CHAPTER-XI
THE ROLE OF JUDICIARY IN REGARD TO EXECUTIVE AND LEGISLATIVE INACTIONS IN PURSUIT OF SOCIO-ECONOMIC JUSTICE

A. Prelude

Though the doctrine of separation of power is traceable to Aristotle, but the writings of Locke and Montesquieu gave it a base on which modern attempts to distinguish between legislative, executive and judicial power is grounded. Montesquieu, in his book wrote that there would be an end of everything where the same person or body were to exercise all the three - legislative, executive and judicial-powers. But in the face of new demands on the government to solve many complex socio-economic problems of the modern society; new institutions have been created and new procedures evolved by which the doctrine of 'separation' has been largely diluted.

Article 50 of the Indian Constitution, which is one of the directive principles, deals with separation of judiciary from executive. It provides:

The State shall take steps to separate the judiciary from the executive in public services of the State.

In India, the doctrine of separation of powers has not been recognised in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be said that our constitution does not contemplate assumption by one organ or part of the State of functions that essentially belong to another. In other words, in the Indian Constitution there is a separation of powers in a broad sense only.

3. See Davis, I, Administrative Law Treatise, 6(1958). The strict separation theory was dented to some extent when the Courts conceded that legislative power could be conferred on the executive and thus introduced the system of delegated legislation. See M.P. Jain and S.N. Jain, Principles of Administrative Law, 19(1979).
in its classical sense, which is structural rather than functional, cannot be literally applied to any modern government because neither the government can be kept in water tight compartments nor any government can run on strict separation of powers. No constitution can survive without a 'conscious adherence' to its system of checks and balances.

Article 37 makes all the directive principles "fundamental in the governance of the country" and it further provides that "it shall be the duty of the state to apply these principles in making laws". The directive principles are binding on the law makers as ordinarily understood, but they should equally inform and illuminate the approach of the Court when it makes a decision as the Court also is State within the meaning of article 12 and makes law even though interstitially. Judicial process is also "State action" under article 37 and the judiciary is bound to apply the directive principles in making its judgments.

It is not primarily the conundrum of language which makes the judge last word on the meaning of the law, but the discovery he makes of the legislative will hidden in those words. Behind the written words of every law lies the latent legislative meaning which gives the law its energy, making it a living entity which possesses an inherent power of evolutionary modulation to suit every situation in which it may be required to operate.

The Courts in the exercise of their jurisdiction may pass such decree or make such order as is necessary for doing "complete justice" in any cause or matter pending before it. At the same time, by virtue of article 38, the State is under an obligation that it shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Article 38 further enjoins the State with a duty that it shall, in particular, strive to minimise the inequalities in

6. See article 141 of the Constitution which provides, "The law declared by the Supreme Court shall be binding on all Courts within the territory of India.
9. See article 142(1) of the Constitution.
income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people.

Thus, all the three organs of the State are under an obligation to create first a social order in which socio-economic justice is a living reality for all. And whenever and wherever, one organ fails to discharge its assigned role, the other organ of the State steps in. The role of the judiciary in this regard had been encouraging in the recent years. The judiciary, being one of the organs of the State, is not only duty bound to apply the directive principles in the making of laws but it can, if the State commits a breach of its duty by acting contrary to these principles, prevent it from doing so. The Courts, in order to discharge its duty, have evolved new legal strategies and processual measures like affirmative action and exemplary costs, which are implicit in articles 37 and 38 of the Constitution. Whenever the government failed to implement the directive principles, the Courts have adopted the course of affirmative action and whenever the government acted contrary to the socio-economic policies of directive principles, the courts have gone to the extent of granting exemplary costs against the State.

In the present Chapter an attempt has been made to discuss a few important cases where the judiciary applied the theory of affirmative action and in certain cases even granted the exemplary costs. And in the end proposed perspectives of the judicial role have been discussed.

