added to this fact was his own disinclination to take decisions. Moreover the economic reforms, initiated by his government was seen by many as a departure from the established national commitment to an egalitarion order. Lacking the requisite moral authority as well as the political elbow room, the central cabinet found it convenient to steer a many controversial political issues including Babri-masjid/ Ram Janmabhoomi dispute, the Supreme court's way. By referring many issues of public importance such as job reservation, the telecom tenders case, the holding of elections in Jammu & Kashmir etc, falling well within its own jurisdiction, the

executive was abdicated its own responsibilities. And much against their inclination the judges found themselves having a have share in governing a deeply divided nation.

The constant fall in the quality of leadership has also been a major factor for the growth of judicial activism. We started with a leadership which had an ideology. They had a percpetion of building the nation. The establishment of institutions like the Planning Commission, National Scientific Laboratories, and art centres further points out the long-term dimensions of their decisions. The post Nehru- Shastri period saw the second generation leadership which systematically demolished all democratic institions one by one, thereby became populist devoid of any nation-building commitment. It was the time when we heard about "commitment judiciary" and "committed bureaucracy". In Mid-seventies even the populist approach was abandoned and greater dependence was on non-political persons who had neither roots among the mases nor any commitment. And at present we have the third generation leadership-a bunch of power hungry people, power seckers, power brockers and power holders, who behave like monarchs of the medieval age[38].

Hence, leadership based on mediocrity, a prolonged and exasperating somnolence on the part of the political executive and its committed bureaucratic appendage have brought the country into the brink,

[38] Halan, Y.C, "Politics, Politician & Polity ' , 1997, P.5

where people have lost all their hope and faith on the government machinery thereby knocking at the doors of the judiciary.

The past few years have also seen an increasing tendency among constitutional functionaries and institutions to take their internal disputes to the court. The Supreme Court has had to not only define the jurisdiction of the Election Commision but even prescribe the procedure for its meetings and routine decision- making. This has been necessitated by the tendency to trasgress one's own lawful jurisdiction and to usurp what rightfully belongs to another. Setting things right in the Election Commission was actually within the jurisdiction of a parliament but due to crisscrossing of narrow political considerations of the various parties it had to remain a mute spectator and allow the apex court to sort it out again and again.

This process of reluctant expansionism was further facilitated by a marked decline in the respect-ability of the politicians enjoyed as a class. One key component of the economic reforms regime was an assertion that the politicians and bureaucrats were inherently incapable of running the economy; consequently a new confidence was reposed in the competance and enterpreneurship of the market managers. This subtle assertion, in fact, undermined a crucial perception i.e.,in the political leaders were the most authoritative interpreter of 'public good/ public interest'. Once this

psychological assault had taken its required tool, groups and individuals felt free to challenge before the Supreme Court the correctness and wisdom of the executive[39]

A noteworthy trend during the recent times has been towards escalation of terrorist activites with international dimensions, smuggling and narcotic trade, and dreadevil acts of mafioso organisations and other desperados. The legislature has been forced to enact provisions to control and contain them and take other harsh administrative measures with the assistance of army and other paramilitary forces. At times these provisions have been challenged as violative of civil and human rights"[40]. This is yet another reason for increased judicial intervention in the instances of transgress of lawful jurisdiction in the exercise of executive authority.

There was also seen a growing tendency among functionaries at all levels of the executive to not only completely ignore the judicial pronouncements which do not suit the powers that be, but also burn midnight oil with a battery of lawyers and other ingenious advisors to find out ways and means to effectively negate, frustrate and circumvent the unpalatable verdict. In stead of ensuring strike and immediate compliance in letter and spirit the entire executive machinery and scare resources, of the state are geared up to see that the judical verdict does not come in the way of the real intentions of the high and mighty calling the shots. After trying

[39] Khare, Harish, "For the Sake of a Civil Society", 1996,P.7
[40] Supranote 34, p.10.

every weapon in its arsenel to defeat the ends of justice by deliberately delaying the proceedings at every step, they do not give up even when facing contempt proceedings, sometimes even at the risk of inviting strictures. Harsh orders of imprisonment or dismissal from service or removal from the post seem to be only potent remedy left with the judiciary to elicit compliance from a recalcitrant and determined executive.

