Chapter III

GENERAL PRINCIPLES OF JUDICIAL CONTROL

Doctrine of Ultra Vires

Perhaps the most important principle to be considered in relation to the judicial control of public corporations in modern India, is, the doctrine of ultra vires. The Latin words "ultra vires" mean "beyond the powers". An act is ultra vires an authority if it is beyond its powers; the converse term is "intra vires".

The ultra vires rule has a long and somewhat tangled history. The term "ultra vires" was first generally used to denote excess of legal authority by independent statutory bodies and railway companies in the middle years of the nineteenth century; though the main features of the doctrine to which this name was given had already been taking shape over a long period in relation to the powers of common-law corporations. The term came to be used in relation to municipal corporations, then to the new types of local government authorities, and finally to the Crown and its servants and even to inferior judicial bodies.

The doctrine of ultra vires, which in England applies to the acts of the Executive was, in the colonies subject to its

rule, applicable to the acts of the colonial legislatures also.\textsuperscript{4} Indian law on judicial control of administrative action therefore developed on similar lines as the Anglo-Saxon law.\textsuperscript{5}

According to Ballantine the mischievous doctrine of \textit{ultra vires} has long been in almost hopeless confusion.\textsuperscript{6} The confusion in the case law pertaining to \textit{ultra vires} acts have resulted from lack of precision in the meaning ascribed by judges in the term "\textit{ultra vires}". It has been said that possibly there is no term in the whole law used as loosely and with so little regard to its strict meaning as the term "\textit{ultra vires}".\textsuperscript{7}

As a result Ballantine opines that "there is perhaps no field in which it has been more difficult to cut through the trite dogmas, formulas, metaphors and legal fictions to the fundamental realities and policies of the law, as in the outmoded doctrine of \textit{ultra vires}".\textsuperscript{8}

It seems appropriate, therefore, at the outset to focus some attention on the meaning which should properly be given to the doctrine of \textit{ultra vires}.

The doctrine of \textit{ultra vires} is one of the most fundamental concepts in administrative law. The doctrine says that the recipient of a statutory power can do only

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  \item \textsuperscript{4} Empress v. Burah & Book Singh, I.L.R. 3 Cal. 63, per Markby J. at 87 - 88.
  \item \textsuperscript{5} S.P. Sathe, \textit{Administrative Law in India}, 1970, N.M. Tripathi Private Ltd., Bombay, p. 105.
  \item \textsuperscript{8} Henry Winthrop Ballantine, \textit{op. cit.}, p. iii in the Preface.
\end{itemize}
those things that are authorised by the statute to be done. If the court finds an act done not to be so authorised it will declare the act to be void and of no legal effect. As nearly all the powers of the administration are to-day statutory in origin, the importance of the doctrine is clear. The doctrine involves the interpretation of statutes by judges, and their personal attitude to the legislation ______ hostile, neutral or friendly ______ may have some effect on the scope of the legislation. A classic statement of the operation of the doctrine is that of Lord Selbourne when he said that it "ought to be reasonably and not unreasonably understood and applied, and whatsoever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."  

The doctrine of ultra vires applies to every legal person created by statute—to trading corporations, commercial companies, public undertakings and local authorities.

For the purpose of this study we shall confine ourselves only to the application of the doctrine to public corporations, particularly, the control of these corporations by the ultra vires rule. But before we proceed to do so, it is necessary to

discuss the doctrine as applied to statutory corporations.

**Application of the doctrine of Ultra Vires to Statutory Corporations**

Statutory Corporations are subject to the doctrine of *ultra vires*. They are mere creatures of the statutes creating them, and the law will not suppose that they were created for any purposes other than those which induced the legislature to act.\(^{11}\)

The doctrine as applied to statutory corporations is stated in Lord Watson's speech in *Baronessa Wenlock v. River Dee Co.*.\(^{12}\)

"Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions".

Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those


\(^{12}\) (1885) 10 App. Cas. 354 at p. 362.

things which it is authorised to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are ultra vires. There must in all cases be statutory authority for what is done, and that authority must either be expressly given or reasonably inferred from the language of an Act of Parliament.

This rule, if rigidly applied to statutory corporations, would greatly handicap their activities and would require empowering legislation to be burdened to an impossible extent by detailed provisions. The courts have therefore held that a corporation may do not only those things for which there is expressed or implied authority, but also whatever is reasonably incidental to the doing of those things. Lord Selbourne said in *Att. - Gen. v. Great Eastern Ry.* 14:

"It appears to me to be important that the doctrine of ultra vires..............should be maintained. But I agree..............that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires".

Palmer says in his work on *English Company law*:

"If a company is formed, for example, to buy, sell and deal in coal, it may, for the purpose of carrying out its objects,

not only buy, sell and deal in coal, but may—(1) purchase or take on lease stores; (2) open shops and agencies; (3) buy and hire lorries, trucks, carts, horses; (4) employ labour; (5) draw and accept bills of exchange; (6) borrow and give security; (7) incur debts; (8) make contracts for purchase of supply; (9) having a banking account; (10) bring actions and take proceedings; (11) compromise actions and disputes; (12) employ agents; (13) pay bonuses and pensions to employees, for these things are fairly incidental to and consequential on the subject to buy, sell, and deal in coal.  

In the application of the doctrine there are then three issues: first, whether what is done is specifically authorised by statute; secondly, whether (if there be no specific authority) one can reasonably imply authority from the language of the statute; and, thirdly, whether an act for which no such direct or implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose.

In the light of the above, we may now deal with the ultra vires control of public corporations in India.

Public Corporations and Ultra Vires Control

The powers of the public corporations are derived solely from statutes and statutory instruments. The corporations are

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therefore subject to judicial determination by the doctrine of ultra vires\textsuperscript{18} in its full force. This means that they can only do those things that they are empowered to do, and so in addition to stating their functions in wide general terms the statutes must provide a wide range of detailed powers to enable a corporation to achieve its objectives. A consequence of this is that action may be taken in the courts if a corporation oversteps its powers or if it fails to do what is required.\textsuperscript{19}

The extent of the ultra vires jurisdiction of the courts over the public corporations is more than a technical or academic legal problem.\textsuperscript{20} It is through its ultra vires jurisdiction that the judiciary asserts its functions of protecting the citizen against encroachments of the executive and public authorities, both in their capacity as legislators by delegation and as quasi-judicial authorities. In the United States, the function of the Supreme Court as the guardian of the Constitution, has produced a dangerous tension between the legislator and the judiciary which reached its climax in the judicial invalidation of important parts of the New Deal legislation and the subsequent series of new appointments to the Court by President Roosevelt. In Britain, too, the ultra vires question has provided some

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material for conflict between Legislature, Executive, and Judiciary but it has been kept in bounds by the self-restraint of the judiciary and the British constitutional system.

As in England, so in India, the doctrine of ultra vires has attained a high level of sophistication, so that the courts are enabled not merely to control actions which are obviously outside jurisdiction, but to examine the reasonableness, motives, and relevancy of considerations. The courts have also exercised controls on various aspects of discretionary powers. Clear-cut cases of ultra vires are those where the authorities act without any jurisdiction or in excess of jurisdiction vested in them.21 The doctrine of ultra vires is so ingrained in the Indian law that when Article 13 of the Constitution of India expressly invalidates existing and future laws to be the extent that they are repugnant to fundamental rights, Kania C.J. expressed the opinion that the Article was unnecessary and was inserted ex mejo re cautela.22 With the gradual growth of delegated legislative powers and the vast extension of public activities in the economic and social field, the dangers of a more acute conflict increase. The whole problem is made more complicated by the doubts which pertain in regard to the extent of the court's powers of supervision over the administration.

The degree of elasticity of the powers conferred upon the corporations, and in particular, the choice between an objective and a subjective formulation of those powers, has a direct bearing upon the question of ultra vires control. The greater the discretion placed in the hands of the governing body of the corporation, the smaller the scope of judicial control.  