B. Affirmative Action Theory

The general aim of all affirmative action programme is to raise the level of those groups that have suffered from discrimination in the past to a position to proportional equality with those who have previously been relatively free from the disadvantages imposed by discriminatory policies. There are many provisions in the Constitution which sanctions

12. See Burton M.Leiser, Liberty, Justice And Morals, 317(1979). See also M.P.Singh, "Jurisprudential Foundations of Affirmative Action:Some Aspects of Equality And Social Justice",10 & 11 Delhi Law Review,39 and 56(1981-82). The learned author has used the expression"affirmative action" to denote what is called compensatory, protective or reverse discrimination, positive equality, etc. The author has given no special reasons for preferring this expression over the others. See note 1,in ibid.
affirmative action.13

The Courts while deciding the cases before it should not adopt a rigid attitude of negativity, for example, stop striking down a law, but it should adopt affirmative attitude, that is, suggest the ways and means to remedy the situation arising out of its decision. It is necessary for doing "complete justice" in any cause or matter pending before it.14 This principle of affirmative action has been explained by the Supreme Court in State of Kerala v. T.P.Roshna.15 In that case a government scheme of admission to the medical colleges was declared unconstitutional by the Court. The Court, however, did not stop at the stage of declaring the scheme invalid but it suggested possible methods for implementation of its judgement. Mr. Justice Krishna Iyer, speaking for the Court pointed out that if they had left the judgement of the Court in the conventional form of merely quashing the formula of admission, the remedy would have aggravated the malady - confusion, agitation, paralysis.16 The learned judge further observed:

The root of the grievance and the fruit of the writ are not individual but collective and while the 'adversary system' makes the judge a mere umpire, traditionally speaking, the community orientation of the judicial function, so desirable in the Third World Remedial jurisprudence, transforms the Court's power into affirmative structuring of redress so as to make it personally meaningful and socially relevant. Frustration of invalidity is part of the judicial duty; fulfilment of legality is complementary.17

Thus, the principle of affirmative action is within the jurisdiction of the court under articles 32 and 136 of the Constitution.

Ratlam Municipality v. Vardichand,18 is a "path finder in the field of people's involvement in the justicing process". The key question to answer in this case was whether by affirmative action a court can compel a statutory body to carry out its duty to the community.19 This question arose in the context of the following circumstances. The Ratlam Municipality

13. See, for example, articles 14,15,16,21,32,37, 38, 41,42, 43, 46, 136, 143, 226 and 335 of the Constitution.
16. Id. at 776.
19. Id. at 1623. The Court stated, "At issue is the coming of age of that branch of public law bearing on community action and the Court's power (conted.)
neglected to discharge its statutory duties like cleaning of public streets and public places, abating all public nuisance and disposing of night soil and rubbish etc. The hygienic conditions in municipal wards became so deplorable and unbearable that the residents of one of the wards, when they failed to move the municipality in any way, resorted to the Court action under section 133 of the Criminal Procedure Code.20

The concerned Magistrate ordered the municipality to abate the nuisance complained of by the residents within fifteen days. The municipality instead of complying with the order of the Magistrate and discharging its statutory duties, contested the order and finally the matter reached the Supreme Court.

The Supreme Court expressed appreciation of the "activist application of Section 133, Cr.P.C." by the Magistrate for the larger purpose of making municipality "do its duty and abate the nuisance by affirmative action."21 Rejecting the plea of the municipality of insufficiency of funds, the Court pointed out that financial inability cannot validly exonerates the municipality from statutory liability and it has no juridical base. The Court further observed:

"The Criminal Procedure Code operates against statutory bodies and others regardless of the cash in their coffers, even as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provision.22"

The request of the municipality for more time to implement the Magistrate order was also turned down by the Court. The Court was not satisfied by merely making a general order to abate the nuisance, but it went further and took a more activist view of its role. It sought to frame a scheme and fix a time-table to implement the same and even arrange to oversee the implementation of the scheme. The Court took a 'realistic' and not 'idealistic' view of the situation and approved a very modest, and not a grandiose, scheme to eliminate the 'worst aspects' of the insanitary conditions. The court also directed that the scheme be executed within one year and that the Magistrate

20. According to Section 133 of Criminal Procedure Code, when a magistrate considers that any lawful obstruction or nuisance should be removed from any public place, he may make a conditional order requiring the person causing such obstruction or nuisance to remove the same.
21. Supra note 18 at 1624.
22. Id. at 1628.
would inspect the progress of the work. The Court further directed that if
the approved scheme was not fully complied with within the stipulated period
then the magistrate should prosecute the municipal officers responsible
under section 188 of the Criminal Procedure Code. The court also exhorted
the State government to give sufficient funds to the municipality to enable
it to implement the scheme. The attention of the government was also drawn
to the directive principle contained in article 47 which obligates the State
to take steps to improve public health as amongst its primary duties. The
Court made a significant observation as regards the directive principles and
future judicial policy. It runs as follows:

Where Directive Principles have found statutory expression
in Do's and Don't's the Court will not sit idly by and allow
municipal government to become a statutory mockery. The
law will relentlessly be enforced and the plea of poor finan­
ce will be poor alibi when people in misery cry for justice.
The dynamics of the judicial process has a new 'enforcement'
dimension not merely through some of the provisions of the
Criminal Procedure Code(as here), but also through activated
tort consciousness. The officers in charge and even the
elected representatives will have to face the penalty of
the law if what the Constitution and follow-up legislation
direct them to do are defied or denied wrongfully. The wages
of violation is punishment, corporate and personal.

