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"PUBLIC CORPORATIONS IN INDIA"

By

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The evolution of the concept of corporation as a legal device to diversify the ownership from control of economic resources is a unique phenomenon of the modern world. As a dominant economic/service institution, it has come to be accepted in different countries with diverse legal systems[1]. In socialist countries particularly, the corporate device has furnished a ready technique for transferring the economic power from the individual to the state; in capitalist systems it is looked upon as a stragey of economic statemanship[2]. With the rapid growth of industrialisation and technological progress the corporations have assumed new characters and have aequired new dimensions. The structure, composition and authority of the corporations have constantly changed and increasingly a new type of corporations known as Public Corporations (or National Corporations), responsible not to the private share holders but to the public authority have come into prominence. The essence of such a corporate body is that it is clothed with the power of government and at the same time possess the flexibility and initiative of a private enterprise. Our concern is primarily with this type of corporation.

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1. See : Friedmann W. 'Law and Social Change' (1951). The legal status and organisation of the public corporation. pp: 187et seq. also "Forms and Functions of public enterprise" in 22 current legal problems (1969) pp: 79-101.

2. See : Cohen and Cohen, Readings in Jurisprudence and Legal philosophy (1953) pp: 841-47

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In India with the advent of independence and with the acceptance of welfare concept. Public Corporations have emerged[3]. If one looks at the constitutive acts of such corporations, one discovers that there are twotypes of such bodies. First there is a class of corporations, created by or under a specific Act of Parliament such as the life Insurance Corporation, Damodar Valley Corporation, Central Ware Housing Corporation, Food Corporation of India, Deposit Insurance Corporation, Road Transport Corporation, International Airports Authority, etc. such Corporate bodies function as responsible indepent organisations, not as part of any department of State. But they may be concerned with the execution of Policy of the Govt. within the field of their activities, as for example in the case of monetary policy, the Reserve Bank of India, State Bank of India. The Second class consits of companies established in terms of Section 617 of the Indian Act, 1956 such as the State Trading Corporation, Hindustan Steel, Sindri Fertilisers, Hindustan Machine Tools etc. A company which can be considered as private company under the Companies Act, can acquire the character of public corporation, if the entire capital is subscribed to by the Government. Thus there may be publicity owned private companies e.g. Andhra Pradesh Mining Corporation. (There appears to be no rationale for making a distinction between private and public companies, when they are owned by the government/governments. Such a distinction at best is only a formal one rather than a material one).

Functionally both the categories of corporations may be classified under three main groups viz.
1) Financial (2) Devemental and (3) Commercial and Industrial undertakings [4].

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3. Om Prakash : The theory and working of State Corporations with special reference to India (1962), which examines the state corporations in their theoritical setting and functional role and offers many interesting and practical insights into the working of public corporations.

4. Basu, Comparative Administrative Law (1969), Vol I. pp. 270-71; Jain and Jain, 'Principles of Administrative Law' (1971) p. 501; Also: Garner J.F. New Public Corporations in public Law (1966)., who groups them under three categories viz. (i) Operating commercial undertakings, (ii) Managerial bodies and (iii) Regulatory bodies - but admits that this system of classification has never been regarded as sacrosanct. p. 324.

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This classification, however cannot be considered as a scientific one since many of the corporations combine more than one function. The basic motivations, however, for the establishment of such corporations, appear to be that (i) they give expression to socialist philosophy (ii) they have the way for the nationalisation of economic resources (iii) they furnish a device to undertake nationaldevelopment and finally (iv) they furnish a strategy for rescue operations in times of crises. The extent of thepresent day role of the government in our national economy is quite apparent from the fact, that there were as many as 86 public undertakings by 1969 (excluding the Departmental concerns) under the control of Central Government alone. An examination of the structure of public corporations however, reveals that in India the member of public corporations established under specific statutes have been few when compared to the number of government companes registered under the Indian Companies Act, 1956. The preference for company type of organisations is due to the fact that a government company can be established with more ease and flexibility while a statutory corporation needs a specific legislation.

Further, incorporation, regulation and winding up of trading corporations including banking and financing corporations being exclusively committed to the Union (under entry 43/44 of list I), the states have to depend upon the Centre for necessary legislation.

The Government companies are independent and are not directly responsible to parliament. It is no doubt true that the Minister is the link, but his discretionary powers to give directions and to influence the companies is great and parliament has little control over such discretionary authority.

The autonomous character of the corporations, subject however, to governmental control at various levels gives rise to many problems of Administrative Law[5].

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5. See Wade, H.W.R. Administrative Law : (1961) pp:30-36 Griffith and Street; Principles of Administrative Law (1967): pp: 279-327; Jain and Jain, Opcit pp. 500-532 for a treatment of specific problems in the context of Indian Public Corporations.

