Chapter I
INTRODUCTION

State intervention of a positive kind in the ownership, operation or regulation of industries and services is a vast movement of worldwide dimensions. It is to be found not only in the highly developed countries of the West but also in the underdeveloped countries of Africa and Asia. It is the leading characteristic of communist regimes. It is also an important feature of all political democracies, whether they claim to be based avowedly on private enterprise or on a mixed economy. The scale of this movement is vast; its diversity bewildering, its political, economic and social significance unquestionable.

In India, the trend of government entering into commercial and industrial activities has been on the increase since independence. The Preamble to our Constitution and the Directive Principles of State Policy indicate the nature of the functions to be carried out by the State. The Preamble declares that the State will secure to all its citizens equality of status and of opportunity and justice, social, economic and political. The Directive Principles enjoin the State to strive to promote the welfare of the people by securing and protecting as effectively as it may a society in which social, economic and political justice shall inform all the institutions of the national life. 


2. Constitution of India, Article 38.
The State is to see that the ownership and control of the material resources of the community are so distributed as 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.\(^3\) With a view to accelerating the pace of economic development in the country, and improving the socio-economic well-being of the people, the Government of India has enunciated the goal of setting up in the country a socialist pattern of society and to resort to economic planning on a large scale. It has assumed an active role in the sphere of business and industry.

Defining the role of the government in the economic affairs of the country, the Industrial Policy Resolution of 1956, lays down that all industries of basic and strategic importance or in the nature of public utility services, should be in the public sector. Other industries which are essential and require investment on a scale which the State alone can make, are also to be in the public sector.\(^4\) Consequently, a phenomenal growth has taken place in the public sector and this has been made possible not only by setting up new undertakings but also by nationalising some of the pre-existing private sector undertakings and establishing a monopoly position for the State.

\(^3\) Article 39(b) and (c).

in those areas. The undertakings of the Central Government are run departmentally and through government companies or statutory corporations like the public corporations.

The present study is concerned with the public corporation which has, since the end of the first world war, become a familiar device for the organisation of public enterprises and services, in many different countries and legal systems. Both its value and its elasticity can be gauged from the fact that it has been adopted in the socialist and entirely State-controlled economic system of the Soviet Union as well as in the non-socialist system of the United States.

Public corporations are of many different kinds and exist for countless purposes. It is no part of our present task to analyse these types and purposes comprehensively. The aim of this work is to analyse the complex problem of judicial control of public corporations in our country. It should, however, be noted that it is not possible to appreciate the legal problems of public corporations unless the general features of such corporations are first clearly understood.

**Meaning of a corporation**

A corporation aggregate is "a collection of individuals united into one body under a special denomination, having perpetual succession under an artificial form, and vested..."
by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued . . . "6

A corporation may be created by the authority of Parliament expressed either in a special statute creating a particular corporation or corporations, or in a general statute under which any number of corporations may be created on complying with its terms.7 Government corporations provide flexibility and continuity of operation, are adaptable to large and complicated business enterprises, and furnishes an advantageous means of handling problems involved in the control and administration of economic enterprises owned wholly or in part by governmental entities.

The institution of the public corporation as a method of administration is not new. The appointment of ad hoc bodies is often the most obvious method of dealing with a particular problem which has arisen.8

   i) Lawful authority of incorporation,
   ii) The persons to be incorporated,
   iii) A name by which the persons are incorporated,
   iv) A place, and
   v) Words sufficient in law to show incorporation


Public Corporations: definition and characteristics

The public corporation is a hybrid organism, showing some of the features of a government department and some of the features of a business company, and standing outside the ordinary framework of the government. In President Roosevelt's (in his message to Congress in 1933 recommending the formation of the T.V.A.) classic phrase it is "clothed with the power of governments but possessed of the flexibility and initiative of a private enterprise". According to Robson, "the underlying reason for the creation of the modern type of public corporation is the need for a high degree of freedom, boldness and enterprise in the management of undertakings of an industrial or commercial character and the desire to escape from the caution and circumspection which is considered typical of government departments". Thus the original impetus to the movement for public corporation came from a two-fold desire to secure freedom from parliamentary supervision over management on the one hand, and Treasury control over personnel and finance on the other. Both these forms of

control were regarded as likely to hamper efficiency and restrict initiative in undertakings of an industrial or commercial character.