It is submitted that the present case is a testimony of a new judi­
cial activism to enforce statutory duties against administrative bodies
through affirmative action. In the present case, an obscure statutory provi­
sion in the Criminal Procedure Code was made use of to enforce a statutory
duty on a municipality. But there is no apparent reason as to why mandamus
cannot be made use of for a similar purpose. Furthermore, this principle
of affirmative action can also be extended to any other statutory body.

Thus, in order to promote the welfare of the people and to secure
just social order, as envisaged by the directive principles it is necessary
that Courts adopt a dynamic role not only to enforce duties against indivi­
duals, or quash wrongful acts of public authorities but also to enforce duti­
es against public authorities through affirmative action.

23. Id. at 1631.
24. Ibid.(Emphasis original)
25. Ibid.
The judiciary has also shown its dynamism through affirmative action in many other cases dealing with workers and labourers by protecting them against exploitation and against moral and material abandonment and ensuring socio-economic justice as envisaged by the various provisions of the directive principles.

In Randhir Singh v. Union of India, the Supreme Court interpreted the doctrine of "equal pay for equal work", enshrined in article 39(d) of the Constitution, as implicit in articles 14 and 16. The Court pointed out that "equal pay for equal work" is not a "mere demagogic slogan" and directed the government to pay the "equal pay" to the petitioner as was being paid to other persons doing the same work. The Central Government, the State Governments and likewise, all expected to function like model and enlightened employers and argument that the principle of "equal pay for equal work" is an abstract doctrine which cannot be enforced in a court of law should ill- come from the mouths of the State and State undertakings.

In Sheela Barse v. State of Maharashtra, the Supreme Court gave detailed directions to the government with a view to providing adequate protection to women prisoners in particular. There are many other cases where the Supreme Court has issued directions to the State and Central governments to improve the conditions of jails and to provide adequate protection to women, children and undertrials.

In Lakshmi Kant Pandey v. Union of India, the Supreme Court, in the


28. See supra note 13.

29. See, for example, Sheela Barse v. Union of India, A.I.R.1986 S.C.1773; (conted.)
absence of any statutory enactment in India providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, issued certain directions and laid certain guidelines and thus, fulfilled the mandate of article 39(e) and (f) of the Constitution which provides that the State shall direct its policies towards securing, *inter alia*, that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in a condition of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the Constitution makers to protect and safeguard the interest and welfare of the children in the country.

Thus, it is submitted, that although directive principles have to be implemented by the legislature and the executive, but the court is also equally responsible for their implementation through liberal judicial interpretation or through affirmative action. Whenever the other two organs of the State have failed to implement the policies of the directive principles, the third organ, that is, the judiciary has to perform its role of implementing them one way or the other. And to such an action or the role of the judiciary, we can not call "excessive judicial legislation".34

The Supreme Court while issuing certain directions in the matter of procedure to be followed for adoption of children by foreigner and Indian parents, did not adopt any rigid approach. In view of the difficulties faced by some of the agencies in implementing the directions by the Supreme Court, it modified some directions and also issued certain new directions.35 This is a very healthy trend which the Supreme Court has set up. Because by adopting this flexible attitude the Court has ensured that the directions and guidelines do not remain only as 'paper tigers' but are implemented in fact.

In *P.Nalla Thampy Thera v Union of India*,36 the petitioner, a resident of Kerala and a commuter of the Indian Railway alleged that by not

---

implementing the reports of the Kunzru, Wanchoo and Sikri Committees, which had been appointed to enquire and report about the numerous train accidents from 1970, the Union of India has failed in discharging its constitutional obligations and had violated, inter alia, the fundamental right of the commuters guaranteed by Articles 19(1)(d) and 21. R.N. Misra, J., speaking for the Court admitted that the "implementing machinery has become non-functional", but did not issue any direction to the union of India in view of the fact that government have limitations both of 'resources' and 'capacity', yet it was hoped that the government and the administration would rise to the necessity of the occasion and take it as a challenge to improve this great public utility in an effective way and with an adequate sense of urgency.

