



FAIRFIELD Institute of Management & Technology

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BBALLB

Administrative Law Paper Code: 208 Semesters IV

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Unit – IV: Administrative Discretion and Judicial Control of Administrative Action

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Unit I

Evolution and Scope of Administrative Law

a. Nature, Scope of development administrative law

Administrative law deals with the powers and functions of the administrative authorities, the manner in which the powers are to be exercised and remedies which are available to the aggrieved persons when those powers are abused by these authorities

Definition by Ivor Jennings

According to Ivor Jennings "administrative law is the law relating to the administrative authorities".

This is the most widely accepted definition, but there are two difficulties in this definition.

(1) It is very wide definition, for the law which determines the power and functions of administrative authorities may also deal with the substantive aspects of such powers.

For example: - Legislation relation to public health services, houses, town and country planning etc.. But these are not included within the scope and ambit of administrative law, and

(2) It does not distinguish administrative law from constitution law.

It is impossible to attempt any precise definition of administrative law which can cover the entire range of administrative process. The American approach to administrative law is denoted by the definition by the definition of administrative law as propounded by Davis.

Definition by K. C. Davis

According to K. C. Davis, "Administrative law as the law concerns the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action".

Definition by Prof. Wade

According to Professor Wade any attempt to define administrative law will create a number of difficulties. But if the powers and authorities of the state are classified as legislative, administrative and judicial, then administrative law might be said "the law which concerns administrative authorities as opposed to the others".

There are some difficulties with this definition also. It fails to distinguish administrative law from constitutional law Like Jennings definition mentioned above; this is also very wide definition. It includes the entire legal field except the legislature and the Judiciary. It also

includes the law of local government. It is also said that it is not possible to divide completely and definitely the functions of legislative, executive and judiciary.

It is very difficult to say precisely where legislation ends and administrative begins. Though enacting a law is functioning of the legislature the administrative authorities, legislate under the powers delegated to them by the legislature and this delegated legislation is certainly a part of administrative law.

Scope of Administrative law

The boundaries of administrative law extend only when administrative agencies and public officials exercise statutory or public powers, or when performing public duties. In both civil and common-law countries, these types of functions are sometimes called —public law functions to distinguish them from —private law functions. The former govern the relationship between the state and the individual, whereas the later governs the relationship between individual citizens and some forms of relationships with the state, like relationship based on government contract.

For instance, if a citizen works in a state owned factory and is dismissed, he or she would sue as a —private law function. Whereas, if he is a civil servant, he or she would sue as a — public law function. Similarly, if residents of the surrounding community were concerned about a decision to enlarge the state- owned factory because of environmental pollution, the legality of the decision could be reviewed by the courts as a —public law function. It is also to be noted that a contract between an individual or business organization with a certain administrative agency is a private law function governed by rules of contract applicable to any individual – individual relationship. However, if it is an administrative contract it is subject to different rules.

So we can see that the rules and principles of administrative law are applicable in a relationship between citizens and the state; they do not extend to cases where the nature of the relationship is characterized by a private law function.

Many definitions and approaches to administrative law are limited to procedural aspects of the subject. The focus of administrative law is mainly on the manner and procedure of exercising power granted to administrative agencies by the legislature.

According to Fox the trend and interaction between substance and procedure as is the unifying

force of the administrative process – in dramatic contrast to the wide variety of substantive problems with which agencies deal- that has persuaded most administrative law professors to concentrate on agency procedure rather than agency substance. So, to a wider extent, the study of administrative law has been limited to analyzing the manner in which matters move through an agency, rather than the wisdom of the matters themselves.

With respect to judicial review, the basic question asked is not whether a particular decision is —right, or whether the judge, or a Minister, or officials have come to a different decision. The questions are what is the legal limit of power or reasonable limit of discretion the law has conferred on the official? That power been exceeded, or otherwise unlawfully exercised? Hence, administrative law is not concerned with the merits of the decision, but with the decision making process.

Development of Administrative Law

Administrative law existed in India even in ancient times. Under the Mauryas and Guptas, several centuries before christ, there was well organised and centralised Administration in India. The rule of "Dharma" was observed by kings and Administrators and nobody claimed any exemption from it. The basic principle of natural justice and fair play were followed by the kings and officers as the administration could be run only on those principles accepted by Dharma, which was even a wider word than "Rule of Law" or "Due process of Law", Yet, there was no Administrative law existence in the sense in which we study it today.

With the establishment of East India company and event of the British Rule in India. The powers of the government had increased. Many Acts, statutes and Legislation were passed by the British government regulating public safety, health, morality transport and labour relations. Practice of granting Administrative licence began with the State Carriage Act 1861. The first public corporation was established under the Bombay Port Trust Act 1879. Delegated legislation was accepted by the Northern India Canal and Drainage Act, 1873 and Opium Act 1878 proper and effective steps were taken to regulate the trade and traffic in explosives by the Indian Explosives by the Indian Explosives Act 1884.

In many statutes, provisions were made with regard to holding of permits and licences and for the settlement of disputes by the Administrative authorities and Tribunals.



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During the Second World War, the executive powers tremendously increased Defence of India Act, 1939 and the rules made there under conferred ample powers on the property of an individual with little or no judicial control over them, In addition to this, the government issued many orders and ordinances, covering several matters by way of Administrative instructions.

Since independence, the activities and the functions of the government have further increased. Under the Industrial Disputes Act 1947, the Minimum Wages Act 1948 important social security measures have been taken for those employed in Industries.

The philosophy of a welfare state has been specifically embodied in the constitution of India. In the constitution itself, the provisions are made to secure to all citizens social, economic and political justice, equality of status and opportunity. The ownership and control of material resources of the society should be so distributed as best to sub serve the common good. The operation of the economic system should not result in the concentration of all these objects.

The State is given power to impose reasonable restrictions even on the Fundamental Rights guaranteed by the constitution. In Fact, to secure those objects, several steps have been taken by the parliament by passing many Acts, for example. The Industrial (Development and Regulation) Act 1951, the Requisitioning and Acquisition of Immovable Property Act 1952, the Essential Commodities Act, 1955. The Companies Act 1956, the Banking Companies (Acquisition and Transfer of undertakings) Act, 1969. The Maternity Benefits Act, 1961, The Payment of Bonus Act 1965, The Equal Remuneration Act 1976, The Urban Land (ceiling and Regulation) Act 1976, The Beedi Worker's Welfare Fund Act, 1976 etc.