Nature does not permit a vaccum. The vaccum created by the vacillation and pervarication of an uncertain executive, a deeply diveded parliament and a compromised political class has been filled up by the judiciary. What has come to be called hyper activism of the judiciary draws its strength, relevance & legitimacy from the inactivity, incompetence, disregard of law and constitution , criminal negligence, corruption, greed for power and money, utter indiscipline and lack of character and integrity among the leaders, ministers and administrators.[41]

**(4.6). An Analytical Overview :** The empirical study of many cases shows that in 1990's, in response to Public Interest Litigation (PIL) writs, the courts have began to direct the government and its administrative authorities on everything from clearing garbage off the streets to cleansing the polity of political sleaze. Earlier judgemnts and decrees were passed and files were closed and shelved. But in 1990's judiciary is following a more pragmatic technique of "Judgements with monitoring" . Today, not only judgements

[41] Kashyap, S.C., "Judiciary-Legislature Interface",Politics India,April,1996,p.22

are pronounced but their result-oriented implementation is also ensured through new tools, methods and techniques. Through these techniques , the fairly swift and dramatic-decis ions of the courts, particularly that of the supreme court, have highlighted not just the larger activist role that judiciary appears to have assigned itself, but also the unresponsiveness of the executive, the bureaucracy and the police to the needs of the people. This expanded role of judiciary taking on the top bureaucracy and the politicians has not gone unnoticed. While some welcome it, others deprecate it. It would, therefore, be convenient to deal with these sorts of depreciations briefly so that the larger question of its impact on democratic governance can be verified.

The allegation of judicial encroachment upon the jurisdiction of the executive, the legislature and other independent and autonomous institutions, what Upendra Baxi, characterises as 'ideological fears[42], infact, depend on one's preferred versions of the so-called doctrine of separation of powers. In a written constitution, with an entrenched Bill of Rights, including a fund:amental right in Article 32 to move directly the Supreme Court for redress of violation of basic rights, the doctrine of separation of powers can only signify a division of functions[43]. Judicial deference to powers and functions of the executive and the legislature must increasingly depend on the constutitional power and duty under Article 32. That power

[42] Supranote 15, P.19
[43] Stone,Julivs, "Social Dimensions of Law and Justice, (Sydney,Maitland) 1966, p.695.

and duty defines the meaning and the scope of deference to coordinate branches of government. Justices, may only accord 'due' deference : that is, respect to decision of other branches of the government is owned when it is constitutionally correct. Constitutionally correct decisions, in our system, are only those which may be said to be completely innocent of violations, of fundamental rights of the Indian people.

This is the operative Indian doctrine of separation of powers which has further been enriched by the doctrine by the 'basic structure of the constitution'[44] . Although initially confined only to the determination of the validity of constitutional amendments, that doctrine has gradually acquired the status of the technology of construction of constitution and now extends to high executive acts[45] , and even at times, to the consideration of validity of legislative action.

The doctrine of 'separation of powers' in its operational meaning perhaps, does not correspond to original model in the Anglo-American orbit. The experience of its operation in India since the enunciation in the earliest decisions of the Supreme Court, whether in Re Delhi Laws Act[46] or Ram Jawaya[47] , has been a site both of collaboration and conflict between the judiciary and other branches of government. But

[44] Keshavananda Bharati V. state of Kerala,1973(4) SCC 225.
[45] S.R Bomai V. Union of India,(1994 ) 3 SCC 1
[46] In re: Delhi Laws Act,A.I.R,1949 FC175
[47] Ram Jawaya V State of Punjap, A.I.R SC 1955 728.

the critics of judicial activitism has been overly articulate over the patterns of conflict. There have been no outcries of 'usurpation' or 'tresspass' of powres in the Special Courts Act advisory opinion[48] or in Sampath Kumar case[49], when justices, even abandoning the recognised doctrine of 'reading down' statutes to make them constitutionally valid, have actually performed the lonely task of redrafting the laws so as hold them valid. Nor did such protest greet in Laxmikant case[50],in which it drafted legislation in regard to inter-country adoptions.

The charge of 'usraption' seems to ring true when the courts started monitoring different institutions like jails, juvenile homes, blood banks and different administrative authorities, like CBI, New Delhi Municipal corporation (NDMC) and the like. However in all these cases, it is incorrect to say that Supreme Court is administering these institutions; they remain administrated by the executive with the superadded duty of reporting to the court. This superadded duty of reporting to the çourt. This would not be at all necessary if the executive agencies were not singleminded in their indifference to the constitutional rights of the constitution.[51].

[48] Special Court Bill. In Re (1979)1 SCC 380.
[49] S.P.Sampath Kumar V.Union of India,(1987)1SCC124.
[50] Laksmikant V. Union of India,A.I.R,1984 SC469.
[51] Supranote,15,p.20.

In the city clean up case, activist justices are doing two things: first, they give content to the newly emergent right to public health under Article 21, rights to life and liberty. and second, they give meaning to Article 48-A i.e., protection and improvement of environment and safeguarding of forests and wild life, and Article 51-A(g) i.e., to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

In the Jain hawala case, judges are doing two things. First, they have only emphasised the legal obligation of any investigating agency to carry out its duties in a fair and independent manner" in accordance with relevant provisions of the code of criminal procedure ( and connected legal provisions) in trying to ascertain the "true relevant facts and circumstances" in a given crime. And second, they have given content to Article 14 (right to equality), thereby, contouring it beyond the bounds of the earlier doctrine of reasonable classification, to the norm of avoidance of arbitrariness and non-rationality in executive action. While the first belongs to the enforcement of public duties under *Mandamus*, the second belongs to the realm of legitimate constitutional interpretation. Similarly the review of arbitrary allocation of federal government housing in housing scam case is only an exercise of post-Maneka Articles 14 & 21 due process standards.