It is submitted that this decision seems to be erroneous and compels us to re-read Ratlam Municipality. In that case the court had rightly pointed out that human rights of Part III have to be respected by the State regardless of budgetary provisions and that financial inability validly cannot exonerate the statutory authority from its statutory liability and it has no juridical base.

Recently the judiciary has also shown its deep concern on the issues relating to environment which are of significance and for welfare of the generality of people living in the country. From R.L. & E Kendra, Dehradun v. State of U.P., to M.C. Mehta v. Union of India, the concern of the judiciary for protection and improvement of environment, as enshrined in Article 48-A of the Constitution, is quite evident. It has issued number of directions and suggested a number of measures for the protection and improvement

37. Id. at 78.
38. Id. at 80.
39. Supra note 18.
40. See supra note 22.
of the environment. Thus, the judiciary has brought the goals of directive principle in article 48-A closer to the life.\textsuperscript{43}

One important question which arises for our consideration is that can the judiciary through affirmative action compel the government to initiate any particular legislation under the guise of redressing a public grievance or ensuring socio-economic justice to people? This question was considered by the Supreme Court in State of H.P. v. Student's Parent, Medical College Shimla,\textsuperscript{44} and the answer has been given in the negative.

In this case a guardian of a student of Medical College, Shimla, addressed a letter to the Chief Justice of Himachal Pradesh High Court complaining of ragging of freshers by senior students. The High Court treated the letter as writ petition and directed the State Government to constitute an anti-ragging committee and called for its report within six months. The Committee, \textit{inter alia}, recommended that the government should initiate a legislation in regard to ragging as early as possible.

Thereupon, the High Court issued directions to the government for the implementation of the various recommendations of the committee and further asked the Chief Secretary to the government to file an affidavit within three months setting out the action proposed to be taken in the matter of anti-ragging legislation.

Bhagwati, J., (as he then was), speaking for the court pointed out that "the judiciary has to be extremely careful to see that under the guise of redressing public grievance it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature".\textsuperscript{45} The learned judge further pointed out that the directions given by the High Court were nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curb the evil of ragging which it was not entitled to do.\textsuperscript{46} It was further observed:

\begin{quote}
It is entirely a matter for the executive branch of the Government to decide whether or not to introduce any particular legislation. Of course,
\end{quote}


\textsuperscript{44} A.I.R.1985 S.C.910.

\textsuperscript{45} Id. at 911.

\textsuperscript{46} Id. at 913. According to Parmanand Singh, the affirmative role played by the High Court through public interest litigation was set at naught by (conted.)
any member of the legislature can also introduce legislation but the court certainly cannot mandate the executive or any member of legislature to initiate legislation, however necessary or desirable the court may consider it to be. That is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution. If the executive is not carrying out any duty laid upon it by the Constitution or law, the Court can certainly require the executive to carry out such duty...47

It is submitted that the court has rightly pointed out that is the domain of the executive to decide whether a particular piece of legislation is to be introduced or not. If this distinction between the executive and judiciary is not kept then it is contrary to the spirit of article 50. The duty of the court is that where it finds that the executive is remiss in discharging its obligations under the Constitution or the law, so that the poor and the under-privileged continue to be subjected to exploitation and injustice or deprived of their socio-economic rights or that socio-economic legislation is not being implemented thereby depriving them of the rights and the benefits conferred upon them, the Court certainly can and must intervene and compel the executive to carry out its constitution and legal obligations and ensure that the deprived and vulnerable sections of the community are no longer subjected to exploitation or injustice and they are able to realise their social and economic rights. It is in this sense that the affirmative action of the court has to play its role.

When the court passes any order in public interest, the Court does so not with a view to mock at legislative or executive authority or in a spirit of confrontation but with a view to enforce the Constitution and the law, because it is vital for the maintenance of the rule of law that the obligations which are laid upon the executive by the Constitution and the law should be carried out faithfully and no one should go away with the feeling that the Constitution and the law are meant only for the benefit of a fortunate few and have no meaning for the large number of half-clad, half-hungry people of this country. But at the same time the court cannot usurp the functions assigned to the executive and the legislature under the Constitution.48

the Supreme Court. See Parmanand Singh, "Public Interest Litigation", XXI, A.S.I.L. 160 at 165(1985). It is submitted that if the direction is only for placing the report of the progress before the court for its information, then it is a valid direction.
47. Supra note 44 at 914.
48. Ibid.
Thus, if the Constitution is to have meaning for millions of Indians, then the legislature and the executive must discharge their duties. They must implement the various provisions of directive principles ensuring socio-economic justice to all. At the same time the role of the Court is that of a reformer because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But in doing so the courts can certainly not encroach upon the spheres of purely legislative or executive activity.