The principal characteristics of a public corporation have been summed up in the following terms by a United Nations Seminar on the organisation and administration of public enterprises:

(1) It is wholly owned by the State.
(2) It is generally created by, or pursuant to, a special law defining its powers, duties and immunities and prescribing the form of management and its relationship to established departments and ministries.
(3) As a body corporate, it is a separate entity for legal purposes and can sue and be sued, enter into contracts, and acquire property in its own name. Corporations conducting business in their own name have been generally given greater freedom in making contracts and acquiring and disposing of property than ordinary government departments.
(4) Except for appropriations to provide capital or to cover losses, a public corporation is usually independently financed. It obtains its funds from borrowing, either from the Treasury or the public, and from revenues derived from the sale of goods and services. It is authorised to use and re-use its revenues.

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13. The seminar was held in Rangoon from March 15 to March 26, 1954, under the auspices of the Economic Commission for Asia and the Far East, the United Nations Technical Assistance Administration, and the International Institute of Administrative Services.
(5) It is generally exempted from most regulatory and prohibitory statutes applicable to expenditure of public funds.

(6) It is ordinarily not subject to the budget, accounting and audit laws, and procedures applicable to non-corporate agencies.

(7) In the majority of cases, employees of public corporations are not civil servants, and are recruited and remunerated under terms and conditions which the corporation itself determines.  

Writing about public corporations, Herbert Morrison observed in 1933: "We are seeking a combination of public ownership, public accountability, and business management for public ends".  

It need be hardly pointed out that both the definition and summary of characteristics have to be looked upon as provisional. Each country has to seek an organizational solution compatible with its constitutional system, political traditions, governmental structure, and economy. So the content of a public corporation may differ from country to country.

Public corporations in India

With the advent of independence public corporations have been on the increase. Article 19 of the Constitution of India while extending a fundamental right to practise any profession or to carry on any occupation, trade or business provides that

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this freedom shall not prevent the State from making any law imposing in the interests of the general public, reasonable restrictions on the exercise of that right. The Article further states that this freedom shall not affect the operation of any existing law so far as it relates to, or prevent the State from making any law relating to the carrying on by the State, or by a corporation owned or controlled by the State of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

So then there is a constitutional protection to State monopoly in trade or State corporations owned wholly or controlled by it in the sphere of any trade or business or industry. 17

Need for Control

It is important that the public corporation should be regarded by all, and should regard itself, as a public concern. Its first business is the competent conduct of the undertaking committed to its charge in the public interest. It must feel that it is responsible to the nation accordingly, and that it cannot be the instrument of this or that private or sectional interest.

The public corporation, as Paton points out, has now become a common feature of modern political life—it provides an interesting compromise between the need for independence from political pressure in the conduct of a utility and the

need for ultimate control in the interest of the community.\textsuperscript{18}

Thus the most disturbing problem in connection with public corporations, especially those responsible for the management of the nationalised industries, is undoubtedly that of control.\textsuperscript{19} A public corporation is a very difficult device to work successfully, because in it a balance is to be created between 'control' and 'autonomy', and this is a very difficult and delicate job. The Western countries like Britain, France and the United States of America themselves are by no means certain that the balance that they have established between 'autonomy' and 'control' is the best possible one. It still remains a controversial problem. Every one agrees that there should be control over public corporations so that they may not become a State within a State or they may not constitute 'a headless fourth branch of the government'.\textsuperscript{20} A powerful corporation, having great financial resources, employing many personnel and possessing monopolistic powers conferred by statute, should be answerable in some measure to the elected representatives of the nation and to the courts of law. At this stage it is expedient to discuss the different forms of control over the public corporations in our country.


\textsuperscript{20} This phrase was used in 1937 in the United States by the Presidents' Committee on Administrative Management with respect to Regulatory Commissions: Davis, \textit{Administrative Law Treatise}, 1958, Vol. I, p. 28.
**Different forms of Control**

**Government Control**

The government exercises control over public corporations through various ways. Thus the statutes initiating some of the public corporations, such as the two Air Corporations, Damodar Valley Corporation, Life Insurance Corporation, Central Warehousing Corporation, and Oil and Natural Gas Commission, provide that the regulations regulating the terms and conditions of their employees will be drawn up by the corporations with the previous approval of the Central Government. The various Acts confer a regulation-making power on the corporations, but, generally, the power is exercisable subject to the previous approval of the government.  