As corporate bodies, the public corporations are subject to the ultra vires limitation on contractual capacity and on tortious liability. As public authorities, forming part of public administration, they are subject to the supervisory powers which the courts as guardians of the law of the land exercise over administrative authorities. Kahn-Freund appears to suggest that only in the latter capacity, the public corporations are subject to ultra vires control.

The 'powers' clauses in the Acts, constituting the public corporations are therefore likely to be read by the courts in the light of this double limitation. Their width and elasticity, which is analogous to the technique of most modern memoranda of association, may not serve as a protection against the tests which the courts apply to the exercise of administrative powers.

25. See infra under Liability of Public Corporations in Tort.
26. 9 Mod. L.R., 1946, p. 237
What are these tests? Despite the extreme difficulty of extracting clear principles from the welter of decisions, the two main causes of invalidity for ultra vires are Excess of Power (excès de pouvoir) and Abuse of Power (détournement de pouvoir). The first means checking legal acts by the terms of the enabling statute, the second means a check on administrative discretion where motives alien to the administrative purpose have prevailed.

The position is much confused, however, through the nebulous test of 'reasonableness' which the courts apply to administrative actions.

According to Friedmann27 grave legal uncertainty as well as political danger would follow from any attempt of the courts to interfere in the administrative policy and discretion of public corporations and to examine reasonableness as distinct from (a) excess of statutory powers and (b) objectionable motives. Not only would such an attitude be an almost open defiance of clear parliamentary language, it would precipitate a dangerous conflict between the judiciary on the one hand and those responsible for policy on the other hand. Where is the limit to be drawn? If the courts examine reasonableness in the wider sense, could they declare invalid as ultra vires a contract by the Damodar Valley Corporation for the purchase of a rest home for staffs' families? Could they invalidate the purchase of administrative headquarters?

by the Air Corporations as being extravagant and therefore not necessary for the discharge of their functions?

The different aspects of ultra vires are best illustrated in the Acts setting up the different public corporations in India. The Acts contain both general and specific empowering provisions; there is little value in trying to guess the interpretation that will be placed by the courts on any particular specific provision. What is important, however, is to try to assess the effect of the general provisions and the extent to which the courts are likely to admit the validity of any challenge.

However, certain actions are expressly put beyond the powers of the corporations by the constituent Acts. Thus the Industrial Development Bank of India "shall not grant any loan or advance or other financial accommodation on the security of its own bonds or debentures." The State Bank shall not make a loan or advance (a) for a longer period than twelve months except as otherwise provided in the Act; or (b) upon the security of stock or shares of the State Bank; or (c) upon the security of any immovable property or the documents of the title relating thereto, except to the extent necessary for any of the purposes of this Act.

Under section 13(1) of the Transport Act, 1962, the British Railways Board is empowered to construct, manufacture, produce, purchase, maintain or acquire anything required for the

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28. Industrial Development Bank of India Act, section 9 (n) (3).
29. State Bank of India Act, section 34(1). See also Reserve Bank Act, section 19.
purposes of the business of the Board but has no power to construct etc. anything not required for any of those purposes.
The statutory duty of the Railways Board, laid down in section 3, is to provide railway services in Great Britain and, in connection with that provision, to provide such other services and facilities as appear to the Board to be expedient; and the Board is empowered to carry goods by rail within Great Britain. In Charles Roberts & Co. Ltd. v. British Railways Board the plaintiffs, who were manufacturers of railway tank wagons, asked for a declaration that the Board had no legal power to construct, manufacture, or produce railway tank wagons with a view to their sale, except to certain nationalised industries. The Board proposed to manufacture wagons with a view to their sale to an oil company and their use by the company on the Board's railways. The court held that this manufacture and sale might be an efficient way of carrying out the Board's business within its statutory powers and duties and that the court should not interfere. The court took the view that the decision was for the minister and for the exercise of his statutory powers. After the commencement of the proceedings, the minister rejected the Board's proposal.

In such cases the application of the doctrine of ultra vires presents no problems save in the interpretation of the statutory words. The application is more difficult in the case of general powers provisions conferred on most corporations. The Damodar Valley Corporation Act, for example, states that:

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30. (1964) 3 All E.R. 651.
"The corporation shall have the power to do anything which may be necessary or expedient for the purposes of carrying out its functions under this Act." The Air Corporations can "take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power, or discharge of any function or duty" conferred on them by the Act. The Reserve Bank of India may, generally, act on "all such matters and things as may be incidental to or consequential upon the exercise of its powers or the discharge of its duties under the Act." The Industrial Development Bank of India is empowered to generally doing such other acts and things as may be incidental to, or consequential upon, the exercise of its powers or the discharge of its duties under the Act or any other law for the time being in force including sale or transfer of any of its assets. The Life Insurance Corporation Act empowers the corporation "to do all such things as may be incidental or conducive to the proper exercise of any of the powers of the corporation." The Industrial Finance Corporation grants the same power in slightly different terms. Where power is given in such general terms the corporation's authority becomes extremely wide and it would be difficult for the courts to declare an action taken by the

31. Damodar Valley Corporation Act, section 22(1).
32. Air Corporations Act, section 7 (2) (1).
33. Reserve Bank of India Act, section 17 (16).
34. Industrial Development Bank of India Act, section 9(1)(n).
35. Life Insurance Corporation Act, section 6 (2) (i).
36. Industrial Finance Corporation Act, section 23 (1) (f).
corporation to be ultra vires the initiating Act.

However, notwithstanding the difficulty involved in the process, the courts are undoubtedly endowed with the power to decide whether an action of a public corporation is ultra vires the Act. When a corporation is authorised to do an act subject to certain conditions, it must be deemed to have been prohibited to do the said Act except in accordance with the provisions of that Act which confers the authority on it.  

When power is conferred on a corporation or a statutory authority under a statute which also includes the manner in which it is to be exercised, power should be exercised in the manner laid down by the statute and in no other way. In M. Pentiah and Ors. v. Muddala Veeramallappa and Ors it was argued before the Supreme Court that an action of a statutory corporation may be ultra vires its powers without being illegal and that when a statute confers an express power, a power inconsistent with that expressly given cannot be implied. The court agreed that a statutory body can only function within the four corners of the statute, but declared that a corporation is entitled to do not only that which is expressly authorised but that which is reasonably incidental to or consequential upon that which is in terms authorised.

From the above discussion it is evident that the

statutory powers conferred on the corporations are frequently so widely drawn as to make the ultra vires doctrine nugatory as a means of exercising judicial control over the activities of the corporations.

Recently the doctrine of ultra vires has been affirmed by the Supreme Court in its decision in A.Lakshmanaswami Mudaliar v. Life Insurance Corporation of India. The directors of a company were authorised "to make payments towards charitable or any benevolent object, or for any general public, general or useful object". In accordance with a shareholders' resolution the directors paid two lakh rupees to a trust formed for the purpose of promoting technical and business knowledge.

The payment was held to be ultra vires. The court said that the directors could not spend the company's money on any charitable or general object which they might choose. They could spend for the promotion of only such charitable objects as would be useful for the attainment of the company's own objects. The company's business having been taken over by the Life Insurance Corporation, it had no business left to promote.