State of H.P. v. Umed Ram is a landmark case on the scope and application of affirmative action. This case arose in the following circumstances. Certain poor residents, mostly Harijans, of tehsil and district Shimla addressed a letter to Hon'ble Chief Justice of Himachal Pradesh High Court, complaining that the government had sanctioned the construction of a road upto their village and after some portion of the road was constructed, further construction of the road has been stopped in collusion with the authorities. The High Court treated the letter as a writ petition and issued the following directions.

First, the High Court directed the State Government to carry out the construction as quickly as possible within the sanctioned limits as communication in the hills is difficult and to a hillman, road is life line. Secondly, the High Court directed that the case be listed again after three months and the Superintending Engineer will on that day place on record of this case a report with regard to the progress made during the intervening period.

The present petition came as a special leave to appeal in which it was argued that there is no power with the Court to direct the government to complete a particular project within the sanctioned time as it involves financial expenditure and the procedure regulating the financial matter of the State was the exclusive domain of the legislature.

49. See, for example, Mohd. Ahmed Khan v. Shah Bano Begum, A.I.R.1985 S.C. 945 at 954 and Jorden Diengdeh v. S.S.Chopra, A.I.R.1985 S.C.935 at 936. In these cases the Court reminded the legislature of their duty to enact legislation in pursuance of the directive principle enshrined in article 44 but did not legislate itself. The court in order to provide justice to the parties before it interpreted the relevant provision of the law accordingly. It is submitted that the approach of the Court in the above mentioned cases is in consonance with the constitutional spirit.

51. Id. at 850.
52. Id. at 851.
53. The argument of the State was based on articles 202 to 207 of the Constitution, Ibid.
The Court considered three important questions, namely, how far the court could give directions which are administrative in nature and secondly, whether any direction could be given to build roads where there are no roads for the enrichment of the quality of life and thirdly, whether the court could direct that the administration should report from time to time so that the action taken can be supervised by the Court.

So far as the first and second questions are concerned, the court pointed out that it is for the legislature to legislate, the executive to implement and carry out that legislation and the judiciary to supervise. The court further pointed out that "affirmative actions are sometimes necessary to keep the judiciary in tune with legislative intention". Affirmative action in the form of remedial measure "activises" or "energises" the executive action and thus, the High Court was within its power to issue the first direction.

Regarding the third question, that is, the direction of the Court to report to the Court what progress had been made, the Supreme Court held that there was no need for the High Court to direct that the matter be listed again before the Court after three months. However, the Supreme Court did not delete this part of the order of the High Court but directed that this be placed before the High Court only to inform it as to what steps had been taken and thereafter the High Court might not take any further action and leave it to the judgement of both legislature and executive.

Explaining the scope of affirmative action, Sabyasachi Mukharji,J., speaking for the Court observed:

Affirmative action in the form of some remedial measure, in public interest, in the background of the constitutional aspirations as enshrined in Art.38 read with Arts. 19 and 21 of the Constitution by means of judicial directions in cases of executive inaction or slow action is permissible within the limits.

It is submitted that the learned judge has rightly explained the true scope of affirmative action. Affirmative action of executive inaction

54. Id. at 854. The Supreme Court placed its reliance on the observations of Pathak, J.,(as he then was) in Bandhua Mukti Morcha v. Union of India, A.I.R.1984 S.C.802. See also Chhatrapati Singh,"Right to Life:Legal Activism or Legal Escapism", 28 J.I.L.I.249(1986).
55. Supra note 50 at 855.
56. Id. at 856.
is permissible and depends upon the facts and circumstances of each case.
Its dimension is never closed and must remain flexible. 57

In Shri Sachidanand Pandey v. State of W.B., 58 the Supreme Court
pointed out that in an administrative action if the government is alive to
the various considerations requiring thought and deliberations and has
arrived at a conscious decision after taking them into account, it may not
be proper for the court to interfere in the absence of malafides. On the
other hand, if relevant considerations are not born in mind and irrelevant
considerations influence the decision, the Court may, interfere in order
to prevent a likelihood of prejudice to the public. 59 Explaining the role
of the Court in the implementation of socio-economic policies, the Supreme
Court pointed out that

When the Court is called upon to give effect to the
Directive Principles...the Court is not to shrug its
shoulders and say that priorities are a matter of
policy and so it is a matter of policy-making autho­
rity. The least that the Court may do is to examine
whether appropriate considerations are borne in
mind and irrelevancies excluded. In appropriate cases,
the Court may go further, but how much further must
depend on the circumstances of each case. The Court
may always give necessary directions. 60

Thus, it is submitted, that the affirmative action by the judiciary
is permissible and is implicit in the various provisions of the Constitution.
But while taking the affirmative action over administrative inaction , the
Court has to function within the permissible limits of judicial review which
will depend upon the circumstances of each case.