Even the judiciary has started taking into consideration the objects and ideals social welfare while interpreting all these Acts and the provisions of the Constitution. In the case of *Vellunkunnel v. Reserve Bank of India*, the Supreme Court held that under the Banking Companies Act, 1949 the Reserve Bank was the sole judge to decide whether the affairs of a Banking company where being conducted in a manner prejudicial to the depositors, interest and the court had no option but to pass an order of winding up as prayed for by the Reserve Bank.

Also, in the case of *State of Andhra Pradesh v. C. V. Rao*, the Supreme Court dealing with departmental inquiry, held that the jurisdiction to issue a writ of certiorari under Article 226 is

supervisory in nature. It is not an appellate court and if there is some evidence or record on which the tribunal had passed the order, the said findings cannot be challenged on the ground the evidence for the same is insufficient or inadequate. The adequacy or sufficiency of evidence is within the exclusive jurisdiction of the tribunal.

The Apex Court in *Shrivastava v. Suresh Singh* observed that in matters relating to questions regarding adequacy or sufficiency of training the expert opinion of public service commission would be generally accepted by the court.

The Supreme Court in *State of Gujrat v. M. I. HaiderBux* held that under the provisions of the Land Acquisition Act, 1994, Ordinarily, government is the best authority to decide whether a particular purpose is a public purpose and whether the land can be acquired for the purpose or not.

Hence, on the one hand, the activities and powers of the government and administrative authorities have increased and on the other hand, there is great need for the enforcement of the rule of law and judicial review over these powers, so that the citizens should be free to enjoy the liberty guaranteed to them by the constitution. For that purpose, provisions are made in the statutes giving right of appeal, revision etc. and at the same time extra-ordinary remedies are available to them under Article 32, 226 and 227 of the constitution of India. The Principle of judicial review is also accepted in our constitution, and the order passed by the administrative authorities can be quashed and set aside if they are malafied or ultravires the Act or the provisions of the constitution.

And if the rules, regulations or orders passed by these authorities are not within their powers, they can be declared ultravires, unconstitutional, illegal or void.

b. Rule of Law and Administrative Law

The expression 'Rule of Law' has been derived from the French phrase 'la principle de legalite', i.e. a Government based on the principles of law. It is implied by the State in the administration of justice. According to Gamer, The Rule of law is used simply to describe the state le words, the term 'rule of law' indicates the state of affairs in a country where, in main, the law mules. Law may be taken to mean mainly a rule or principle which governs the external actions of the human beings and which is recognized and aloof affairs in a country where, in main, the law is observed

and order is kept. It is an expression synonymous with law and order.

The basis of Administrative Law is the 'Doctrine of the Rule of Law'. It was expounded for the first time by Sri Edward Coke, and was developed by Prof. A.V.Dicey in his book 'The law of the Constitution' published in 1885. According Coke, in a battle against King, he should be under God and the Lank thereby the Supremacy of Law is established.

Dicey regarded rule of law as the bedrock of the British Legal System. His doctrine is accepted in the constitutions of U.S.A. and India.

According to Prof. Dicey, rules of law contain three principles or it has three meanings as stated below:

1. Supremacy of Law or the First (meaning of the Rule of Law).
2. Equality before Law or the Second meaning of the Rule of Law: and
3. Predominance of Legal Spirit or the Third meaning of the Rule of Law.

1. Supremacy of Law: The First meaning of the Rule of Law is that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. It implies that a man may be punished for a breach of law but cannot be punished for anything else. No man can be punished except for a breach of law. An alleged offence is required to be proved before the ordinary courts in accordance with the ordinary procedure.

2. Equality before Law: - The Second meaning of the Rule of Law is that no man is above law. Every man whatever is his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

Prof. Dicey states that, there must be equality before the law or equal subjection of all classes to the ordinary law of the land. He criticized the French legal system of droit Administrative in which there were separate administrative tribunals for deciding the cases of State Officials and citizens separately. He criticizes such system as negation of law

3. Predominance of Legal Spirit: - The Third meaning of the rule of law is that the general principles of the constitution are the result of juridical decisions determining the rights of private



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persons in particular cases brought before the Court.

Dicey states that many constitutions of the states (countries) guarantee their citizens certain rights (fundamental or human or basic rights) such as right to personal liberty, freedom from arrest etc. According to him documentary guarantee of such rights is not enough. Such rights can be made available to the citizens only when they are properly enforceable in the Courts of law, For Instance, in England there is no written constitution and such rights are the result judicial decision.

Application of the Doctrine in England: Though, there is no written constitution, the rule of law is applied in concrete cases. In England, the Courts are the guarantors of the individual rights. Rule of law establishes an effective control over the executive and administrative power.

However, Dicey's rule of law was not accepted in full in England. In those days, many statutes allowed priority of administrative power in many cases, and the same was not challenged before the Courts. Further sovereign immunity existed on the ground of 'King can do no wrong'. The sovereign immunity was abolished by the 'Crown Proceedings Act, 1947. Prof. Dicey could not distinguish arbitrary power from discretionary power, and failed to understand the merits of French legal system.

Rule of Law under the Constitution of India: - The doctrine of Rule of Law has been adopted in Indian Constitution. The ideals of the Constitution, justice, liberty and equality are enshrined (embodied) in the preamble.

The Constitution of India has been made the supreme law of the country and other laws are required to be in conformity with the Constitution. Any law which is found in violation of any provision of the Constitution is declared invalid.

Part III of the Constitution of India guarantees the Fundamental Rights. Article 13(1) of the Constitution makes it clear that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provision of Part III dealing with the Fundamental Rights, shall, to the extent of such inconsistency, be void. Article 13(2) provides that the State should not make any law which takes away or abridges the fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void. The Constitution guarantees equality before law and equal protection of laws. Article 21 guarantees right to life and personal liberty. It provides that no person shall be

deprived of his life or personal liberty except according to the procedure established by law. Article 19 (1) (a) guarantees the third principle of rule of law (freedom of such and expression).

Article 19 guarantees six Fundamental Freedoms to the citizens of India -- freedom of speech and expression, freedom of assembly, freedom to form associations or unions, freedom to live in any part of the territory of India and freedom of profession, occupation, trade or business. The right to these freedoms is not absolute, but subject to the reasonable restrictions which may be imposed by the State.

Article 20(1) provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence not be subject to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. According to Article 20(2), no person shall be prosecuted and punished for the same offence more than once. Article 20(3) makes it clear that no person accused of the offence shall be compelled to be witness against himself. In India, Constitution is supreme and the three organs of the Government viz. Legislature, Executive and judiciary are subordinate to it. The Constitution provided for encroachment of one organ (for instance Judiciary) upon another (for example Legislature) if its action is mala fide, as the citizen (individual) can challenge under Article 32 of the Constitution.