With reference to the position in the United Kingdom, Professor Robson aptly points out that "the statutes dealing with nationalisation confer powers in such general terms and formulate them in such language that it will be difficult, if not impossible, for the courts to apply the doctrine of ultra

The formulation of powers in subjective terms is, indeed, an objectionable feature of the legislation creating public corporations. It is, however, a feature which is not present in every case in India: the powers of the Air Corporations, for example, are not formulated subjectively, being confined to the doing of things which may be necessary or convenient for the discharge of the functions of the corporations.43

Although the powers of the public corporations are expressed in such wide terms as to make the doctrine of ultra vires almost inapplicable, Parliament has been careful to declare that the public corporations have no authority to commit unlawful acts. A typical formulation is found in the statute nationalising the airlines industry:

"Nothing contained in this section shall be construed as authorising the disregard by the Corporation of any law for the time being in force".44 But this does not really take the matter further, as the ultra vires doctrine is not concerned with acts which are already prohibited by the ordinary criminal or civil law; further as Robson pertinently asks, what is the correct legal position if a minister acting within his very widely drawn legal powers, gives directions to a statutory corporation to commit an illegal act.45

42. See e.g. Smith v. London Transport Executive, (1951) A.C. 555.
43. Air Corporations Act, 1953, section 7 (2) (1).
44. Air Corporations Act, 1953, section 7 (3)(a).
The other general principles of judicial control to which the public corporations in India may be further subject are:

1. Liability in Tort.
2. Liability in Contract.
3. Special Liability under particular Acts like the Income Tax Act, the Industrial Disputes Act, etc.

It would be appropriate and meaningful to consider each one separately.

**Liability of Public Corporations in Tort**

A tort is a civil wrong (which is not exclusively a breach of contract or a breach of trust), the remedy for which is a common law action for damages and, where necessary, a decree of the court such as an injunction. The law of tort is therefore concerned with such matters as trespass to persons, lands and goods, nuisance, negligence, defamation, deceit. A tort is to be distinguished from a crime, which is an offence for which punishment is meted out by the State as a result of criminal proceedings. The same facts may, of course, form a basis for a criminal charge and for an action in tort, e.g., manslaughter and negligence arising from an act of careless driving.

As there is no codified law of torts in India, the Indian courts have generally followed the relevant English Law.

The general principles of tortious liability apply both to natural persons and corporate bodies.\(^47\) To have a broader perspective of the tortious liability of public corporations, it is essential to discuss first the liability of corporations in general, in tort.

Inasmuch as a corporation is an artificial person distinct in law from its members, it is not capable of acting in *propria persona*, but acts only through its agents or servants.\(^48\) All the acts, and therefore all the wrongful acts, of a body corporate are in fact the acts of its agents or servants, though imputed in law to the corporation itself. But this does not mean that the liability of a body corporate is therefore in all cases a vicarious liability for the acts of other persons. A distinction can be drawn between the personal and the vicarious liability of a corporation in much the same way as is done with the liability of natural persons.\(^49\)

Whatever difference of opinion there may be on the question of the abstract legal doctrine as to how far an agent or servant of the corporation can be said to act within the scope of his employment in respect of a tort which is *ultra vires* the corporation, it seems to be clear that there is

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consensus of authority for holding that a corporation cannot be immune from liability in respect of torts brought about at its instance on the ground that the act was not *intra vires* the corporation. 50

In India, local authorities like municipalities and district boards have been held liable for the faults of their officers or servants. 51

In Jokhu v. Municipal Board, Benares 52 the plaintiff was the owner of a house within the limits of Benares Municipality. It was alleged that the house was not within the radius of 600 feet from the nearest standpipe nor had it got any water pipe connection. Sometime in 1929, this house was assessed to water tax. On receipt of notice, the plaintiff filed an objection praying exemption from water tax as his house was beyond the prescribed radius. It appears that the Board took no action on his objection and it remained pending. On 19th May, 1934, a distress warrant was issued against the plaintiff and the officer deputed by the Board attached the plaintiff's cattle and other movable properties. The plaintiff filed a suit for ₹200/- as damages on account of illegal attachment. The Board was held liable and it was held that a corporation is liable to be sued for any tort provided that (i) it is a tort in respect of which an

52. A.I.R. (1938) All. 66.
action would lie against a private individual; (ii) the person by whom the tort is actually committed, is acting within the scope of his authority and in the course of his employment as agent of the corporation; and (iii) the act complained of is not one which the corporation would not, in any circumstances, be authorised by its constitution to commit. 53

In Municipal Board, Mathura v. Gopi Nath 54, it was held that where a statutory corporation like a Municipal Board is negligent in the manner of performance of any act authorised by the statute, it will be liable for any damage caused by it. In this case the Municipal Board was found guilty of not maintaining proper system of water supply through pipes which had become old and rotten with the result that they were unable to withstand the water pressure and gave way and the water overflowed into the street and the adjoining houses and the Board was held liable.

From the above it is sufficient to note this principle, that in general, corporations are liable in tort, and that, therefore, the ordinary law of torts is applicable to them; but their nature as bodies corporate, having powers and duties cast upon them by statute, does cause certain modifications in the application of the ordinary law of torts to them.

In the light of the foregoing background we may now deal with the tortious liability of public corporations in India. The liability in tort which is likely to arise by the acts and

omissions of public corporations will mostly be confined to
trespass, negligence, breach of trust, and occasionally nuisance,
conversion or fraud. Before a corporation is liable, it must be
shown that the relation of principal and agent or of master and
servant existed between the corporation and the person who committed
the act. 55 In this connection it should be noted that a master
is not responsible for the negligence of his servant while
engaged in doing something which he is permitted to do for his
own purposes, but not employed to do for his master. 56 For the
master's liability to arise, the act must be a wrongful act
authorised by the master or a wrongful and unauthorised mode
of doing some act authorised by the master. 57 The driver of a car
taking the car on master's business makes him vicariously liable
if he commits an accident. Thus where the vehicle was driven
for and on behalf of the owner while in the custody of his
authorised agent, the owner would be vicariously liable even
if the driver was not his servant. 58

Since a public undertaking is a separate legal entity
from the government, it cannot avail of the immunity attached
to the government under Article 300 of the Constitution of India
with respect to suits for torts committed by its servants just

Part 5, sec.5, para 179, p. 88.
Guj. 216.
58. Life Insurance Corporation of India and another v.
Smt. Kasturben Naranbhai Vaghia and others,
like any other torts committed by its servants. Hence, a government undertaking remains vicariously liable for torts committed by its servants just like any other incorporated body. In case of a statutory corporation like a public corporation, the concerned statute creating it may confer some immunity on it in this regard.

A statute setting up a public corporation confers duties and powers over it. Sometimes it may not be possible to exercise the same without infringing private rights. For example, one of the functions of the Damodar Valley Corporation is promotion of schemes of drainage, irrigation, water supply, generation, transmission and distribution of electricity. To enable it to exercise these duties, it has been expressly given power to construct dams, etc. It may not be possible for it to do so without interfering with private rights. Statutory authorisation will generally be a defence for an action for tort. However, the statutory power or duty must be exercised with reasonable care. If it is exercised negligently then a public body will be liable unless the statute indicates a contrary intention. In case of some of the public corporations, statutes generally exempt them and their employees from liability for the negligence of the latter. For instance, section 40 of the Agricultural Refinance Corporation Act, 1963 provides that "No suit or other legal proceeding shall

60. M.P.Jain and S.N.Jain, op. cit., p. 529.
lie against the Corporation or any director or any officer of the Corporation or any other person authorised by the Corporation to discharge any functions under this Act for any loss or damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this Act". Some statutes offer this protection not to the corporation but only to members or employees of the corporation concerned. For example, section 47 of the Life Insurance Corporation Act, 1956 states that: No suit, prosecution or other legal proceeding shall lie against any member or employee of the Corporation for anything which is in good faith done or intended to be done under this Act. It is difficult to appreciate the reason of these variations. In the modern welfare State, the image of which is implicit in the Preamble and the Directive Principles of State Policy of the Constitution of India, when the State is entering into business and commercial activities of all kinds, the protection clause in the statutes establishing public corporations seems to be incongruous and unjustified.61

It is obvious that before the government can be held for tortious acts of someone even in the discharge of commercial functions, the person must be an agent or employee of the government. Since a public undertaking is an independent entity, it may not be regarded, technically speaking, as an agent or an employee of the government which may be owning or controlling it.

The Supreme Court basing its decision on this technicality, held in *H.E.M. Union v. Bihar* that a government company even though controlled wholly or partly by a government department will be ordinarily presumed not to be a servant or agent of the State. Consequently, as the legal position stands now, government cannot be held liable for tortious acts of a public undertaking or those of its employees.