C. Exemplary Costs

It is for the legislature to legislate, the executive to implement
and carry out that legislation and the judiciary to supervise. The proper

57. See, for example, Olga Tellis v. Bombay Municipal Corporation, A.I.R.
latter case the Supreme Court was satisfied that government was taking
steps for improving slums and providing alternative accommodations. Hence
no direction was issued except that the eviction would take place after
some time.


59. Id. at 1114.

60. Id. at 1115. See also Vincent v. Union of India, A.I.R.1987 S.C.990.Where
banning of injurious drugs was sought by way of public interest litiga­
tion, the Supreme Court pointed out that judicial proceedings is not the
appropriate forum but since issue being of national importance, it issued
certain directions. See also Social Work & Research Centre, Banawara v.
(conted.)
role of a judge is to do justice between the parties before him. If there is any law which seemingly impairs the process of justice, then it is the province of the judge to do all he legitimately can in its interpretation so as to do justice in the instant case before him. Article 142(1) provides that the Supreme Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing "complete justice" in any cause or matter pending before it. At the same time article 32 in case of Supreme Court and article 226 in case of High Court, confer power to issue any directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari which ever may be appropriate.

Thus, article 32 and 226 read with article 142(1) of the Constitution confer the power on the court to pass an order of "exemplary costs" in appropriate cases to do "complete justice". The judiciary in the recent years has made full use of these constitutional provisions and whenever and wherever, an "appropriate case" came before it which required the granting of exemplary costs, it did not hesitate to grant the exemplary costs against the executive. In most of the cases, where the exemplary costs were granted by the court, involved the gross violation of fundamental right to life and personal liberty by the executive.

In Rudul Sah v. State of Bihar, the Supreme Court granted monetary compensation of Rs. thirty five thousands to the petitioner against the lawless act of the Bihar government which kept him in illegal detention for over fourteen years after his acquittal. Infact, in this case when the petition came

62. S.N.Jain, "Money Compensation for Administrative Wrongs Through Article 32", 25 J.I.L.I.118(1983), See also State of Panjab v. Dial Chand Gian Chand & Co., A.I.R.1983 S.C.743, where the court held that High Court can not grant damages while exercising its writ jurisdiction. However, section 151 of Civil Procedure Code provides:"Nothing in this Code shall be deemed to limit or otherwise affect this inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." And hence this section gives inherent right to the High Courts to award exemplary costs.
64. See also Khatri v. State of Bihar, A.I.R.1981 S.C.1068 and Sant Bir v. State of Bihar, A.I.R.1982 S.C.1470. In these two cases the Court did show its concern towards the protection of life and liberty of the persons against the lawlessness of the state but did not actually grant any compensation to the victims.
up before the court for hearing, the counsel for the State informed the Court that the petitioner had already been released. Thus, the court was left with one important question to answer, that is, whether it could grant some exemplary costs against the State for its lawlessness and detaining a person wrongfully. The Court gave a farewell to the traditional approach of merely deciding the cases and leaving the parties at their respective places without further remedy. The Court adopted the new activist approach and pointed out that the loss done to the life and liberty of the petitioner by the wrongful act of the State can be corrected by the judiciary by awarding monetary compensation to him. Therefore, the State must repair the damages done by its officers to the petitioner's right. The Court further pointed out that the State may have recourse against those officers who are guilty in violating the most precious right of the petitioner.

It is submitted that the approach of the Court is in consonance with the constitutional spirit. By this process the chances of abuse of power by the state will be minimised and the right to life and personal liberty will become meaningful for all in the real sense. The most important aspect of this judgment is that the Court pointed out that the State may have recourse against the guilty officers. This observation of the Court will also prevent the misuse of the power by the persons who are responsible for executive wrongs.