In India, the meaning of rule of law has been much expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. It's also regarded as a part of natural justice.

In *Kesavanda Bharti v. State of Kerala*, the Apex Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure. The Supreme Court in *Menaka Gandhi v. Union of India*, observed that Article 14 strikes against arbitrariness. In *Indira Gandhi Nehru v. Raj Narain*, Article 329-A was inserted in the Constitution under 39th amendment, which provided certain immunities to the election of office of Prime Minister from judicial review. The Supreme Court declared Article 329-A as invalid since it abridges the basic structure of the Constitution.

In *A.D.M Jabalpur v. Shivakant Shukla* (popularly known as Habeas Corpus Case), the question

before Supreme Court of India was, whether there was any rule of law in India apart from Article 21 of the Constitution. The Supreme Court by majority held that there is no rule of law other than the constitutional rule of law. Article 21 is our rule of law. If it is suspended, there is no rule of law.

Rule of law and Administrative law

Introduction: Rule of law is classical principle of administrative law. As a matter of fact this principle was one of the principles that acted as impediment development of Administrative Law principles. The irony further is that the rule of law is now an important part of modern Administrative Law. Whereas the rule of law is still the one of the very important principles regulating in common law countries and common law derived countries modern laws has denied some of the important parts of rule of law as proposed by Dicey at the start of 19th Century.

Dicey Rule of Law: The concept of rule of law backs to the time of Aristotle. Aristotle ruled out the concept of rule under discretion by all means and tried to convey his followers that given the choice it is always rule of law that scores over rule of discretion.

In Modern times the rule of law was propounded by the Albert Dicey, a British jurist and Philosopher. He gave following three postulates of rule of law:

1. Everyone is equal before the law.
2. Sanctions have to be backed by law.
3. Courts are the ultimate body and supremacy of court is ambivalent in civilized society.

He was firm proponent of the concept and very influential thinker of his times.

Though the first two principles still exist in almost every legal system of world, the third principle was protested by many of jurists of that time. The Dicey in particular opposed the principle of French system of Droit Administratif. England at that time was in fact propounding some quasi legislative and quasi judicial processes which were taken cognizance of English thinkers of that time; still the whole common law system of country was blindfolded with the Dicey's philosophy of "rule of law."

Dicey's Rule of Law and Modern Administrative Law: Dicey's view and proposition of rule of law has succeeded in part and wasn't sustainable on other. Most of the modern legal system

implements the principles of judicial review and similar principles of proportionality and legitimate expectations. Dicey's views on written and unwritten constitutions are subject to much debate and discussion.

What can be said is that some written constitutions (for e.g. the U.S. Constitution) have been quite successful at providing a framework within which individual rights are protected while others (e.g. some of the Soviet bloc's Constitutions) have been near total failures.

The modern administrative law is fine mixture of Droit Administratif, the French law system and Dicey rule of law. The sophisticated combination of the two principles has given rise to powerful and vast body of executive. In fact the development of modern Administrative law is consequence of development of administration and its side effects.

c. Separation of Powers and Its Relevance

In the context of separation of powers, judicial review is crucial and important. We have three wings of the state, judiciary, Legislature and Executive with their function clearly chalked out in our Constitutions. Article 13 of the constitution mandates that the "state shall make no law, which violates, abridges or takes away rights conferred under part III". This implies that both the Legislature and judiciary in the spirit of the words can make a law, but under the theory of checks and balances, the judiciary is also vested with the power to keep a check on the laws made by the Legislature. Montesquieu: The foundations of theory of separation of powers were laid by the French Jurist Baron De Montesquieu in his great work *Espirit De Lois* (the spirit of Laws) published in 1748. The conclusions of Montesquieu are summarized in the following quoted passage. "When the legislative and executive powers are united in the same persons or body there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to enforce them in a tyrannical manner...were the powers of judging joined with the legislature the life and liberty of the subject would be exposed to arbitrary control. For the judge would then be the legislator. Were it joined to the executive power, the judge might be have with all the violence of an oppressors" To obviate the danger of arbitrary government and tyranny Montesquieu advocated a separation of governmental functions. The decline of separation of powers requires that the functions of legislations,

administration and adjudications should not be placed in the hand of one body of persons but should be distributed among the district or separate bodies of persons.

Principles of Checks and Balances

The Doctrine Of Separations Of Powers May Be Traced Back To An Earlier Theory Known As The Theory Of Mixed Government From Which It Has Been Evolved. That Theory Is Of Great Antiquity And Was Adumbrated In The Writings Of Polybius, A Great Historian Who Was Captured By The Romans In 167 BC And Kept In Rome As A Political Hostage For 17 Years In His History Of Rome Polybius Explained The Reasons For The Exceptional Stability Of Roman Government Which Enabled Rome To Establish A Worldwide Empire. He Advanced The Theory That The Powers Of Rome Stemmed From Her Mixed Government. Unmixed Systems Of Government That Is The Three Primary Forms Of Government Namely, Monarchy, Aristocracy And Democracy – Were Considered By Polybius As Inherently Unstable And Liable To Rapid Degeneration. The Roman Constitutions Counteracted That Instability And Tendency To Degeneration By A Happy Mixture Of Principles Drawn From All The Three Primary Forms Of Government. The Consuls, The Senate And The Popular Assemblies Exemplified The Monarchical, The Aristocratic And The Democratic Principles Respectively. The Powers Of Government Were Distributed Between Them In Such A Way That Each Checked And Was Checked By The Others So That An Equipoise Or Equilibrium Was Achieved Which Imparted A Remarkable Stability To The Constitutional Structure. It Is From The Work Of Polybius That Political Theorist In The 17th Century Evolved That Theory Of Separation Of Powers And The Closely Related Theory Of Checks And Balances.

Separation of Powers- Indian Constitution

Indian constitution is a very well built document. It assigns different roles to all the three wings of government the Legislature, Executive and the Judiciary. There is no ambiguity about each wings power, privilege and duties. Parliament has to enact law, Executive has to enforce them and the judiciary has to interpret them. There is supposed to be no overlapping or overstepping.

The judiciary versus the Executive or Legislative is a battle which is not new but in recent times,

the confrontation is unprecedented with both the sides taking the demarcation of powers to a flash point. Justice Mukherjee observed, “it does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking no place in the system of Government that Indian has at the present day”. The theory of checks and balance has been observed in the Indian constitution. There is no rigorous separation of powers. For instance, parliament has the judicial power of impeachment and punishing for contempt. The president has the legislative powers of ordinance making. Thus, the Indian constitution has not applied the doctrine of separation of powers in its strictest form.