The government also exercises control over the financial aspects of the public corporations. For example, section 35 of the Air Corporations Act provides for previous approval of the government for undertaking any capital expenditure exceeding Rs. 15 lakhs. Besides these specific powers, the government has extensive and ultimate control over the public corporations through the power to issue directions. This power is evidently

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22. Thus section 21 of the Life Insurance Corporation Act says "In the discharge of its functions under the Act, the Corporation shall be guided by such direction in matters of policy involving public interest as the Central Government may give to it in writing, and if any question arises whether a direction relates to a matter of policy involving public interest the decision of the Central Government thereon shall be final". See also section 34 (1) of the Air Corporations Act. However, in some cases, the initiating Act provides that directions are to be issued by the government only after consultation with the corporation concerned (Section 34 (2) of the Air Corporations Act).
given to ensure that these corporations do not behave in a manner inconsistent with the government and national policies.

**Parliamentary Control**

In determining the degree of parliamentary control, it is generally accepted that parliamentary supervision should not extend to matters of day-to-day administration of public corporations.

The following techniques may be used by the members to discuss matters pertaining to public corporations in Parliament:

1. Questions to the ministers.
2. Raising half an hour discussion on any enterprise including a public corporation.
3. Moving a motion for adjournment on a matter of public importance.
4. Raising discussion on matters of urgent public importance for short duration.
5. "Calling attention" of the House to matters of urgent public importance.
7. Discussion on President's address.
8. Discussing the report of the Enquiry Committee, if any.
9. Members get an opportunity to discuss the working of a corporation when the statute, which created it, is amended.
11. Discussion on Annual Reports of the Corporations can take place.
However, the most effective form of parliamentary supervision is an examination by a committee of members of Parliament.

Control by the Public

Public opinion properly channelled is a very effective source of control of the functions of public corporations. Debates on the functions of the public corporations organised by individual groups outside the parliamentary forum may force the government or the minister concerned to take steps for redressing the grievances. According to Garner, control by the public is one of the most effective practical checks on the functioning of public corporations.\(^2^3\)

The different forms of control over public corporations discussed so far, suffers from certain limitations. Firstly, governmental control is deficient and is subject to manipulations specially in the matter relating to the issue of policy directives. Secondly, parliamentary control is inadequate inasmuch as most members of Parliament are not well conversant with the basic principles governing the public corporations. Finally, control by the public is totally ineffective in this country because the general public remains largely uneducated as a result of mass illiteracy and widespread poverty.

In the context of the above shortcomings, judicial control of public corporations in India thus assumes paramount

significance.

Judicial Control

The aim of accountability of public corporations is to ensure that they fulfil their duty and make proper use of their power, and it is to the courts that we must turn for the tests of legality and limits of the acts of these corporations. Thus, judicial control forms an integral part of the problem of accountability.

The ordinary means of judicial control over the activities of any government agency apply equally, at least in theory, to a public corporation; indeed the jurisdiction of the courts over a public corporation is the same as it is over any private or public company, except that the powers of the former depend on the terms of a special statute while the powers of a company will depend on the terms of its memorandum of association.

The law courts may come into the picture on certain occasions. For example, when a public corporation discriminates against a particular individual or privately owned corporation, the courts may have to examine the question whether Articles 14 and 15 of the Constitution of India can be invoked to grant relief to those who are being discriminated against. On the one hand it is contended that a public corporation because of insulated personality, is not the State, and that the Constitution

only says that 'the State shall not discriminate.' On the other hand, it is argued that a public corporation is the shadow of the State and that as a public body, it cannot be permitted to act in an arbitrary manner. An extreme case of permissible judicial control is presented by the London Passenger Transport Board (1933-48). Here the holders of 'A' 'B' or 'L.A.' stock, of not less than 5 per cent of the total amount of that stock then outstanding, could apply to the High Court for 'a receiver' or 'a receiver and manager' if the Board defaulted in respect of the payment on the stock for not less than three months. 'C' shareholders had the same right should the Board fail to pay interest on that stock at the standard rate for three consecutive years, of which the first year was to be not earlier than the one ending on June 30, 1936. Of course, such an eventuality did not arise; otherwise, it would have been interesting to see a public corporation in the liquidation court. In India, it is customary to put a legal bar to liquidation in the case of various public corporations. The Damodar Valley Corporation Act, 1943, gives a place of honour to judicial control in the matter of certain disputes: "..... any dispute between the Corporation and any Participating Government regarding any matter covered by this Act