However, in Jiwan Mal Kochar v. Union of India, the Supreme Court once again adopted the traditional approach and denied the petitioner of his right to compensation by saying that the relief prayed for "cannot be granted in this proceeding under Article 32 of the Constitution." In this case the petitioner had claimed damages and compensation against the Union of India, State of Madhya Pradesh and other officials who were responsible for certain remarks passed in his absence by the Court, which resulted in the loss, direct or indirect, humiliations and indignity.

But the Supreme Court in all other cases, after Jiwan Mal Kochar, has taken a consistent view and has granted exemplary costs under article 32 in order to do "complete justice" in proceedings before it.

65. Supra note 63 at 1089.
67. Ibid.
In Devaki Nandan v. State of Bihar, the Court noted that the officers of the State had harassed the petitioner "intentionally" and "deliberately". Here the officers of the government had disregarded the mandamus issued by the Court to the government to pay pension to a retired civil servant.

In Sebastian M. Hongray v. Union of India, the writ was filed by a student on behalf of the wives of two persons. These persons were taken by the military Jawans to the military camp and the government failed to produce them before the Supreme Court in habeas corpus proceedings. In fact, these two persons had met an unnatural death when they were in the custody of the government. The Court, keeping in view the torture and mental agony and oppression undergone by these innocent wives, granted the exemplary cost of rupees one lac to each of the two women.

In a yet another important case of Bhim Singh v. State of J&K, the Supreme Court noted the authoritarian act of the police by which the petitioner, a member of the State Legislature, was prevented from attending the meeting of the Assembly and wrongfully kept in the police custody. He was not produced before the Magistrate within the requisite period and hence his fundamental rights under articles 21 and 22(1) were violated. The Supreme Court considered this as the "appropriate case", and rightly so, for awarding the exemplary costs of rupees fifty thousands.

Thus, it is submitted, that the court has rightly used the new tool of exemplary costs in "appropriate cases" where the administrative authorities acted in most oppressive and arbitrary manner.

In M.C. Mehta v. Union of India, the Supreme Court once again explained the true scope of article 32 of the Constitution and pointed out that "the power of the court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remidal.

71. Id. at 499. See also People's Union for Democratic Rights v. State of Bihar, A.I.R.1987 S.C.355 where the Supreme Court directed the State to pay the compensation of Rs 20,000/- for every case of death and Rs 5000/- for every injured person without prejudice to just claim that might be advanced. In this case the police had opened an unprovoked firing on the people without previous warning as a result of which 21 people had died and several others were injured.
in scope and provides relief against a breach of the fundamental right already committed."

The Supreme Court also pointed out that the words "in appropriate cases" have been used deliberately because it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the Court in a petition under article 32. The infringement of the fundamental right must be gross and patent, that is incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of large number of people or it should appear unjust or unduly harsh or oppressive on account of their poverty or disability or socio-economically disadvantaged position to require the persons affected by such infringement to initiate and pursue action in the civil courts.73

It is submitted that though the Supreme Court has rightly evolved a new principle of granting exemplary costs in some extreme cases of authoritarianism, but it has failed to evolve some uniform basis for quantifying the amount of exemplary costs to be given in an "appropriate case". The amount of exemplary costs in a given case is left to the individual discretion of a judge deciding the case, which in our opinion, is not a good law. Any new principle evolved by the Supreme Court becomes the part of our constitutional jurisprudence.74 And that principle which is a part of our supreme law should not remain as uncertain law. Therefore, it is suggested that the Supreme Court should also evolve some uniform base for quantifying the amount of exemplary costs or it should lay down certain guidelines for determining this amount. It is only then that the new principle evolved by the Supreme Court will become a good precedent for future development of law.

D. Proposed Perspectives

The underlined objective of the Constitution is to establish a first social order in which socio-economic justice is ensured to all. Law is to be the instrument for achieving that objective. Law and justice must accordingly converge into a particular point. That is the purpose of the directive principles of state policy.75 The demanding tasks of the day are, therefore, legislative action, purposeful judicial reform, and sensitive administrative stream-lining so as to transform our conditions of socio-economic life and

73. Ibid.
74. See supra note 8.
75. Justice Hari Swarup, supra note 8 at 82.
other human values. Law to dialogue with justice must suffer a sea change. Legal justice has often been the obsession of the judicial process and social justice sometimes its unconcern. But times have changed and the "new orientation of judicial justice, of social justice" is gradually coming to stay in our country, thanks to the preamble to the Constitution and the directive principles of state policy.