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It will readily be admitted that not only according to law but in actual practice as well, such corporations are subject to extensive governmental control both in relation to their policy and working. Paradoxically, the excercise of discretionary powers rests on the statutory foundation, is as much as, the Government possesses extensive powers to dicitate policies, control the management by appointments to the govering Boards and regulate the affairs of the Corporations in many ways. The Central Govt. even possesses the power to modify the provisions of the Companies Act in relation to their application to govt. companies and may even declare that certain provisions shall not apply to such companies. Consequently, the preference for the company form of organisation and their proliferation has unwittingly contributed for the enhancement of discretionary powers of the executive arm of the government. However, to two types of corporations, mentioned above, differ greatly in regard to ministerial control, finance and probably also judicial supervision. By way of illustration, we may analyse the statutory provisions relating to the Food Corporation, Agricultural Credit Corporation and International Airports Authority[6]. In all these cases the entire capital comes from the government. Although the corporations have a distinct legal personality and are empowered to deal as such, Govt. has over-riding powers in several areas. Under Sec. 6 of the Food Corporation Act (1964), the Corporation shall be guided by such instructions on questions of policy, as may be given to it by the Central Goverrment, and the decision of the Central Govt. on policy questions is final. Secondly, all but one member of the Board of Directors shall be appointed by the Central Govt. (Sec. 7). The Central Govt. may constitute oneor more advisory committee to advise the Govt. or the Corporation in regard to 'any' matter connected with the purpose of the Act (Sec.II). Further the management of the State Food Corporation is subject to the general superintendence and direction of Central and State Govts. (Sec. 19). And finally under Sec. 44 of the Act, the Central Govt. may make rules in relation to the terms and conditions of appointment of directors; the composition of Advisory Committees, additional functions of the Corporations, the manner in which the corporation may invest its funds, and 'any other matter'. But surprisingly the Act, permits the audit of accounts by the Auditors qualified to act as auditors, under Sec. 226 of the Companies Act 1956 and not by the Comptroller and Auditor General of India.

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6. The Food Corporations Act (1964)
The State Agricultural Credit Corporations Act (1968)
The International Airports Authority Act (1971).

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Similarly the State Agricultural Credit Corporation Act (1968) vests in the Govt. extensive power to give policy directions (Sec. 8), appoint managing director (Sec. 9), extend the scope of the activities of the corporations (Sec. 19(J), limit the borrowings and deposits of the corporation (Sec.22), regulate the investment of surplus funds (Sec. 27), make rules in relation to the functions of the Executive Committee, prescribe rules of procedure, and generally in relation to any other matter which is required to be, or may be permitted for carrying out the purposes of the Act.

The International Airports Authority Act 1971, under which, the Central Govt. has constituted an authority styled International Airports Authority of India, as a body corporate, offers an extreme example of Governmental Control. Under it, the Government has not only the power of appointment to and removal from service any member, but the entire programme of activities and financial estimates, are to be submitted to the Central Government for prior approval. The Government reserves the power to revise such estimates and plans. The parliamentary control in this sphere is almost non existent. The powers, to borrow and invest funds is subject to the consent and regulation by the Government.

The most striking feature of this enactment is that the Central Government is empowered to supersede the Authority if it is unable to discharge its functions in times of emergency or if it has defaulted in complying with 'any directions' issued by the Central Government under the Act, and if the public interest so demands, As in the case of Food Corporation and Agricultural Credit Corporation, the Govt, can issue specific directions on the questions of policy and management (Sec. 34 and 35).

A common feature to all these three corporations is that, these bodies are empowered to make regulations with respect to the procedures to be followed for the transaction of business, the service conditions, remuneration, duties and conduct of officers and employees, the delegation of powers to make regulations on 'any matter' which may be necessary for the efficient conduct of the affairs of the Corporation.

It will be seen from the above that the Government and authorities of the corporations enjoy wide discretionary powers the excercise of which may bind not only the officers and servants but the members of the public who come within the sphere of their operation. The broad question that may be posed in this context is whether these corporations differ in any way from the government authority itself. Secondly in view of the legal personality of the corporation the question of vires of the act also assumes importance. Thirdly most of the corporations have general duties, functions and objects and they are couched in imperative terms. Such duties also include duties to the general public to provide a proper and efficient service. Naturally the question that arises is whether these statutory duties can be the subject matter of enforcement and if so by what means?

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Since the powers of the Corporations are mostly derived from the Statutes and Statutory instruments they are without exception subject to the Doctrine of Ultra vires. Therefore, any action may be challenged which is in excess of the power conferred by the statute instelf. But the degree of the elasticity of the powers as we have noted above, conferred upon the corporation under the statute has a direct bearing on the question of ultravires. The power of the Govt. and the corporation are unlimited in scope and in their discretionary nature. Admittedly, the powers of a corporation created by a statute are limited and circumscribed by the statute which regulate it, and extend no further than is expressly stated therin, or is necessarily or properly required for carrying into effect the purposes of its incorporation. Generally what the statute does not expressly or impliedly authorise is to be taken as prohibited[7].