Importance of Judiciary

Importance of Judiciary: An endeavor is being made to highlights the judicial functioning in India, in the context of increasing cases of judicial corruptions and delays in administration of justice. The Indian judiciary has so far, gained the public confidence in discharging its constitutional functions. As an institution, the judiciary has always commanded considerable respect from the people of country. The roots of this high regard lie in the impartiality, independence and integrity of the members of the judiciary. The judiciary in a democratic polity governed by the rule of law stands as a bull work against abuse or misuse of excess use of powers on the part of the executive and protects the citizens against the government lawlessness. The Indian judiciary is considered as Guardian of the Rights of the citizens of India, explained, argued and emphasized in several contexts.

Independence of Judiciary

The independence of the judiciary is the independence of the exercise of the functions by the judges in an unbiased manner i.e. free from any external factor.

So the independence of the judiciary can be understood as the independence of the institution of the judiciary and also the independence of the judges which forms a part of the judiciary. The courts have gone well beyond ensuring that laws are implemented. The Supreme Court has invented its own laws and methods of implementation, gained control of bureaucracy and threatened officers with contempt of court if its instructions are not complied with. The question is not whether some good has come out of the all this. The issue is whether the courts have arrogated vane and uncontrolled powers of themselves which undermine both Democracy and Rule of law, including the question is no undermine both Democracy and Rule of Law including

the powers exercised under the doctrine of separation of powers.

Administration of justice is a divine function. In fact the rank of a country in the civilization is generally determined according to the degree in which justice is actually administered. This sacred functions to be an institutions manned by men of high efficiency, honesty and integrity. Justice delayed is Justice denied. This phrase seems to be tune in so far as the administration of justice in India is concerned. While the people have reasons to feel disappointed with functioning of the legislatures and the executive, they have over the years clung to the belief that they can go to the courts for help. But unfortunately, the judiciary is fast losing its credibility in the eyes of the people for one of the main reasons that justice delivery systems have become costlier and highly time consuming. It is needless to say that the ultimate success of a democratic system is measured in terms of the effectiveness and efficiency of its administration of justice system. Lord Bryce observed, “There is no better test of the excellence of a Government than the efficiency of its judicial system”.

d. The Relationship of Administrative Law to Constitutional Law and other Concepts

Constitutional Law and Administrative Law

Administrative law is categorized as public law since it governs the relationship between the government and the individual. The same can be said of constitutional law. Therefore, it is undeniable that these two areas of law, subject to their differences, also share some common features. With the exception of the English experience, it has never been difficult to make a clear distinction between administrative law and constitutional law. However, so many administrative lawyers agree that administrative law cannot be fully comprehended without a basic knowledge of constitutional law. As Justice Gummov aptly observed —The subject of administrative law cannot be understood or taught without attention to its constitutional foundation.

This is true because of the close relationship between these two laws. To the early English writers there was no difference between administrative and constitutional law. Therefore, Keitch observed that it is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial.

However, in countries that have a written constitution, their difference is not so blurred as it is in England. One typical difference is related to their scope. While constitutional law deals, in general, with the power and structures of government, i.e. the legislative, the executive and the judiciary, administrative law in its scope of study is limited to the exercise of power by the executive branch of government. The legislative and the judicial branches are relevant for the study of administrative law only when they exercise their controlling function on administrative power.

Constitutional law, being the supreme law of the land, formulates fundamental rights which are inviolable and inalienable. Hence, it supersedes all other laws including administrative law. Administrative law does not provide rights. Its purpose is providing principles, rules and procedures and remedies to protect and safeguard fundamental rights. This point, although relevant to their differences, can also be taken as a common ground shared by constitutional and administrative law.

Administrative law is a tool for implementing the constitution. Constitutional law lays down principles like separation of power and the rule of law. An effective system of administrative law actually implements and gives life to these principles. By providing rules as to the manner of exercising power by the executive, and simultaneously effective controlling mechanisms and remedies, administrative law becomes a pragmatic tool in ensuring the protection of fundamental rights. In the absence of an effective system of administrative law, it is inconceivable to have a constitution which actually exists in practical terms.

Similarly, the interdependence between these two subjects can be analyzed in light of the role of administrative law to implement basic principles of good administration enshrined in the Constitution of Ethiopia. The constitution in Articles 8(3), 12(1) and 12(2), respectively provides the principles of public participation, transparency and accountability in government administration. As explained above, the presence of a developed system of administrative law is sine qua non for the practical realization of these principles.

Administrative law is also instrumental in enhancing the development of constitutional values



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such as rule of law and democracy. The rules, procedures and principles of administrative law, by making public officials, comply with the limit of the power as provided in law, and checking the validity and legality of their actions, subjects the administration to the rule of law. This in turn sustains democracy. Only, in a government firmly rooted in the principle of rule of law, can true democracy be planted and flourished.

Judicial review, which is the primary mechanism of ensuring the observance of rule of law, although mostly an issue within the domain of administrative law, should look in the constitutional structure for its justification and scope. In most of the countries, the judicial power of the ordinary courts to review the legality of the actions of the executive and administrative agencies emanates from the constitution. The constitution is the supreme document, which confers the mandate on the ordinary courts. Most of the written constitutions contain specific provisions allocating judicial review power to the high courts, or the Supreme Court, including the grounds of review and the nature and type of remedies, which could be granted to the aggrieved parties by the respective courts. A basic issue commonly for administrative law and constitutional law is the scope of judicial review. The ultimate mission of the role of the courts as custodians of liberty', unless counter balanced against the need for power and discretion of the executive, may ultimately result in unwarranted encroachment, which may have the effect of paralyzing the administration and endangering the basic constitutional principle of separation of powers. This is to mean that the administrative law debate over the scope of judicial review is simultaneously a constitutional debate.

Administrative and constitutional law shares a common ground, and supplements each other in their mission to bring about administrative justice. Concern for the rights of the individual has been identified as a fundamental concern of administrative law. It ultimately tries to attain administrative justice. Sometimes, the constitution may clearly provide right to administrative justice. Recognition of the principles of administrative justice is given in few bills of rights or constitutional documents. Australia and South Africa may be mentioned in this respect.