The Law Commission has recommended that "the State also should be liable for torts where a corporation owned or controlled by the State would be liable". Under the Tort Bill introduced in India, it is not clear whether the government would be liable for torts committed by public undertakings. The bill makes the government liable for the tortious acts of its servants and an agent is defined as a person who, being employed to do any act for the government, is doing the act under the control of the government. Can a public undertaking be regarded as an agent of the government under the Act? It would depend whether the definition does away with the technicality of law that a public undertaking is independent of the government or it introduces the test of control by the government as a matter of fact.

Under the common law it has been held that a public corporation is not an agent or servant of the Crown. In India also, as seen in Chapter II, it has been decided that a public

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corporation is neither an agent nor a department of the State. However, since the Acts initiating public corporations clearly say that the corporation can sue and be sued, it may be deduced that the public corporation in our country will be liable for the torts of its servants to the same extent as a private employer of full age and capacity would have been. But as observed in Chapter II, sometimes the Acts of incorporation contain express provisions giving additional defence grounds to the public corporation against a claim for damages for the torts committed by its servant. For example, section 57(2) of the Damodar Valley Corporation Act, says:

Save as otherwise provided in the Act no suit or other legal proceeding shall lie against the corporation for any damage caused or likely to be caused by anything in good faith done or purported to be done under this Act.

Some Acts appear to confer immunity on the servants of the corporation. For example, section 57(1) of the Damodar Valley Corporation Act provides:

No suit, prosecution, or legal proceeding shall lie against any person in the employment of the corporation for

66. e.g., Damodar Valley Corporation Act, section 3(2); Industrial Finance Corporation Act, section 3(2); Life Insurance Corporation Act, section 3(2). For other examples, see Chapter II under the heading General Liability of Public Corporations in India.

anything which is in good faith done or purported to be done under this Act.

It should be noted that such protection would not extend to an act done maliciously. The Law Commission has rightly pointed out that such protection clauses should not be made "to extend to negligent acts however honestly done". If the recommendation of the Law Commission is accepted, it may then not be necessary to incorporate such protection clauses in the statute book.

**Liability of Public Corporations in Contract**

By far the most important modification of the law of contract, results from the increasing role played by the government, by local authorities, and the growing number of incorporated public authorities as owners and managers of industry, as providers of public utilities, administrators of social services, or in some other capacity which requires the making of contracts. It is perhaps not surprising that this problem has as yet been so little explored in the common law systems. It is a familiar problem in continental systems, where the relations between public authority and the citizen have, for many decades, been the concern of the science of public law.

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68. Law Commission of India, *op. cit.*, p. 39. See also Chapter II.

Here we propose to analyse the liability of public corporations in contract. But first it would be expedient to make a brief survey of the liability of corporations in general, in contract.

An incorporated body is a legal person distinct from its members. As such it can own property, sue, and be sued in its own name, and it can make contracts. The actual physical actions are performed by the corporation's agents or servants, but that does not prevent the attribution of these actions to the corporation itself.  

The Indian Contract Act 1872 (Act IX of 1872) makes no mention of a corporation. No provision is made in the Contract Act as regards the capacity of a corporation to enter into a contract; all that sections 10 and 11 say is that the party must be competent to contract, and in order to be so, the person must be of the age of majority and of sound mind and not otherwise disqualified from doing so, but no mention is made as to the contracting powers of a corporate body. The powers of a corporation to make a contract vary according to the character of the corporation.  

Contracts with a corporation are often required by the Act establishing it to be executed in a particular form, as,

for instance, under seal. "The question in such cases is whether the Act is imperative and not subject to any implied exception when the consideration has been executed in favour of the corporation. If the Act is imperative and the contract is not under seal, the fact that the consideration has been executed on either side does not entitle the party who has performed his part to sue the other on an implied contract for compensation. This may work hardship, but the provision of the Act being imperative, and not merely directory, it must be complied with". In such cases the corporation cannot be charged at law upon the contract, though the consideration has been executed for the benefit of the corporation. "The Legislature has made provisions for the protection of ratepayers, shareholders and others who must act through the agency of a representative body by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer ---- The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement". This view has been confirmed by the Supreme Court.


Thus where the statutory provision is mandatory, it would seem, as Salmond and Williams point out, that in general the non-statutory exceptions will be excluded.\textsuperscript{75}

Just as a corporation cannot be sued upon a contract which is required to be, but which is not under seal, though the consideration has been executed for its benefit, so it cannot sue upon the contract, though it has performed its own part of the contract so that the other party has had the benefit of it.\textsuperscript{76}

In \textit{Mohamad Ebrahim Molla v. Commissioners for the Port of Chittagong}\textsuperscript{77} the commissioners for the Port of Chittagong sued the defendant for the recovery of money due as hire of a tug lent to the defendant under a contract with him. The contract was not under seal as required by S.29 of the Chittagong Port Act, 1914. It was held that the Act was imperative in its terms and that the plaintiffs could not sue on the contract. It was held at the same time that the plaintiffs were entitled to payment upon a \textit{quantum meruit}. According to Pollock and Mulla\textsuperscript{78}, both counsel and the Court were in error in thinking that the plaintiffs were entitled to recover \textit{quantum meruit}. No question of payment upon a \textit{quantum meruit} can arise where an Act is imperative.

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\textsuperscript{76} Raman Chetti \textit{v. Municipal Council of Kumbakonam}, (1907) 30 Mad. 290; Mohamad Ebrahim Molla \textit{v. Commissioners for the Port of Chittagang}, (1927) 54 Cal. 189, 210 et seq., South Barrackpore Municipality (Chairman of) \textit{v. Amulya Nath Chatterjee}, (1907) 34 Cal. 1030.

\textsuperscript{77} (1927) 54 Cal. 189.

\textsuperscript{78} Pollock and Mulla, \textit{op. cit.}, p. 476.
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Against the above analysis it would now be desirable to deal with the contractual liability of public corporations in India.

In India, the Act incorporating corporations, generally lays down its powers and limitations, including the manner in which it must contract.  

Public corporations can also enter into contracts like private corporations, regarding the performance of their statutory duties. In the U.K., a statutory corporation (such as are most public authorities other than the Crown) has power to contract only for the purposes authorised by statute (Ashbury Carriage Co. v. Riche) and for such purposes as may fairly be regarded as incidental to or consequential upon those purposes (Att.Gen. v. Great Eastern Ry.). For intra vires contracts, public authorities are generally liable in the ordinary way, e.g., a contract by a local authority to sell coke (Bradford Corporation v. Myers). As corporations (not being companies under the Companies Acts) they are no longer governed by special rules as to contracting under seal.

The old theory of freedom of contract is giving way in public law to standard forms of contract with large monopolies.


81. (1875) L.R. 7 H.L. 653.


like the public corporations which provide electricity and rail transport. Here the terms and conditions and the charges are regulated, and the consumer's only choice is to accept the terms in toto or reject the service altogether.\textsuperscript{85}

In India, public corporations can make contracts\textsuperscript{86} and can sue or be sued for breach of contract\textsuperscript{87}. Where a statute makes a specific provision that a body corporate has to act in a particular manner and in no other, that provision of law, being mandatory and not directory, has to be strictly followed.\textsuperscript{88}

In connection with the liability of public corporations in contract it should be noted that since a public undertaking does not have the status of a government department, it cannot avail of the restrictions provided in Article 299 of the Constitution of India and section 80 of the Civil Procedure Code, regarding suits against government.\textsuperscript{89} A public undertaking

\textsuperscript{85} O.Hood Phillips, op. cit., p. 642.