But in those cases where greater discretion is placed in the hands of the government/governing body the scope for the effective control either by parliament or judiciary is diminshed. This gives rise to the question of the extent of judicial review of the actions of public corporation as public authority forming part of the public administration itself. The test for the application of the doctrine of ultravires being the excess of power and or abuse of power, it is uncertain whether the courts would interfere where motives are alleged in the excercise of administrative powers. In India as well as in England the courts have been reluctant to use the Doctrine of Ultravires as an instrument of interference with administrative responsibilities. It is however, possible to visualise nice questions as to the extent to which the public duties imposed upon corporations corporations engender private rights. As it is apparent from the powers given to the Food Corporation, State Agricultural Credit Corporation, International Airports Authority, Electricity Boards, State Road Transport Corporations etc. that a vast majority of potential conflicts are covered by the elasticity of such powers and hence are removed from the judicial forum. It is needless to reiterate that the judicial control of the excercise of administrative power by such corporations is at present in our country confined to only a few marginal, perhaps notable areas and is far from being comprehensive. The writ of Mandamus is the appropriate remedy against statutory bodies. But such a writ will not normally be issued against a Govt. company. The judicial pronouncements in this sphere are few[8],

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7. Halsbury's, The Laws of England' Vol. 9(1954). p. 63.

8. Corporation of Nagpur Vs. N.E.L.P. : A.I.R. (1958) Bombay 498: Praga Tools Corporation Case: AIR (1969) SC. P. 1309, 1310: See also Jain and Jain: P. 530.

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and the case law suggests that the writ of mandamus will lie if it is a public utility concern. The statutory bodies have been outside the purview of writ jurisdiction, unless a statutory duty is imposed by the provisions of the statute.

It may be observed in general, that the control of the corporations through the writs is rather in a nebulous state of affairs. This is partly because of the legacy of common law traditions and subtle distinctions between statutory, discretionary and general duties of the corporations. An alternative to this situation lies in the ministerial supervision parliamentary debate and public auditing.

So far as the financial accountability of statutory corporations is concerned, the relevant statutes provide for independent audit (here again the procedure is not uniform; in some cases the audit is by Chartered Accountants and in others by the Comptroller and Auditors General) and the executive is required to make reports to the parliament. These reports furnish a means for parliamentary scrutiny and view of the working of such undertakings. But a disquieting fact is that such reports are too often destined for pigeonholes. In so far as Govt. Companies are concerned (in addition to the statutory audit) the Comptroller and Auditor General possesses the right to comment upon, or supplement to the Statutory Audit Report, which together with the Annual Report on the working of the Company, are required to be laid before the Parliament. Here again the Parliamentary control is indirect. It is well known that in most of the Government companies the private holding in the capital is minimum. For example the State Trading Corporation, hot-withstanding its formal position under the Companies Act, in substance, is a department and an organ of the Govt. of India with the entirety of its capital subscribed by the Government. It may be termed more or less as the "Third arm" of the Government. Here the Executive claims more powers to give directions and control the affairs of the corporation but is notheld anserable to its actions. It is not held answerable to its actions. Is it not reasonable to assume that the nations representatives in Parliament should be able to excercise a detailed control over them? More so because, Parliament is something more than a share holder.

Yet another important question in the context of public corporation is whether the shell of the corporation should not be cracked open under justifiable circumstances[9].

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9. See Generally: Krishna Bahadur "Personality of Public Corporation and lifting the Corporate Veil" 14 J.I.L.I (1972) pp: 207-227

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It is suggested in certain quarters that public corporation, being principally a non-profit making body, generally getting capital from the consolidated Fund does not face problems similar to those faced by private corporations and therefore the theory of lifting the veil of the corporation has no relevance to the Public Corporations. It may be pointed out here that in the State Trading Corporation's case[10], the Supreme Court refused to pierce the corporate veil in the context of a claim of fundamental Rights by the Corporation. The court did not consider it necessary to lift the corporate veil for purposes of vesting fundamental Rights on Corporations. It did not think that the theory was against the judicial principles. It may be submitted here that not all the statutory corporations and government companies are non profit making agencies. In fact they are competing with the other private commercial undertakings and hence there is little justification for treating them differently especially when they are placed in an identical situation.