Constitutional law needs to be understood to include more than the jurisprudence surrounding the express and implied provisions of any constitution. In its broader sense, constitutional law

connotes the laws and legal principles that determine the allocation of decision-making functions amongst the legislative, executive and judicial branches of government, and that define the essential elements of the relationship between the individual and agencies of the state. Professor Wade has observed that administrative law is a branch of constitutional law and that the connecting thread is the quest for administrative justice.

f. Classification of Administrative Law

Pure administrative function can be divided into three categories:

- Administrative discretion
- Ministerial action
- Administrative instruction

Administrative Discretion:

In Layman's language, discretion means choosing from amongst the various available alternatives without reference to any predetermined criterion, no matter how fanciful that choice may be. A person in his will has discretion to dispose his property in any manner, no matter how arbitrary and fanciful that may be. But when the word discretion is qualified by the word 'administrative' has somewhat different overtones. 'Discretion' in this sense means choosing from amongst the various available alternatives but with reference to the rules or reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful but legal and regular.

The problem of administrative discretion is complex. It is true that in any intensive form of government cannot function without the exercise of some discretion by the officials. It is necessary not only for individualization of the administrative power but also because it is humanly impossible to lay down a rule for every conceivable eventuality in the complex art of modern government. But it is equally true that absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. Hence, there has been a constant conflict between the claims of administration to an absolute discretion and the claims of subjects to a reasonable exercise of it.

Ministerial Action:

Ministerial function is that function of agency which is taken as a matter of duty imposed upon it by the law devoid of any discretion or judgment. Therefore, a ministerial action involves the performance of a definite duty in respect of which there is no choice, no wish and no freedom. In this, the high authority dictates and lower authority carries out. Collection of revenue may be one such ministerial action. In addition, if the statute requires that the agency shall open a bank account in a particular bank or shall prepare the annual report to be placed on the table of the minister, such action of opening the bank account and the preparation of the annual report shall be classified as ministerial

When an administrative agency is acting ministerial it has no power to consult its own wishes but when it is acting administratively its standards are subjective and it follows its own wishes.

Administrative Instruction:

Administrative instruction means power to issue instruction flow from the general executive power of the administration. In any intensive form of government the desirability and efficacy of administrative instruction issued by the superior administrative authorities to their subordinates cannot be over emphasized. 'Administrative instruction' is a most efficacious technique for achieving some kind of uniformity in administrative discretion and to manipulate in an area which is new and dynamic. These instructions also give a desired flexibility to the administration devoid of technicalities of the rule-making process.

Administrative instruction may be specific or general and directory or mandatory. Its type depends largely on the provisions of the statute which authorizes the administrative agencies to issue instructions. The instructions which are generally issued not under any statutory authority but under the general power of administration are considered as directory and hence are unenforceable not having the force of law.

If administrative instructions have no force of law but if these are consistently followed for a long time government cannot depart from it at its own sweet will without rational justification.

UNIT-II

Legislative Functions of Administration



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a. Meaning and concept of delegated legislation

Delegated Legislation

Meaning of Delegated Legislation

Delegated legislation (also referred to as secondary legislation or subordinate legislation or subsidiary legislation) is law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation. It is law made by a person or body other than the legislature but with the legislature's authority. Often, a legislature passes statutes that set out broad outlines and principles, and delegates authority to an executive branch official to issue delegated legislation that flesh out the details (substantive regulations) and provide procedures for implementing the substantive provisions of the statute and substantive regulations (procedural regulations). Delegated legislation can also be changed faster than primary legislation so legislatures can delegate issues that may need to be fine-tuned through experience.



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Legislation by the executive branch or a statutory authority or local or other body under the authority of the competent legislature is called Delegated legislation. It permits the bodies beneath parliament to pass their own legislation. It is legislation made by a person or body other than Parliament. Parliament, through an Act of Parliament, can permit another person or body to make legislation. An Act of Parliament creates the framework of a particular law and tends only to contain an outline of the purpose of the Act. By Parliament giving authority for legislation to be delegated it enables other persons or bodies to provide more detail to an Act of Parliament. Parliament thereby, through primary legislation (i.e. an Act of Parliament), permit others to make law and rules through delegated legislation.

The legislation created by delegated legislation must be made in accordance with the purposes laid down in the Act. The function of delegated legislation is it allows the Government to amend a law without having to wait for a new Act of Parliament to be passed. Further, delegated legislation can be used to make technical changes to the law, such as altering sanctions under a given statute. Also, by way of an example, a Local Authority have power given to them under certain statutes to allow them to make delegated legislation and to make law which suits their area. Delegated legislation provides a very important role in the making of law as there is more delegated legislation enacted each year than there are Acts of Parliament. In addition, delegated legislation has the same legal standing as the Act of Parliament from which it was created. There are several reasons why delegated legislation is important. Firstly, it avoids overloading the limited Parliamentary timetable as delegated legislation can be amended and/or made without having to pass an Act through Parliament, which can be time consuming.

Changes can therefore be made to the law without the need to have a new Act of Parliament and it further avoids Parliament having to spend a lot of their time on technical matters, such as the clarification of a specific part of the legislation. Secondly, delegated legislation allows law to be made by those who have the relevant expert knowledge. By way of illustration, a local authority can make law in accordance with what their locality needs as opposed to having one law across the board which may not suit their particular area. A particular Local Authority can make a law to suit local needs and that Local Authority will have the knowledge of what is best for the locality rather than Parliament.

Thirdly, delegated legislation can deal with an emergency situation as it arises without having to wait for an Act to be passed through Parliament to resolve the particular situation. Finally, delegated legislation can be used to cover a situation that Parliament had not anticipated at the time it enacted the piece of legislation, which makes it flexible and very useful to law-making. Delegated legislation is therefore able to meet the changing needs of society and also situations which Parliament had not anticipated when they enacted the Act of Parliament.

A portion of law-making power of the legislative is conferred or bestowed upon a subordinate authority. Rules & regulations which are to be framed by the latter constitutes an integral portion of the statute itself. It is within power of parliament when legislating within its legislative few, to confer suborbital administrative & legislative powers upon some other authority. Subordinate legislation, is the legislation made by an authority subordinate to the sovereign authority, namely, the legislature. According to Sir John Salmond, "Subordinate legislation is that which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority." Most of the enactments provide for the powers for making rules, regulations, by-laws or other statutory instruments which are exercised by specified subordinate authorities. Such legislation is to be made within the framework of the powers so delegated by the legislature is, therefore, known as delegated legislation. Thus all law making which takes place outside the legislature expressed as rules, regulations, bye laws, orders, schemes, directions or notifications etc is termed as delegated legislation.