\textsuperscript{86} Vide, for example, section 3(2) of the Food Corporations Act 1964, section 3(1) of the National Co-operative Development Corporation Act, 1962, section 3(2) of the Industrial Development Bank of India Act, 1964, section 3(2) of the Oil and Natural Gas Commission Act, 1959, section 3(1) of the Central Warehousing Corporation Act, 1962, section 4 of the Khadi and Village Industries Commission Act, 1956, section 3(1) of the Deposit Insurance Corporation Act, 1961 amended in 1968, section 3(2) of the Agricultural Refinance Corporation Act, 1963.

\textsuperscript{87} Vide, for example, section 9(1) of the Life Insurance Corporation Act, 1956, section 7(1)(b) of the Air Corporations Act, 1953, section 6(3) of the State Bank of India Act, 1955, section 25(3) of the Industrial Development Bank of India Act, 1964.


has the same legal status as any other incorporated body and can be sued for breach of contract under the ordinary law.

As stated in Chapter I, the government exercises quite a good deal of control over these undertakings by issuing directives. An important question is: Is a contract entered into by an undertaking contrary to a ministerial direction enforceable against it? In such a case, the ordinary principles of company law will apply, that is, the persons dealing with such undertakings are not obligated to enquire whether all formalities of internal management have been complied with, unless there is something to show that they should have made the enquiry.\(^90\)

Thus it is clear that a public undertaking is not entitled to any privilege and immunity attached to the government by the Constitution of India in the matter of suits against it. It is subject to the ordinary laws\(^91\) except insofar as it may have special powers, immunities and privileges under the statute establishing it.

Where the Act creating public corporations in India lays down that contracts can be entered into only in writing, an oral contract entered into by its employees would not be binding on the corporations.\(^92\) The delegation of authority to enter into contracts under the Act must be specifically proved. The question of implied

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authority does not arise at all. It is therefore quite clear that any contract entered into in any manner other than in accordance with the provisions of the Act shall not be binding on the corporation, for it is well established that any contract entered into by a statutory body not according to the provisions laid down in the Act or in the Statutory Rules shall be void and unenforceable.

The question whether a public corporation has taken full benefits under a contract even though not binding and therefore entitling the plaintiff to get compensation under section 70 of the Contract Act is a mixed question of fact and law and hence, could not be gone into for the first time in second appeal.  

A public corporation cannot undertake by contract to do something which is not related to the powers conferred by the statute. In other words, the contracts of public corporations will be void if they relate to functions which the corporation is not authorised by statute to perform. If the Life Insurance Corporation, for instance, entered into a contract that it would supply cement to Bihar, that contract would not be enforceable because such a task is absolutely beyond the scope of powers stated in the Life Insurance Corporation Act. Hence, the other party would have no right to institute a suit if the Life Insurance Corporation failed to perform this task.

Thus if on the true construction of a statute creating a

corporation it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal and void, and incapable of being ratified. 95

Similarly, a public corporation cannot by contract disable itself from performing its statutory duty. 96 It is beyond the powers of a corporation to contract not to use the powers with which they are invested, presumptively for the public good 97; as a power for the compulsory purchase of land. 98 Let us suppose that the Oil and Natural Gas Commission enters into an agreement with a person possessing property very near the Oil and Natural Gas Commission project not to damage his land or property. But if it honours this agreement, it will not be able to "transport and dispose of natural gas and refinery gases produced by the Commission." 99 This agreement, would, therefore, be against the statutory duty of the Oil and Natural Gas Commission and would be unenforceable. Again, any contract which tends to be injurious to the public or against the public good would be void as being

99. Oil and Natural Gas Commission Act, 1959, section 14(2)(e)
contrary to public policy. 100

Unless protection was afforded by the initiating Act, a public corporation would be liable for breach of contracts which has been lawfully executed. Thus the Food Corporation may be liable for breach of contract with a contractor for construction of a godown for the storage of food grains. However, the corporations may be liable for breach of contract with its employees. In this connection we may refer to the case of Damodar Valley Corporation v. Pratap Roy 101, where, a tracer, appointed and subsequently dismissed by the Damodar Valley Corporation, charged the Damodar Valley Corporation with having violated certain clauses of the contract of appointment. It was held that the order of dismissal could not have retrospective effect and that a clear notice of one month as stated in the contract between the tracer and the Damodar Valley Corporation was essential. Here it would be relevant to point out that normally a contract of personal service will not be enforced by an order for specific performance nor will it be open for a servant to refuse to accept the repudiation of a contract of service by his master and say that the contract has never been terminated. The remedy of the employee is a claim for damages for wrongful dismissal or breach of contract. But when a statutory status is given to an employee and there has been a violation of the provisions of the statute

101. 60 C.W.N. 1023.
while terminating the services of such an employee, the latter will be eligible to get the relief of a declaration that the order is null and void and that he continues to be in service, as it will not then be a mere case of a master terminating the services of a servant. The exceptions to the normal rule that no declaration to enforce a contract of personal service will be granted are:

(1) a public servant who has been dismissed from service in contravention of Article 311; (2) reinstatement of a dismissed worker under Industrial Law or by Labour or Industrial Tribunals; (3) A statutory body when it has acted in breach of a mandatory obligation, imposed by statute. In regard to dismissal of employees, reference may also be made to the case of *Indian Airlines v. Sukhdeo Rai*. Here, the Act did not cast any obligation upon the Indian Airlines Corporation to appoint employees under a particular type of contract or to terminate them on specific grounds. Hence, though the Corporation's employee was dismissed in contravention of the Regulations made under the Act, it was held that the dismissal cannot be declared as null and void. However, in *Sukhdev Singh v. Bhagatram*, the Court held that the employees of the statutory bodies like the Oil and Natural Gas Commission, the Life Insurance Corporation and the Industrial Finance Corporation have a

statutory status, and they are entitled to a declaration of being in employment when their dismissal or removal is in contravention of statutory provisions.

Again, in Mithoolal Nayak v. Life Insurance Corporation of India105, the Supreme Court agreed with the High Court that where the contract is bad on the ground of fraud, the party who has been guilty of fraud or a person who claims under him cannot ask for a refund of the money paid. The Court declared that it is a well established principle that courts will not entertain an action for money had and received where, in order to succeed, the plaintiff has to prove his own fraud.

Hence, a contract with a public corporation would be clearly vitiated if fraud is practised by the other party. Thus where in a contract in connection with the issue of policies the assured had fraudulently suppressed material facts which were within his knowledge while furnishing the answers to the questions contained in the personal statements, it has been held that such a contract would be clearly vitiated on account of the fraud practised by the assured.106

We can also consider the case of Damodar Valley Corporation v. K.K.Kar107. In this case the respondent (the

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tenderer) entered into a contract with the appellant (Damodar Valley Corporation) to supply coal but as he failed to do so in accordance with the terms of the contract, the appellant unilaterally repudiated the contract and ultimately paid the respondent for the supply of coal. It was the case of the appellant that these payments, including the return of the deposit amount, finally settled the claims of the respondent. After receiving those payments the respondent claimed from the appellant damages for repudiation of the contract. When the appellant did not agree the respondent served a notice of his intention to refer the matter to the arbitration under the arbitration clause contained in the contract. The arbitration clause provided for reference to the adjudication of the arbitrators after notice, any question, dispute or difference arising between the parties upon or in relation to or in connection with the contract. The question arose whether the court on an application under sections 9(b) and 33 of the Arbitration Act was entitled to enquire into the truth and validity of the averment as to whether there was or was not a final settlement on the ground that if that was proved, it would bar a reference to the arbitration inasmuch as the arbitration clause itself would perish.

It was held that the question whether there had been a full and final settlement of a claim under the contract was itself a dispute arising 'upon' or 'in relation to' or 'in
connection with the contract. A claim for damages was a dispute or difference which arose between the respondent and the appellant and was 'upon' or 'in relation to' or 'in connection with' the contract, and the reference to the arbitrator by the respondent was not barred.