26. See Chapter II.
or touching or arising out of it shall be referred to an arbitrator who shall be appointed by the Chief Justice of India. The decision of the arbitrator shall be final and binding on the parties.

Judicial control also comes in with regard to the question of fixing compensation. This is a temporary phase in the life of a public corporation, and is relevant only in those cases where existing industrial units have been nationalized.

However two aspects of judicial control must be distinguished. On the one hand there is the general legal responsibility for breach of contract, tort or other actions which lead to legal sanctions. In the common law jurisdictions all the public corporations appear now to be subject to the jurisdiction of the ordinary courts. In some instances, the statute has specifically declared them liable before the courts. Thus, the British Regional Hospital Boards, despite their expressed character as Crown servants, are expressly made legally liable before the courts. In other cases the legal liability follows from the constitution of the enterprise as a separate legal entity and from incidental provisions. In the Continental systems, the legal responsibility of the public enterprises is determined by their public law status. According to the doctrine and practice which, with some variations, has prevailed in Germany, France and Italy alike, the public

29. See Chapter III.
corporations, insofar as they are public authorities, are normally suable before the administrative courts.

Another aspect is the special control exercised over the public authorities restraining the abuse and the extension of statutory power conferred upon them. In the Continental jurisdictions, this judicial supervision is exercised through the administrative courts, most of which have worked out tests based on the French concepts of "excès de pouvoir" and "détournement de pouvoir". These broadly correspond to the concept of abuse of power which has been developed in English law. The statutory powers of the public corporations, especially where they administer a public monopoly, are usually so widely drawn that their actions cannot easily be invalidated. In the Continental jurisdictions, where the practice of the courts has had time to establish itself over a very long period, the possibilities of judicial interference probably go somewhat deeper but there are now well-established principles which allow a fair measure of predictability comparable to the position in private law. It should, however, be pointed out, as Friedmann aptly says, that in Italy at least, side by side with this power of judicial invalidation which is controlled by established doctrine and precedent, a purely administrative


31. See for an example, the English case of Smith v. London Transport Executive, (1951) A.C. 555 and see Chapter Three under Doctrine of Ultra Vires.
invalidation of transactions by the public corporation is
effected by exercise of the so-called tutela, and that for
administrative as well as legal reasons. Such a state of
affairs is apt to jeopardise the management of the corporations
and the rights of third parties who enter into transactions with
the corporations.

While stressing the importance of judicial controls
over public boards, Robson said: "Since the political control
which is exercisable over the public service boards is
comparatively weak, it is desirable that judicial control over
their activities should be strengthened, and be made, indeed,
much stronger than it is in the case of an ordinary department,
subject to full ministerial responsibility to Parliament." 33

In the Chapters which follow we propose to analyse the
different aspects of judicial control exercisable over the public
corporations in India. But before we do so, it is essential to
review the literature on the subject and lay down the
delimitation of the present study.

Review of Literature

There is already a wealth of literature on public
undertakings in India. Many learned writers have dealt with
the nature and problems of the public undertakings in India,
e.g., Vadilal Dagli (Ed.) : The Public Sector in India -

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32. W. Friedmann in Government Enterprise, A Comparative Study,
Edited by W. Friedmann and J.F. Garner, 1970, Stevens & Sons,

33. W.A. Robson, (Edited), Public Enterprise, 1937, London,
p. 382.
A survey; Nabagopal Das: (1) The Public Sector; and (2) The Public Sector in India; D.S. Ganguly: Public Corporations in a National Economy; Raj K. Nigam (Ed.): Changing Horizon - Public Sector; Om Prakash: Theory and Working of State Corporations with Special Reference to India; V.V. Ramanadham: (1) Problems of Public Enterprises; (2) Structure of Public Enterprises in India; K.A. Sankarasubramaniam: Public Sector - A survey; T.R. Sharma: Working of State Enterprises in India; O.P. Kaushal: Management, Organisation and Control in Public Enterprises; S.S. Khera: Government in Business; C. Lotia: Managerial Problems of the Public Sector in India; Administrative Problems of State Enterprises in India etc. All these books have indeed helped us to understand and assess our public undertakings. But few of them have been able to devote