Constitutionality Delegated legislation

The Legislature is quite competent to delegate to other authorities. To frame the rules to carry out the law made by it. In the case of *D. S. Gerewal v. The State of Punjab*, K.N. Wanchoo, it was observed that there is nothing in the words of Article 312 which takes away the usual power of delegation, which ordinarily resides in the legislature.

The words "Parliament may by law provide" in Article 312 should not be read to mean that there is no scope for delegation in law made under Article 312...." In the England, the parliament being supreme can delegated any amount of powers because there is no restriction. On the other hand in America, like India, the Congress does not possess uncontrolled and unlimited powers of delegation. In *Panama Refining Co. v. Rayans*, the supreme court of the United States had held



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Position in the USA: Two phenomena operate in the USA namely—1. Separation of Power and 2. “Delegatus non potest delegare”.

Position in England: In England, the Parliament is Supreme, unhampered by any constitutional limitations with wide legislative powers on the executive. Parliament being supreme and its power to legislate being unlimited, there is nothing to prevent Parliament from delegating its legislative power to the executive officers or other subordinate bodies. In England, the practice of delegating legislative power has certainly been facilitated by the close fusion of the legislative and executive power resulting from the development of the cabinet system of government in England.

Position in India

In *Queen v. Burah* wherein the Privy Council had validated only Conditional Legislation and therefore as per its reasoning delegated legislation is not permitted. The administration of civil and criminal justice within the said territory was vested in such officers as the Lieutenant-Governor may from time to time appoint.

Again in *King v. Benoari Lal Sharma* Conditional legislation was again applied by the Privy Council wherein the validity of an emergency ordinance by the Governor-General of India was challenged inter alia on the ground that it provided for setting up of special criminal courts for particular kinds of offences, but the actual setting up of the courts was left to the Provincial Governments which were authorised to set them up at such time and place as they considered proper. The Judicial Committee held that "this is not delegated legislation at all. It is merely an example of the not uncommon legislative power by which the local application of the provisions of a statute is determined by the judgment of a local administrative body as to its necessity." The Privy Council held that "Local application of the provision of a state is determined by the judgment of a local administrative body as to its necessity."

As regards constitution of the delegation of legislative powers the Indian Legislature cannot be in the same position as the prominent British Parliament and how far delegation is permissible has got to be ascertained in India as a matter of construction from the express provisions of the Indian Constitution. It cannot be said that an unlimited right of delegation is inherent in the legislative power itself. This is not warranted by the provisions of the Constitution and the legitimacy of delegation depends entirely upon its being used as an ancillary measure which the

legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law, and what can be delegated in the task of subordinate legislation which by its very nature is ancillary to the statute which delegates the power to make it. Provided the legislative policy is enunciated with sufficient clearness or a standard laid down the courts cannot and should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case.

In the case of *Sikkim v. Surendra Sharma* it was held that 'All Laws in force' in sub clause (k) of Art. 371 F includes subordinate legislation.

Criticisms of Delegated legislation

Delegated legislation is criticized for its various main defects which are as follows:-

- It has been suggested that by allowing delegated legislation it has allowed to make and amend laws.
- It lacks democracy as too much delegated legislation is made by unelected people.
- Delegated legislation is subject to less Parliamentary scrutiny than primary legislation. Parliament therefore has a lack of control over delegated legislation and this can lead to inconsistencies in laws. Delegated legislation therefore has the potential to be used in ways which Parliament had not anticipated when it conferred the power through the Act of Parliament.
- Delegated legislation is the lack of publicity surrounding it. When law is made by statutory instrument the public are not normally notified of it whereas with Acts of Parliament, on the other hand, they are widely publicized. One reason for the lack of publicity surrounding delegated legislation is because of the volume of delegated legislation made and this result in the public not being informed of the changes to law. There has also been concern expressed that too much law is made through delegated legislation.

Reasons for Growth of Delegated Legislation

1. Bulk of law comes from the administrators. Also Legislation is occupied with important policy matters and rarely finds time to discuss matters of details.

2. Filling in Details of legislation- The executive in consultation with the experts or with its own experience of local conditions can better improvise. Also legislation has become highly technical because of the complexities of a modern govt.
3. Need for flexibility:- Ordinary legislative process suffers from the limitation of lack of experiment. A law can be repealed by parliament itself, if it required adjustment administrative rule making is the only answer between two sessions.
4. Meeting Emergency Situations
5. When Govt. action required discretion – rule making power of administrative agencies is needed when the government needs to have discretion to carry out the policy objectives.
6. Direct participation of those who are governed is mere possible in delegated legislation.

CONTROL MECHANISM

Legislative Control on delegated legislation

While in the context of increasing complexity of law-making, subordinate legislation has become an important constituent element of legislation, it is equally important to see how this process of legislation by the executive under delegated powers, can be reconciled with the democratic principles or parliamentary control. Legislation is an inherent and inalienable right of Parliament and it has to be seen that this power is not usurped nor transgressed under the guise of what is called subordinate legislation. It can control the following:

1. Normal Delegation: -

a) Positive : - where the limits of delegation are clearly defined in the enabling Act

b) Negative: - does not include power to do certain thing (these not allowed)

2. Exceptional Delegation: -

a) Power to legislate on matters of principle (policy)

b) Power is amend Act of parliament (In re Delhi laws Acts)

ii. Judicial

Judicial control can

1) Doctrine of ultra vires and

2) Use of prerogative writs.

iii Procedural

Procedural Control Over Delegated Legislation (A Prior consultation of interests likely to be affected by proposed delegated Legislation:- From the citizen's post of view the most beneficial safeguard against the dangers of the misuse of delegated Legislation is the development of a procedure to be followed by the delegates while formulating rules and regulations. In England as in America the Legislature while delegating powers abstains from laying down elaborate procedure to be followed by the delegates. But certain acts do however provide for the consultation of interested bodies and sometimes of certain Advisory Committees which must be consulted before the formulation and application of rules and regulations. This method has largely been developed by the administration independent of statute or requirements. The object is to ensure the participation of affected interests so as to avoid various possible hardships. The method of consultation has the dual merits of providing as opportunity to the affected interests to present their own case and to enable the administration to have a first-hand idea of the problems and conditions of the field in which delegated legislation is being contemplated.

Prior publicity of proposed rules and regulations:- Another method is antecedent publicity of statutory rules to inform those likely to be affected by the proposed rules and regulations so as to enable them to make representation for consideration of the rule-making authority. The rules of Publication Act, 1893, sec.1. Provided for the use of this method. The Act provided that notice of proposed 'statutory rules' is given and the representations of suggestions by interested bodies be considered and acted upon if proper. But the Statutory Instruments Act, 1946 omitted this

practice in spite of the omission, the Committee on Ministers Powers 1932, emphasized the advantages of such a practice.