Law also cannot stand still; it must change with the changing social values and social concepts. It must constantly be on the more adapting itself to the fast changing society and not lag behind. It must shake off the institutions of the colonial past and assume a dynamic role in the process of social transformation. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people.

Legislatures are, however, not best fitted for the role of adapting the law to the necessities of the time, for the legislative process is too slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad and other legislative activities. Sometimes the drafting of the laws is also poor and ambiguous. Even the executive can sometimes fail to implement the law in its true spirit. Thus, task must, therefore, of necessity fall upon the Courts because the courts can by the process of interpretation adopt the law to suit the needs of the society. The judiciary is one of the most important organs of the State. It has to inform all the institutions of the national life to administer social justice at their own levels.

Therefore, whenever the legislative programme or executive action falls short in measuring the demands of social change, the courts assume the responsibility of initiating and prompting that social change which envisages

---

78. See National Textile Workers' Union v. P.R. Ramakrishnan, A.I.R.1983 S.C.75 at 87 (Per Bhagwati, J., as he then was).
79. Supra note 10 at 1584.
80. Ibid.
81. Ibid.
socio-economic justice to all. The degree and pace of judicial intervention vary with the dimensions to which the urgency for socio-economic justice is met by the other two organs of the State, that is, legislature and the executive. 82

Thus, if the Constitution is to have any meaning for 'have-nots', then the judiciary should not wait till the legislation is passed by the legislature or action is taken by the executive to meet the demands of socio-economic justice. The judiciary has to move with its own programme and should act as a precursor of future legislative or executive action. In the shaping of reliefs of affirmative action or exemplary costs, the court is not bound by traditional forms, or blinkered by orthodox perspectives. The courts should move beyond them and impose orders which take stock of the realities of the existing situation. 84 Because the "judiciary is an arm of social revolution". 85 It is an agent of social change. And this role of the judiciary is also necessary to advance the prime objectives of the Constitution, that is, socio-economic justice, which is given in the most sonorous terms in the preamble of the Constitution and the directive principles of state policy.

But, the judiciary has to function within its limits. In filling up the legislative void or curing administrative wrongs or executive inactions, the judiciary cannot encroach upon the principal functions of other two organs, that is legislature and the executive. There is no doubt that the limits of judicial power and those of the executive and legislature tend to overlap at the edges. But the Court cannot proceed beyond the limits of its judicial power. The court should bring about an urgency in executive or legislative lethargy, if any, in any particular case, but it must remember the following warning of Benjamin N. Cardozo:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspirations from consecrated principles. He is not to

82. Supra note 76 at 17.
83. See supra note 49.
yield to spasmodic sentiments, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains.86

Thus, from the above warning of Cardozo, it is amply clear that a judge cannot roam at his will under the garb of bringing about socio-economic change. The judiciary has to operate as a constitutional check where the legislature or the executive acts in excess of its powers or abuses, misuses or even allows to rust their powers.87 The tool for determining the direction in which the court should move, is provided in the preamble, fundamental rights and directive principles of state policy. The Courts should also refrain from issuing orders or commands which are incapable of enforcement.88 And finally the judiciary must remind itself of its own limitations as judicial institution.

However, our judges must remember that they are not monks or scientists but participants in the living stream of our national life, steering the law between the danger of rigidly on the one hand and of formlessness on the other. The proper role of a judge has been very aptly stated by Lord Denning in the following words:

> My root belief is that proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule - or even to change it -so as to do justice in the instant case before him.89

It is submitted that the justice system ceases to be functional if courts do not make the technology of statutory construction serve the betterment of society. If a broad and viable reading of statutory language were not adopted by judges filled by the wish to make things work according to

88. See, for example, Peoples' Union for Democratic Rights v. Ministry of Home Affairs, A.I.R.1985 Del.268. This case is popularly known as Delhi Riots case. In this case the court pointed out that if no effective or relief can be granted, the court should not entertain the public interest litigation. Id. at 279. See also State of West Bengal v. Sampat Lal, A.I.R.1985 S.C.195.
89. Quoted in supra note 76 at 24.
social justice, courts may be classed with the dinosaurs. Justice D.P. Madon has rightly remarked that

If the law is to operate today so as to secure social justice to all, who else can do it but judges whose constitutional task is to apply and interpret the law? Nature abhors a vacuum. Take away judicial activism and tyranny will step in to fill the vacant space.91

Thus, the judiciary has a limited but an important role to play in regard to executive and legislative inactions in pursuit of socio-economic justice.