In enriching the contents of fundamental rights to and compelling the authorities to do their mandatory duties, under the law or to refrain from doing them against law, or in setting aside the accomplished illegal acts, the judiciary only performs its duty.[52] No one can deny that the executive the legislative and the judiciary should function in harmony. But cordial relations, between the different institutions is not an end in itself and can certainly not be used as a shield against accountability. If, there is less harmony between different institutions, it is because politicians, along with the bureaucracy, not only failed to follow and enforce law but blantly violated it. What judiciary is doing, is trying to restore that harmony by enforcing the compliance with the constitution and the law of the land through adoption of certain operational principles and attitudes within the framework of the constitution. Therefore, the present situation is not really a case of democratic institution trying to exert itself over another; rather, it is a case of citizens finding new ways to expressing their concern for events occuring at the national level, and exerting their involvement in the democratic process[53] .

The larger question of democratic governance is corelated with the doctrine of separation of powers vis-a-vis the enforcement of judicial order. The power to punish for contempt of court is like most powers is a power coupled with the duty to initiate proceedings for

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[52] Khanna ,H.R ,"Judicial Activism:Courts As Trustees of The Constitution",*Politics India,April,1996,p.11.*

[53] Supranote,33,p.11.

contempt in appropiate cases.Moreover, the judiciary vis-a-vis PIL functions as a moral pedagogue of the Nation and not as a push bottom solutions for all ill visiting the Indian people. The effectiveness of judicial orders is eminently to be measured by transformations of the political cultures from sites of microfascism into role of law sites[54] . Therefore, judicial bid to transform the culture of Indian governnance must be accompanied by the mechanism of enforcement of its orders. And in 1990's the judiciary has rightly done so in many cases. Among the most visible mechanism of enforcement has been the invocation of contempt of power, symbolised in Vasudevan case regardless of what might be said in the instant situation of the wisdom of activation of this mighty power. Along with the power of contempt of court, the innovation of new strategies have created an environment for administrative authorities to take judiciary seriously.

By institutionalising an element of individual accountability in democratic governance and denying the political/ bureaucratic class immunity from the exacting demands of the rules of law, it has not only made the state more ethical, power more accountable and governance more just, but also enhanced constitutional culture in Indian governance and management of public institution in India.

[54] Baxi, Upendra, " Judicial Activism ,Legal Education and Research in Globalising India", *Annual Capital Foundation Lecture*,(New Delhi, January20,1996)

# CONCLUSION

In the brief span of more than four decades of its working the judiciary has decided several thousand cases which had a vital bearing on the life of citizens individually and also were responsible for conditioning the socio-economic and political climate of the nation from time to time. The period from the Gopalan case to the Judges trasfers case vis-a-vis Keshvananda Bharati case has been a long way in which the judiciary's activist role has been evolved, particularly in the last two decades India has seen the full spectrum of the judiciary from the "committed" judiciary of the past to the "activist" judiciary of today. Although in the seventies lawyers and justices achieved a proper conception of judicial power as people's power, yet in the eighties the public interest movement innovated a direct unmediated form of people-judiciary partnership.

This partnership signified a democratisation of access to the Supreme Court by the simple process of people writings letter to justices (epistolary jurisdiction); drawing attention to the violation of other people's right (renovating the judicial doctrine of standing); it also entailed new forms of fact finding ( socio-legal commission of inquiry), enabled articulation of new fun damental rights ( right to dignity, privacy,

shelter etc) and forms of redress of violation of rights (compensation, damages, rehabilitation) and new forms of continuing judicial invigilation on governmental institutions (prisons, juvenile homes, women's protective homes, asylums for psychiatric care etc). The most important contribution of judiciary through PIL has been to transform the classical liberal rights mode enshrined in the constitution into a Paradigm of people's right. This contribution of judiciary vis-a-vis institutionalisation of PIL has been discussed in chapter one.

Chapter two examines the control of the judiciary over the bureaucracy from the period 1950 to 1990. The welfare philosophy state being the raison d'etre for the origin of bureaucracy, its growth has been accompanied efforts to exclude judicial review of administrative action, thereby putting limits to judicial control. However, the dichotomy between the rule of law and administrative law has vanished with the reorientation of the Diceian doctrine of rule law to include social and economic goals of the state. This has been examined in this chapter through an empirical analysis of important cases. The analysis shows that the working of judicial control has passed through three phases. Originating as review of administration, it matured as review of procedure and culminated as review of substance.