Publication of Delegated Legislation: - Adequate publicity of delegated legislation is absolutely necessary to ensure that law may be ascertained with reasonable certainty by the affected persons. Further the rules and regulations should not come as a surprise and should not consequently bring hardships which would naturally result from such practice. If the law is not known a person cannot regulate his affairs to avoid a conflict with them and to avoid losses. The importance of these laws is realized in all countries and legislative enactments provide for adequate publicity.

iv Judicial

Judicial control over delegated legislature is exercised at the following two levels:-

1. Delegation may be challenged as unconstitutional; or
2. That the Statutory power has been improperly exercised.

The delegation can be challenged in the courts of law as being unconstitutional, excessive or arbitrary. The scope of permissible delegation is fairly wide. Within the wide limits, delegation is sustained it does not otherwise; infringe the provisions of the Constitution. The limitations imposed by the application of the rule of ultra vires are quite clear. If the Act of the Legislature under which power is delegated, is ultra vires, the power of the legislature in the delegation can never be good.

No delegated legislation can be inconsistent with the provisions of the Fundamental Rights. If the Act violates any Fundamental Rights the rules, regulations and bye-laws framed there under cannot be better. Where the Act is good, still the rules and regulations may contravene any Fundamental Right and have to be struck down. Besides the constitutional attack, the delegated legislation may also be challenged as being ultra vires the powers of the administrative body framing the rules and regulations. The validity of the rules may be assailed as the stage in two ways:—

- (i) That they run counter to the provisions of the Act; and
- (ii) That they have been made in excess of the authority delegated by the Legislature.

The method under these sub-heads for the application of the rule of ultra vires is described as the method of substantive ultra vires. Here the substance of rules and regulations is gone into and not the procedural requirements of the rule marking that may be prescribed in the statute. The latter is looked into under the procedural ultra vires rule. When the Court applies the method of substantive ultra vires rule, it examines the contents of the rules and regulations without probing into the policy and wisdom of the subject matter. It merely sees if the rules and regulations in their pith and substance are within the import of the language and policy of the statute.

The rules obviously cannot go against the intent of statute and cannot be inconsistent with the provisions of the Act. They are framed for giving effect to the provisions of this Act and not for nullifying their effect and they should not be in excess of the authority delegated to the rule-making body. Delegated legislation should not be characterised with an excessive exercise of discretion by the authority. The rules cannot be attacked to the general plea of unreasonableness like the bye-laws framed by a local body. Reasonableness of the rules can be examined only when it is necessary to do so for purpose of Articles 14 and 19 of the Constitution.

d. Sub-Delegation

The expression 'subordinate legislation' means the act of making statutory instruments by a body subordinate to the Legislature and in exercise of the power, within specific limits, conferred by the Legislature. The term also connotes and covers the statutory instruments themselves. Legislation is either supreme or subordinate. The former is that which proceeds from the supreme or sovereign power in the State, and which is therefore incapable of being repealed, annulled or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power, and is, therefore, dependent for its continued existence and validity on some superior or supreme authority. The idea is to supplement Acts of Supreme Legislative Body by prescribing detailed rules required for their operation.

Principle Underlying Sub-Delegation

The basic principle in this respect is that the sub-delegate should not be given uncanalised and unguided legislative power. Like delegation, sub-delegation is also subject to the doctrine of excessive delegation. Where a statute itself authorizes an administrative authority to sub-delegate its powers, no difficulty arises as to its validity since such subdelegation is within the terms of the statute itself. Sub-Delegation of legislative powers When a statute confers some legislative

powers on an executive authority and the further delegates those powers to another subordinate authority of agency, it is called 'subdelegation.' Thus, a chain of delegation gets created in which the origin of the power flows through the Parent Act. Sub-delegation is the further delegation of power by a delegate to another person or agency. The basic principle in this process is summarised by the maxim 'Delegatus Non Potest Delegare, Such sub-delegation can't be made without the duly authorisation by the parent statute under which the delegation has been taken place

Unit-III

Judicial Functions of Administration

a. Need for Devolution of Adjudicatory Authority on Administration

In view of the rapid growth and expansion of industry, trade and commerce, ordinary law courts are not in a position to cope up with the work-load. Ordinary judges, brought up in the traditions of law and jurisprudence, are not capable enough to understand technical problems, which crop up in the wake of modern complex economic and social processes. A good number of situations are such that they require quick and firm action. Otherwise the interests of the people may be jeopardized. According to Servai, 'the development of administrative law in a welfare state has made administrative tribunals a necessity'. Hence, a number of administrative tribunals have been established in the country, which can do the work more rapidly, more cheaply and more efficiently than the ordinary courts.

b. Nature of tribunals-constitution, powers, procedures, rules of evidence

Section 2(aa) of The Administrative Tribunals Act, 1985 defines "Administrative Tribunal", in relation to a State, means the Administrative Tribunal for the State or, as the case may be, the Joint Administrative Tribunal for that State and any other State or States;

Establishment of Tribunals and Benches thereof

Section 4 of The Administrative Tribunals Act, 1985 deals with Establishment of Administrative Tribunals. –

- (1) The Central Government shall, by notification, establish an Administrative Tribunal to be known as the Central Administrative Tribunal, to exercise jurisdiction, powers and authority conferred on the Central Administrative Tribunal by or under this Act.
- (2) The Central Government may, on receipt of a request in this behalf from any State Government, establish, by notification, an Administrative Tribunal for the State to be known as the (Name of the State) Administrative Tribunal to exercise the jurisdiction, powers and authority conferred on the Administrative Tribunal for the State by or under this Act.
- (3) Two or more States may, notwithstanding anything contained in sub-section (2) and notwithstanding that any or all of those States has or have Tribunals established under that sub-section, enter into an agreement that the same Administrative Tribunal shall be the Administrative Tribunal for each of the States participating in the agreement, and if the agreement is approved by the Central Government and published in the Gazette of India and the Official Gazette of each of those States, the Central Government may, by notification, establish a Joint Administrative Tribunal to exercise the jurisdiction, powers and authority conferred on the Administrative Tribunals for those States by or under this Act.
- (4) An agreement under sub-section (3) shall contain provisions as to the name of the Joint Administrative Tribunal, the manner in which the participating States may be associated in the selection of the Chairman, Vice-Chairman and other Members of the Joint Administrative Tribunal, the places at which the Bench or Benches of the Tribunal shall sit, the apportionment among the participating States of the expenditure in connection with the Joint Administrative Tribunal and may also contain such other supplemental, incidental and consequential provisions not inconsistent with this Act as may be deemed necessary or expedient for giving effect to the agreement.
- (5) Notwithstanding anything contained in the foregoing provisions of this section, or sub-section (1) of Section 5, the Central Government may, -
 - (a) With the concurrence of any State Government, designate, by notification, all or any of the Members of the Bench or Benches of the State Administrative Tribunal established for that State under sub-section (2) as members of the Bench or Benches of the Central Administrative Tribunal in respect of that State and the same shall exercise the jurisdiction, powers and authority conferred on the Central Administrative Tribunal by or under this Act;
 - (b) On receipt of a request in this behalf from any State Government, designate, by