The arguement that the veil of the corporation should be lifted to determine the status of its employees and the nature of their employment so as to afford minimum protection under Art. 311 of the Constitution, has also not appealed. The courts have ruled that the employees of the public corporations are not Civil servants[11]. Theoritically the distinction between a Civil servant and an employee of the Corporation may be valid on the touchstone of traditional principles. In reality the distinction between service under government departments and service under corporations which are subject to dominant government is virtually meaningless. It is pertinent to note that employment policies of various statutory Corporations are decisively influenced by the Govt. And in most of these bodies, important positions are occupied by civil servants either as deputationists from govt. departments or as experts. This class of personnel enjoy the protection given under Article 311 of the constitution; for e.g. a class of employees who have been transferred from the Departments to Food Corporation and International Air-Ports authority (See Sec. 12 A(5) of the Food Corporation Act (Amended) 1968 and Section 12 (2)(e) of the International Airports Authority Act 1971, Whereas the personnel employed by the Corporation directly are not entitled to claim such benefits simply because their service conditions are subject to the rules framed by the corporation. Considered from a wider perspective, this may amount to some kind of discrimination within the system and is anachronistic. Therefore, even if this

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10. AIR. (1963) SC. 1811.

11. Bibhuti Bhusan vs. Damodar Valley Corporation A.I.R.1953, Cal.581, The Indian Airlines Corporation vs. Sukhdeo Rai A.I.R.(1971) S.C.1828; and Madan Mchanlal vs. Om Prakash A.IR. (1957) All.384.

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class of employees cannot claim as of right the protection of Article 311 of the Constitution, should they not be given reasonable opportunities to explain their position on the basis of the principles of natural justice?

A recent judgement of Supreme Court which reaches the high watermark illustrates this problem. In Indian Airlines Corporation Vs. Sukhdeo Rai (AIR 1971 SC 1828), it was held that though the Respondent, an employee of the Indian Airlines Corporation, was dismissed in contravention of the Regulations made under the Act the dismissal could not be declared as null and void. It was held that the relationship between the corporation and the respondent was nothing but that of relation of master and servant. The court said, "The fact that the corporation was set up under and regulated by Act XXVII of 1953 does not envisage any change." The Court following its own earlier decision in S.R. Tiwari Vs. Dist. Board of Agra (AIR 1964 SC 168), laid down the three exceptions to the general rule of 'Master and Servant' where such declaration would be issued. The exception are (i) cases of public servants falling under Art. 311 (2) of the Constitution (ii) cases falling under the Industrial Law and (iii) cases where acts of Statutory bodies are in breach of a mandatory obligation imposed imposed by a statute.

However, nice these principles may be, they would not provide adequate safeguards for the persons who become the victims of the whims of the management executives. It may be argued that with the greater identification of the public corporations with the Govt. and with their status as public servants under other laws, why an exception should be made in context of protection under Art. 311(2) of the Constitution alone. Moreover the statutory corporation has been considered as 'State' within the meaning of Art. 12 of the Constitution.

As far as the contractual liability of the corporation is concerned, the position in India does not present any difficulty. The State itself is liable in contract as per the provisions of the Constitution. With respect to tortious liability of the State, the position is rather anamolous because of the absence of any clear legislation, and Art. 300 of the Constitution. This has resulted in the application of the age old distinction between the sovereign and non-sovereing functions of the state in determining the liability. It may be noted that the continental systems have developed elaborate and tough principles of legal libaility, for government and public authorities. The common law world has no clear duality of systems and jurisdictions. The liability of the State in India is a confused subject and the confusion is still greater as far as the suability of public corporation for

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their wrongful action, is concerned.[12]

C O N C L U S I O N :

The expanding horizons of public corporations, their identity with the governmental powers, the close and effective control by the government of the functional managerial and policy matters, has brought into relief not only the critical problems of jurisprudence but more significantly the question of administrative directions and the limits thereof. Briefly stated the important questions which required to be tackled are :

1. Whether the statutory Corporations and government companies should be treated as public authorities (particularly because some of them bear close idenity with the state itself) for purposes of issuance of writs.

2. Whether the fiction of corporate personality should be rigidly adhered to even where the incongruities of such personality are quite apparent.

3. Whether the employees of Public Corporations should not enjoy the identical benefits given to the civil servants, under the Constitution and on the basis of administrative jurisprudence.

4. How a citizen can claim relief where the abuse and excess of discretionary powers of the corporations' officials is the cause of injury.

5. Whether the principle of public accountability and parliamentary control over the government companies should not be tightend, particularly because this class of corporation is less controlled by the parliament; and (6) how the parliamentary and judicial controls can be made effective in the context of expanding coutours of 'Administrative discretion'.

This paper has attempted to project these broad issues in the hope that the Seminar will explore them in depth so as to find solutions within the framework of Law to strengthen the autonomous character of the Corporate personality and prevent them from simply becoming a "third arm" of the Government.

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12. Arora, R.S. State Laibility and the Public Corporation in India: Public Law (1966) p. 239 at p. 241