In connection with contracts by public corporations it should be noted that a repudiation by one party alone does not terminate the contract. Where the contract is void, illegal or fraudulent etc., the entire contract is non est or voidable. Again, where the dispute between the parties is that the contract itself does not subsist either as a result of its being substituted by a new contract or by rescission or alteration, that dispute cannot be referred to the arbitration as the arbitration clause itself would perish if the averment is found to be valid.¹⁰⁸

Lastly, it should be remembered that when a contract or transaction is illegal as it has been specifically prohibited by a statute the court cannot enforce the contract either directly or indirectly.¹⁰⁹

**Special Liability Under Particular Acts**

A public corporation may also be liable under certain Acts like the Income-tax Act, the Sales-tax Act, the Industrial Disputes Act, the Factories Act, etc..

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As an illustration, let us take up the question of taxation. If public and private undertakings co-exist in a particular industry, any undue advantage granted to public corporations in the matter of taxation would vitiate the process of judging 'the relative efficiency', and may create a sense of complacency in the public sector.

In India, the property of the Union Government is exempt from taxation, except insofar as Parliament may by law provide, unless such a tax was levied immediately before the commencement of the Indian Constitution. The property and income of the State Government are also exempt from Union taxation. This exemption does not, however, prevent the Union Government from imposing a tax (such as Parliament may by law provide) in respect of a trade or business of any kind carried on by or on behalf of a State Government except insofar as any class of trade or business is declared by Parliament to be incidental to the ordinary functions of the government. But public corporations in India are taxable like ordinary companies. This policy is supported on the grounds that uniform taxation of public and private enterprise would ensure conditions of equality in operation and fair competition. It should also increase efficiency by providing an incentive to public enterprise to render a good account of its operation in terms of net financial results.

In Andhra Pradesh State Road Transport Corporation v. The Income Tax Officer and Anr. the Supreme Court discussed the claim of the public corporation to tax exemption. It was contended on behalf of the corporation that income tax could not be levied on it, and reference had been made to Article 289 of the Constitution. While examining this question, the Supreme Court stated: "The corporation, though statutory, has a personality of its own and this personality is distinct from that of the State or other shareholders. It cannot be said that a shareholder owns the property of the corporation or carries on the business with which the corporation is concerned. The doctrine that a corporation has a separate legal entity of its own is so firmly rooted in our notions derived from common law that it is hardly necessary to deal with it elaborately. It may be that the statute --- may provide expressly or by necessary implication that the income derived by the corporation from its trading activity would be the income of the State. The doctrine of the separate entity or personality of the corporation is always subject to the exceptions which statutes may create, and if there is a statutory provision which clearly indicates that despite the concept of the separate personality of the corporation, the trade carried on by it belongs to the shareholders who brought the corporation into existence and the income received from the said trade likewise belongs to them, that would be another matter. It would then be possible to hold

112. (1964) 7 S.C.R. 17.
that as a result of the specific statutory provisions the income received from the trade carried on by the corporation belongs to the shareholders who have constituted the said corporation. The Supreme Court finding no such statutory provision said that the income derived by the appellant from its trading activity cannot be said to be the income of the State under Article 289(1). Accordingly, the Court rejected the claim for tax exemption.

Thus it is evident that the public corporations in India may be held liable under the Income-tax Act. Similarly, they may be liable under the Sales-tax Act. In this connection we can consider the case of M/s. Damodar Valley Corporation v. The State of Bihar 113. A corporation, with the object of constructing a number of dams, entered into an agreement with the contractors. Under clause 8 of the agreement, the corporation agreed to make available to the contractors such equipment as was necessary and suitable for the construction. The contractors were charged the actual price paid by the corporation for the equipment and machinery thus made available. The equipment thus supplied by the corporation to the contractors were classified into two groups, group A and group B. The machinery in group A was to be taken over from the contractors by the corporation after the completion of the work at their "residual value", which was to be calculated in the manner set out in the agreement. The machinery in group B was to become the property of the contractors after its full price had been paid by them. The Sales-tax Officer

assessed the corporation under section 13(5) of the Bihar Sales-tax Act, 1947, upon which the corporation contended that in the facts and circumstances of the case, it could not be held that the property in the goods included in group A did pass to the contractors and the transaction amounted to a sale and that the transaction amounted only to a hire purchase agreement.

It was held on the construction of the terms of the agreement between the parties that the transaction was a sale on deferred payments with an option to re-purchase and not a mere contract of hiring, as contended on behalf of the corporation.

In practice, however, we find diversity in the statutory provisions in the matter of taxing our public corporations. There are three patterns of statutes in this regard: those which specifically provide that public corporations will pay the usual taxes; those which grant specific exemption; and those which are silent on the matter. Thus some of the corporations have been exempted from income-tax, super-tax and business-profits tax. Section 20 of the Rehabilitation Finance Administration Act, 1948, provided: "Notwithstanding anything contained in the Indian Income-tax Act, 1922, or in any other enactment for the time being in force relating to income-tax, super-tax or business profits-tax, the administration shall not be liable to pay income-tax, super-tax or business profits-tax on any income, profits or gains". Similarly, section 48(1) of the Reserve Bank of India Act, says: "Notwithstanding anything contained in the Indian Income-Tax Act, 1922, or any
other enactment for the time being in force relating to income-tax or super-tax, the bank shall not be liable to pay income-tax or super-tax on any of its income, profits or gains.\textsuperscript{114}

Some of the Acts expressly provide for the taxation of the corporations e.g., section 43(1) of the Damodar Valley Corporation Act, says: The corporation shall be liable to pay any taxes on income levied by the Central Government in the same manner and to the same extent as a company. Section 43(2) of the same Act lays down that "The Provincial Government shall not be entitled to any refund of any such taxes paid by the corporation". Section 40 of the Industrial Finance Corporation Act provides that "For the purposes of the Indian Income-tax Act--the corporation shall be deemed to be a company within the meaning of that Act and shall be liable to income-tax and super-tax accordingly on its income, profits and gains."\textsuperscript{115} The implication in section 30 of the Deposit Insurance Corporation Act, 1961, is that after the prescribed period of tax exemption, it shall be liable to pay income-tax or super-tax on any of its income, profits or gains. Some other Acts e.g., the Air Corporations Act, 1953, the Life Insurance Corporation Act, 1956, the Khadi and Village Industries Commission Act, 1956, and the National Co-operative Development Corporation Act, 1962, are silent on the matter of taxation.

\textsuperscript{114} See also section 35 of the Industrial Development Bank of India Act.

\textsuperscript{115} See also section 39 of the Warehousing Corporations Act, 1962, section 42 of the Food Corporations Act and section 29 of the Oil and Natural Gas Commission Act.
In Andhra Pradesh State Road Transport Corporation v. The Income-Tax Officer And Anr, it had been contended on behalf of the Andhra Pradesh State Road Transport Corporation that where the legislature wanted to provide for the liability of the corporation to pay the taxes on income levied by the Central Government, it has made specific provisions in that behalf and since no such provision has been made in the Act, it follows that the legislature intended that no tax should be levied on the income earned by the corporation established under the Act. The Supreme Court, however, rejected this contention because there was no substance in the argument. In the absence of any express exemption it may, therefore, be assumed that the public corporation is subject to the ordinary laws of taxation.

We may conclude that the public corporation may be liable under the Income-tax Act and the Sales-tax Act. It may likewise be subject to industrial laws, such as, the Industrial Disputes Act, 1947, the Factories Act, 1948 etc. and the same standards in fixation of wages have to be applied to them as to workmen in a private enterprise. The position has been made clear by the Supreme Court in Hindusthan Antibiotics Ltd. v. The Workmen wherein the court concluded, after an elaborate discussion, that "the same principles evolved by the industrial adjudication..."
in regard to private sector undertakings will govern those in the public sector undertakings having a distinct corporate existence".

Provisions for Compensation under Initiating Acts

An opportunity for exercising judicial control over public corporations also comes in with regard to the fixing of compensation. The question of compensation inevitably arises whenever a public corporation is established through nationalisation.