35. 1955, Eastern Economist Pamphlet.
37. 1963, Bookland, Calcutta.
38. (Collection of Editorials from Lok Udyog), 1970, The Fertilisers and Chemicals, Trivancore Ltd.
40. 1959, Osmania University, Hyderabad.
42. 1961.
43. 1961, Bombay.
44. 1964, Bombay.
45. 1963, Asia Publishing House, Bombay.
46. 1967, Bombay.
47. 1958, Indian Institute of Public Administration, New Delhi.
sufficient attention to the intriguing problem of judicial control over public corporations. In most cases a few pages, or at most one or two chapters have been devoted to judicial control. Consequently, there is a dearth of material pertaining to the judicial control of public corporations and it is submitted that this sphere of law remains largely unexplored. Some of the available sources giving a brief account of the legal aspects and judicial control of public corporations in India are as follows:

- Principles of Administrative Law by M.P. Jain and S.N. Jain
- The Theory and Working of State Corporations by Om Prakash
- The Indian Administrative Law by M.C.J. Kagzi
- Comparative Administrative Law by Durga Das Basu
- Administrative Law by S. Rajagopalan
- Administrative Law by V.G. Ramachandran
- Administrative Law in India by S.P. Sathe
- A Text-Book on Administrative Law by Rameshwar Dayal
- Lectures on Administrative Law by U.P.D. Kesari
- Nature and Control of Public Corporations in India by Mira Ganguly
- Administration of Government

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Thus, full justice has not been done to the problem of judicial control. In this study we have therefore sought to break new ground in dealing with all the different aspects of judicial control over public corporations in India.

**Methodology**

In contrast to the English Law where a wealth of experience and a formidable literature describing the different legal aspects of public corporations are available, there is, as already stated, a paucity of material on the relevant law on the subject in India. This confronted the present writer with the stupendous task of placing exclusive reliance on the primary sources like statutes setting up public corporations, rules and regulations made thereunder, reports and publications of the corporations, judicial decisions, specially the Supreme Court decisions as given in the Supreme Court Reports, the All India Reporter, the Supreme Court Appeals, journals published in India and abroad and to authoritative works of English writers on Administrative Law and public corporations. Where necessary English and American principles have been mentioned to elucidate a difficult matter on the subject in the Indian Law.

**Delimitation**

In this research, we shall devote particular attention to those public corporations which have been set up by the Central Government. The following are few examples of public corporations

established under the Central Statutes -

(1) The National Co-operative Development Corporation.
(2) The Damodar Valley Corporation.
(3) The Oil and Natural Gas Commission.
(4) The Khadi and Village Industries Commission.
(5) The Indian Airlines Corporation.
(6) The Air-India.
(7) The Life Insurance Corporation.
(8) The Employees' State Insurance Corporation.
(9) The Reserve Bank of India.
(10) The State Bank of India.
(11) The Industrial Finance Corporation.
(12) The Rehabilitation Finance Administration.
(13) The Central Warehousing Corporation.
(14) The Deposit Insurance Corporation.
(15) The Industrial Development Bank of India.
(16) The Food Corporation of India.
(17) The Agricultural Refinance Corporation etc..

All these have been set up in the public sector under specific Acts of Parliament viz., the National Co-operative Development Corporation Act, 1962 (26 of 1962), the Agricultural Refinance Corporation Act, 1963 (10 of 1963), etc. Each of these undertakings is a body corporate having perpetual succession and a common seal. 59

59. See Chapter II.
However, the legal or judicial principles evolved in the case of other corporate bodies have been included within our purview, because, these principles are also applicable to the above undertakings.

The present study has been undertaken from the standpoint of the Indian law but in the light of the English and to some extent the American system. Here we have confined our attention exclusively to the different means of judicial control that may be exercised over the public corporations in this country.