During this period although the courts have evolved techniques to minimise bureaucracy triumphant, otherwise likely to flourish

under the shelter of frequent legislative endeavour, to preclude judicial review of administrative action , yet it has responded positively only to the problems at systematic level. Through different judgements it has reconciled the conflict claims of fundamental right and directive principle of state polilcy. But the approach of a judiciary to the problems of non-performances, non-implementation inaction has been very cautious, sporadic and peripheral.

On these aspects the period of 1990's marks a departure. While the judiciary had contended itself with forbidding gross ministerial or bureaucratic wrongdoings in the past, it now demands positive performance and moral performance at that. While it continues to address the issue of substantive justice, it has evolved new devices and mechanisms to counter the hurdles that used to come up on the path of achieving the goals of substantive justice. These mechanism and trends are discussed in chapter three. The issue of corruption and non-performance of the mandatory duties of the administrative authorities are the new dimensions of the judicial control over bureaucracy, around which the issue of accountability and responsibility revolves · The judiciary has freed the Central Bureau Investigation from the clutches ofthe political executive; it has forced the officials to clean the streets; it has also punished the bureaucrats for the contempt of court order. And ,in the process it has innovated new techniques. In-Camera session, reporting to the courts instead of higher administrative authority, constituting committees, forcing

bureaucrats to be present during hearings and going beyond the parameters of contempt of court, are some of the substantial antidote to arrogance of bureaucratic power; all this thereby has institutionalised the individual accountability.

However this activism of judiciary has not put a full stop to the earlier role of judicial self-restraint. Rather the period of nineties have witnessed both type of roles of the judiciary depending on the issues it involves. The judgement of Supreme Court on the telecom piolicy and the Bombay High Court's dismissal of a PIL in the P.B. Sawant case are clear testimony to the fact of judicial non-intervention in executive sphere.

The lack of institutionalised leadership, a deeply divided parliament, inability and reluctance of the parliament to debate and decide isssues, abdication of responsibilities by the poliltical executive and its committed bureaucratic appendage, decline in the respectability of the politicians as a class enjoyed, which was fa cilitated by the new economic reforms and an increase in people's awareness are the some of the factors that this study identified, for the growth of judicial activism in handling the problems at the functional level. Keeping these factors in mind, the study argues that the doctrine of separation of powers should be interpreted in an operative terms. In other words, in a written constitution, with an entrenched Bill of Rights, including a fundamental right in Article 32 to

move directly the Supreme Court of India for redress of violation of basic rights, the doctrine of separation of powers only signifies a division of functions. Judicial deference to powers of other branches depends on the constitution power and duty under Article 32. That power and duty defines the meaning and scope of deference to coordinate branches of government. Therefore, respect to other branches is owed when it is constitutionally correct and constitutionally correct decisions are only those which are innocent of violations of fundamental rights of Indian people. This operative Indian doctrine of separation of powers has been further enriched by the doctrine of basic structure of the constitution. Therefore the increasing role of judiciary in India is a continuing aspect of its power of judicial review.

Furthermore the power to punish for contempt of court is enshrined in the constitution. If the function of constitutionalism is the protection of life and liberty of the people, courts should remain independent and powerful. Constitutionalism would prove an ineffective safeguard of liberty without an extraordinary measure of voluntary compliance with court orders by officials and private citizens not necessarily parties to the litigation. It is this necessity that has given rise to the frequent use of power for contempt of court. There would be no place or need for `judicial activism' in a culture formation where political power is sensitive to the values of constitutionalism; the necessity has

arisen because power seeks, to configurate its own law and 'jurisprudence' above and beyond the law and constitution.

In enriching the contents of fundamental rights and compelling the authorities to do their mandatory duties, under the law, the judiciary has not only started a sustained learning of the rule of law values in administration but also has induced a greater fidelity to constitutional values and visions in the actual practice of politics, making laws and policies, direction of economic and social developement, equitable distribution of resources, and promotion of just and people-friendly development of science and technology. Hence it has enhanced the Indian juristic sensibility and even to an extent Indian political sensibililty of democratic governance.

To conclude, the following are the findings of this study : (i)increasing role of judiciary in India is a continuing aspect of its power of judicial review; (ii) however its new role of taking on bureaucrats and political heavy weights is qualitatively different. It is more intense in some respects than in the past and it is continuity of the past in some other respects. This balance has made it less threatening to the system as a whole; (iii) the qualitative difference between the present approach of the judiciary and the past approach, at least, in part, the result of bureaucratic intertia, and a weak and indecisive leadership; (iv) by institutionalising the accountability and enforcing the authorities to do their duty it has brought

back the institutional vibrancy and has made the state more ethical, power more accountable and governance more just, thereby enhancing the constitutional culture in India's democratic governance.

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