A characteristic feature of British nationalisation legislation is its axiomatic insistence on the principle that compensation must be paid for assets transferred from private to national ownership. In India, such insistence is not only axiomatic but also compulsory so that the statutes dealing with nationalisation may not be ultra vires the Constitution of India.

Before studying the constitutional provisions relating to compensation, it would be advisable for our purpose to describe the provisions for compensation laid down under the Acts initiating public corporations in India.

In India, the question of payment of compensation arose when the Reserve Bank, the Air Corporations, the State Bank and the Life Insurance Corporation were set up through nationalisation.

The Acts relating to the two Banks, provides for the amount of compensation to be paid per share. But the Air Corporations Act (section 25 and 27, and the Schedule) lays down the principles and the mode of giving compensation. The Life Insurance Corporation Act (section 16 and First Schedule) specifies the principles of compensation.

Reserve Bank

The first occasion when the amount of compensation was to be decided as a result of nationalisation, came when the Reserve Bank of India was nationalised. The stock exchange value of the shares was taken as the basis of calculation. The average monthly prices of the shares between March 1947 (the month of announcement of nationalisation plan) and February 1948 (when the Bank was finally nationalised) were taken and compensation at the rate of Rs.118-10-0 per share was announced and paid. There was quite a good deal of discontentment amongst the shareholders that the government had taken undue advantage of the depression in the share market on account of the announcement of the policy of nationalisation and the amount of compensation allocated was not fair and reasonable considering the future loss of earnings to the shareholders. 121

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120. Reserve Bank of India (Transfer to Public Ownership) Act, section 3 and section 6(2); State Bank of India Act, section 9 and First Schedule.

The State Bank of India Act was passed in May, 1955, and the State Bank of India, constituted on July 1, 1955, took over the assets and liabilities of the Imperial Bank.

The same basis of calculating compensation on the basis of stock exchange prices were adopted on further nationalisation of the Imperial Bank of India in the year 1954. The average share prices between 20th September, 1953 and 20th December, 1954 (the date of the announcement of the nationalisation of the Bank) were calculated and payment of compensation was to be made at the fixed rate of Rs.1,765-10-0 for each fully paid share and Rs.431-12-4 per share in the case of a partly paid-up share. It was also provided that Rs.10,000/- of the amount of compensation would be paid in cash and the rest in government bonds.

In the case of the Damodar Valley Corporation the compensation payable is laid down by the Act. For those dispossessed by the corporation's installations the policy is, wherever possible to provide land for land and house for house. Those who do not want land and/or house, are paid compensation in cash in accordance with the existing law. Compensation payable is determined by agreement between the corporation and the party dispossessed, failing which it is decided by arbitration.
In the case of nationalisation of air services, the government, however, did not agree either with the payment of compensation on the basis of market quotations nor on the valuation of assets. It, however, took into account the purchase price of the assets and after subtracting the depreciation calculated on the basis of the Indian Income-tax Act, arrived at the compensation amount. The total amount decided upon thus was ₹ 4.7 crores out of which 10 per cent was to be paid in cash and the balance in bonds at 3½ per cent interest per annum, redeemable at part at the end of five years. There was some criticism about the compensation paid. Most of the aircrafts and spare parts were purchased by the private operators from the war-surpluses at cheap rates. They felt that it was a sort of expropriation which is against the spirit of India's democratic Constitution.122

The basis of compensation paid to the Life Insurance Companies was laid down in the Life Insurance Corporation Bill. The principles have, however, been framed in a very legalistic language, the gist of it may be put thus: One of the principle entitles an insurer to twenty times the annual average of the share of the surplus allocated to shareholders. Alternatively, an insurer may claim ten times the annual average of the share of the surplus allocated to shareholders plus the paid-up

122. K.C. Bhandari, op. cit., p. 133.
capital or assets equivalent to it. The insurer was free to choose whatever computation was advantageous to him. Disputes were to be settled by a tribunal appointed for the purpose.

Having laid down the provisions for compensation under the initiating Acts, we may proceed to examine the constitutional implications relating to compensation with special reference to the recent amendments.

**Constitutional Implications with special reference to recent Constitutional Amendments.**

It is quite possible that the parties concerned are not satisfied with the compensation offered.

It is well-known that Article 31(1) of the Constitution of India lays down that no person shall be deprived of his property save by authority of law. Thus Article 31(1) is attracted if a person is deprived of property (1) without the authority of law; (2) under the authority of a law which is *ultra vires*.

Compensation for compulsory acquisition of property has specific constitutional significance in India. Article 31(2) says "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall
be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash.\footnote{123} It should, however, be noted that the protection of Article 31(2) is available to property not only of 'individuals' or 'corporations' but also of the State. Otherwise, the property of a local or a municipal authority can be acquired without compensation.\footnote{124} Thus it is clear that Article 31(2) deals with the compensation for compulsory acquisition of property and lays down two conditions subject to which the authority conferred upon the State could be exercised: (1) the existence of a public purpose; and (2) the payment of compensation.

**Public Purpose**

The concept of public purpose connotes public welfare. With the march of civilisation, notions as to the scope of the general interests of the community are fast changing and widening. The emphasis is unmistakably shifting from the individual to the community. It is, therefore, difficult to precisely define public purpose; it is an elastic, not a static, concept and varies with the requirements of the society.\footnote{125} Whatever fosters the general interest of the community, as opposed to particular interest of the individuals, must be regarded as a public purpose. It is not

\footnotesize{\textit{123. Constitution of India}, Article 31(2).}
necessary that the property acquired must be made available to the public at large or that the public benefit aimed at must apply to the whole community. However, if the acquisition benefits only certain individuals it may still be for a public purpose where the individuals are benefited not as individuals but in furtherance of a scheme of public utility. Even acquisition of property for an individual may be a public purpose if the public derives an advantage from the scheme. 126

The following are a few of the examples where acquisition or requisition has been upheld on the ground that it was for a public purpose: acquisition for the rehabilitation of thousands of displaced persons 127, acquisition of land for co-operative societies for the construction of houses under special schemes, since the public generally benefited by such schemes, even though the direct and immediate beneficiaries of the scheme may be individuals 128, acquisition of land by government at the instance of a corporation, for widening a lane for the safety and convenience of the public 129; acquisition of land from public

revenue for development into an industrial area, and requisition of a godown for storing government food grains collected for distribution in deficit areas, acquisition of accommodation for an employee of a Road Transport Corporation - a statutory body; and nationalisation of land.

(2) Payment of Compensation

The framers of the Indian Constitution did not qualify the phrase "compensation" with any adjective—say, "just", "reasonable" or "nominal", etc. "There had been a good deal of bowling and batting on this pitch between the Bar and the Bench in India". So, it would be relevant for our present study if we examine similar provisions in some other written constitutions e.g. Amendment V of the American Constitution provides:

"nor shall private property be taken for public use, without just compensation".

Article 153 of the Weimar Constitution provided:

"Expropriation can only take place for the public benefit and on a legal basis. Adequate compensation shall be granted, unless a Reich law otherwise provides".

According to Section 51 (xxxii) of the Australian Constitution the Commonwealth Parliament is empowered to make laws with respect to:

"The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws". However, the Australian case study on this subject indicates that there has been some fluctuation in the meaning attached by the courts to the words "just terms". The Australian paragraph (xxxii) is not identical in meaning with the Fifth Amendment of the Constitution of the United States.

India

Article 31(2) of the Constitution of India as originally passed read as follows: No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifics the principles on which, and the manner in which, the compensation is to be determined and given.

Actually, the question of amount of compensation under Article 31(2) was one of the important questions before the Supreme Court in the cases relating to abolition of Zamindari, but its decision on the effect of Article 31(2) could be avoided in those cases on account of the insertion of Articles 31-A and 31-B. The decision of the Supreme Court on the effect of Article 31(2) could not, however, be avoided when the case of State of
West Bengal v. Bela Banerjee came before it. The Supreme Court interpreted Article 31(2) and held that the word compensation in that clause meant full cash equivalent of the property deprived of and that the question of compensation was a justiciable issue before the court. On the basis of the view taken in Bela Banerjee's case, it became open to the court to invalidate laws for compulsory acquisition or requisition in case they did not provide for adequate compensation.

The legal position as expounded by the Supreme Court in Bela Banerjee's case again created a difficult situation for the government to compulsorily acquire or requisition property without regard to payment of its full equivalent value. But by its decision in the case of Shri Shankari Prasad Singh Deo v. Union of India, the Parliament had already been armed with the necessary power to amend the articles related to fundamental right to property in Part III of the Constitution. It seems that the Parliament was also getting tempted to widen the scope of constitutional security acquired by Articles 31-A and 31-B to protect certain items of legislation relating to agrarian reforms and social welfare which affected the proprietary rights of certain citizens. With this end in view the Parliament made the Constitution (Fourth) Amendment Act, 1955.

136. (1952) S.C.R. 89.
137. S.P. Gupta, Supreme Court on Amendment of Fundamental Rights in Indian Constitution, Foreward by N.A. Palkhivala, Law Publishing House, Allahabad, p. V.
Fourth Amendment

The chief provision of the Amendment is that compensation under Article 31 is no more a justiciable matter under the Constitution. The Amendment does not say that no compensation will be paid in future for property compulsorily acquired, nor is its intention to abolish compensation altogether. All that it does say is that although compensation should be paid in all cases of acquisition, it is the sole business of the Legislature to determine the amount of compensation or the principles or the manner in which it will be paid and no court of law will sit over it in judgement. Thus, the question of compensation is withdrawn from the field of judicial determination and placed exclusively at the will of the Legislature.138

In this context, it would be interesting to see how the 1955 Amendment was interpreted by a foreign jurist, Justice Douglas of the American Court:

"The new clauses have not yet been authoritatively construed --- The question of reasonableness of the compensation, however, is no longer a justiciable one, the courts being confined to determining whether the formula for compensation provided by the Legislature has been met --- whatever the cause, the 1955 amendment casts a shadow over every factory, plant, or other individual enterprise in India. The Legislature

may now appropriate it at any price it desires, substantial or nominal ---- The result can be just compensation or confiscation-dependent wholly on the mood of Parliament".  

After the amendment Article 31(2) read as follows: No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

However, the amendment of Article 31(2) barring the question of adequacy of compensation from being raised in any court, did not lead to any significant result. In the case of Vairavalu v. Special Deputy Collector\(^{140}\), the Supreme Court stated that even after the amendment, provision for compensation in Article 31(2) is a necessary condition for the making of a law of acquisition or requisition; that the Amendment Act accepted the meaning of compensation and principles for determination as defined in the case of Bela Banerjee; and that the law of compulsory acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for determination.


\(^{140}\) (1965) 1 S.C.R. 614 at p. 626.
the determination of the same. This was substantially upheld in the case of Union v. Metal Corporation. But in the case of Gujarat v. Shantilal, the Supreme Court observed that "a challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the constitutional declaration that adequacy of compensation provided is justiciable".

The dichotomy of the judicial views expressed in the Metal Corporation case and the Shantilal case, expressed in simple words is this: in the former case, the court emphasised on 'just equivalent' of the property acquired and, therefore, if the principles specified in the law for the purpose of fixing compensation sought to achieve that object then the adequacy of compensation was not challengeable in a court. In the latter case, the court has repudiated the idea of 'just equivalent', it now insists on compensation and will intervene only if it is illusory or the principles specified for the purpose are 'irrelevant'.

After the decision in the Shantilal case, the provision of fundamental rights of property under Article 31(2), as understood earlier, became a dead letter. But it was resuscitated by the majority decision in the case of R.C. Cooper v. Union of India which has, in substance, overruled the decision in the

case of Shantilal. Thus the attempt on the part of the Parliament to take away the effect of 31(2) as it originally stood, failed and it again led to a situation which the Parliament did not want to accept.

By the Constitution (Twenty-Fifth Amendment) Act, 1971, Clause 2 of Article 31 has been further amended by substituting the word compensation by the word 'amount'. Another change made in that Article is that the law determining the amount or laying down the principle for the determination of the amount to be paid in return for the property acquired or requisitioned shall not be called in question in any court on the ground that the amount so fixed or determined is not adequate or that such amount is to be given otherwise than in cash. By this amendment a new clause (2 B) has been inserted in Article 31 whereby the operation of Article 19 (1)(f) has been excluded from the scope of Article 31(2). The amendments made by the Twenty-Fifth Amendment Act in Article 31 are directed to meet the judgement of the Supreme Court in the case of R.C. Cooper v. Union of India 145 popularly known as Bank Nationalisation case. The law relating to compulsory acquisition and requisition does not now have to pass the test of compensation and the validity contemplated by old Article 31(2) and Article 19(1) (f) respectively.

But the most important amendment made by the Twenty-Fifth Amendment Act is the insertion of Article 31-C. By the insertion of Article 31-C a very wide power has been granted to the Parliament

and State Legislatures to take away or abridge the fundamental rights for implementing the Directive Principles contained in Article 39 clause (b) and clause (c).

The validity of the Twenty-Fifth Amendment Act was, however, challenged in the historic case of *Kesavananda v. State of Kerala*¹⁴⁶ and other connected writ petitions filed before the Supreme Court under Article 32 of the Constitution, popularly known as *Fundamental Rights case*.

For our purpose we shall confine ourselves only to Article 31(2) as dealt with in the above case. In that case¹⁴⁷ Sikri C.J aptly pointed out the changes brought about in Article 31(2) by the Twenty-Fifth Amendment Act:

"If we compare Article 31(2) as it stood before and after the 25th Amendment, the following changes seem to have been effected. Whereas before the amendment, Article 31(2) required the law providing for acquisition to make provision for compensation by either fixing the amount of compensation or specifying the principles on which and the manner in which the compensation should be determined, after the amendment Article 31(2) requires such a law to provide for an 'amount' which may be fixed by the law providing for acquisition or requisitioning or which may be determined in accordance with such principles and given in such manner as may be specified in such law. In other words, for the idea that compensation should be given now

the idea is that an 'amount' should be given. This amount can
be fixed directly by law or may be determined in accordance
with such principles as may be specified".\textsuperscript{148}

Dealing with the validity of clause 2 of Article 31 as
amended by the Twenty-Fifth Amendment Act, it was unanimously
held by the Supreme Court in \textit{Kesavananda v. State of Kerala}\textsuperscript{149}
that it is valid. The difference, however, arose on the question
whether the law fixing the amount or laying down the principle
for the determination of the amount for acquisition or
requisition of the property is justiciable. The majority
held that the amount fixed or the principle laid down for the
determination of the amount must have a reasonable relation to
the property acquired and if the amount is illusory and has no
relation to the property sought to be acquired or requisitioned,
the courts can strike down such law as invalid.

Our conclusion for the purpose of the present study
is that the Constitution of India grants the disappropriated
owners the right to have compensation which should be determined
by the provisions made in the statute itself relating to the
nationalisation of industry. What is provided in the Act is final
and cannot be challenged in the court. Herein lies the authority
of the Legislature to pay what it can at its convenience.\textsuperscript{150}

In England there is no constitutional bond as such but legal

\textsuperscript{148} A.I.R. (1973) S.C. 1461 at p. 1553 per Sikri C.J.
\textsuperscript{149} A.I.R. (1973) S.C. 1461.
\textsuperscript{150} See R.S. Arora, "Rise of the Public Corporation in India:
customs compel the insertion of express provisions in the relevant Act for compensation to be paid to disappropriated owners. To be compensated is thus a legal right in Britain which is conferred upon disappropriated persons by Act of Parliament and can also be taken away from them by passing another Act of Parliament for that purpose. While in India in case the ownership of a property is transferred to the State or to a corporation owned and controlled by the State, disappropriated persons have the constitutional right to be compensated.