notification, all or any of the Members of the Bench or Benches of the Central Administrative Tribunal functioning in that State as the Members of the Bench or Benches of the State Administrative Tribunal for that State and the same shall exercise the jurisdiction, powers and authority conferred on the Administrative Tribunal for that State by or under this Act.

And upon such designation, the Bench or Benches of the State Administrative Tribunal or, as the case may be, the Bench or Benches of the Central Administrative Tribunal shall be deemed, in all respects, to be the Central Administrative Tribunal, or the State Administrative Tribunal for that State established under the provisions of Article 323-A of the Constitution and this Act.

(6) Every notification under sub-section (5) shall also provide for the apportionment between the State concerned and the Central Government of the expenditure in connection with the Members common to the Central Administrative Tribunal and State Administrative Tribunal and such other incidental and consequential provisions not inconsistent with this Act as may be deemed necessary or expedient.

Composition of Tribunals and Benches thereof. –

According to Section 5 (1) Each Tribunal shall consist of a Chairman and such number of Vice-Chairmen and Judicial and Administrative Members] as the appropriate Government may deem fit and, subject to the other provisions of this Act, the jurisdiction, powers and authority of the Tribunal may be exercised by Benches thereof.

(2) Subject to the other provisions of this Act, a Bench shall consist of one Judicial Member and one Administrative Member.

(4) Notwithstanding anything contained in sub-section (1) the Chairman-

(a) May, in addition to discharging the functions of the Judicial Member or the Administrative Member of the Bench to which he is appointed, discharge the functions of the Judicial Member or, as the case may be, the Administrative Member, of any other Bench;

(b) May transfer the Vice-Chairman or other Member from one Bench to another Bench;

(c) May authorize the Vice-Chairman or the Judicial Member or the Administrative Member appointed to one Bench to discharge also the functions of the Vice-Chairman, or as the case may be, the Judicial Member or the Administrative Member of another Bench; and

(d) May, for the purpose of securing that any case or cases which, having regard to the nature of the questions involved, requires or require, in his opinion or under the rules made by the Central

Government in this behalf, to be decided by a Bench composed of more than two members issue such general or special orders, as he may deem fit:

Provided that every Bench constituted in pursuance of this clause shall include at least one Judicial Member and one Administrative Member.

(6) Notwithstanding anything contained in the foregoing provisions of this section, it shall be competent for the Chairman or any other Member authorized by the Chairman in this behalf to function as a Bench consisting of a single Member and exercise the jurisdiction, powers and authority of the Tribunal in respect of such classes of cases or such matters pertaining to such classes of cases as the Chairman may by general or special order specify:

Provided that if at any stage of the hearing of any such case or matter it appears to the Chairman or such Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members the case or matter may be transferred by the Chairman or, as the case may be, referred to him for transfer to, such Bench as the Chairman may deem fit.

(7) Subject to the other provisions of this Act, the Benches of the Central Administrative Tribunal shall ordinarily sit at New Delhi (which shall be known as the Principal Bench), Allahabad, Calcutta, Madras, New Bombay and at such other places as the Central Government may, by notification, specify.

(8) Subject to the other provisions of this Act, the places at which the Principal Bench and other Benches of a State Administrative Tribunal shall ordinarily sit shall be such as the State Government may, by notification, specify.

2. All cases specified in para.1 above shall be posted for admission before a Single Member Bench. If the Single Member Bench is of the view that any such case is not fit for admission, it shall order such a case to be posted before a Bench of two Members.

3. All urgent matters for admission and interim orders which are moved for hearing during vacation shall be heard by a Vacation Bench which shall ordinarily consist of a Single Member. The Chairman may constitute a Bench of two Members also as a Vacation Bench. However, if the Single Member sitting as a Vacation Bench is of the view that any case is not fit for admission, he shall order such a matter to be posted before a Bench of two Members, immediately after the vacation.

4. Where for any reason, a Bench of more than two Members cannot be constituted all urgent matters for admission and interim orders which are moved for hearing shall be heard by a Bench consisting of a Single Member. If the Single Member is of the view that any case is not fit for admission he shall make such interim orders, as he may deem fit and post, as soon as may be, the case before a Bench of two Members.

5. Notwithstanding anything contained in paras.1 to 4 above, if at any stage of hearing of any such case or matter, it appears to the Chairman or such Single Member that the case or matter is of such nature that it ought to be heard by a Bench consisting of two Members, they may refer the case or the matter to a Bench consisting of two Members subject to the proviso to sub-section (6) of Section 5 of the Administrative Tribunals Act, 1985.

6. Bench of a Single Member or a Bench of more than one Member, as the case may be, shall be constituted in the case of Principal Bench by the Chairman and in his absence by the Vice-Chairman of the Principal Bench and in case of other Benches by the Vice-Chairman of the respective Benches and in their absence by the Chairman.

Section 6. Qualifications for appointment as Chairman, Vice-Chairman or other Members. -

- (1) A person shall not be qualified for appointment as the Chairman unless he-
 - (a) Is, or has been, a Judge of a High Court; or
 - (b) Has, for at least two years, held the office of Vice-Chairman
- (2) A person shall not be qualified for appointment as the Vice-Chairman unless he-
 - (a) Is, or has been, 2[or is qualified to be, j a Judge of a High Court; or
 - (b) Has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India; or
 - (bb) Has, for at least five years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or
 - (c) Has, for a period of not less than three years, held office as a Judicial Member or an Administrative Member.
- (3) A person shall not be qualified for appointment as a Judicial Member unless he-
 - (a) Is, or has been, or is qualified to be, a Judge of a High Court; or
 - (b) Has been a member of the Indian Legal Service and has held a post in Grade I of that

Service for at least three years.

(3-A) A person shall not be qualified for appointment as an Administrative Member unless he-

(a) Has, for at least two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or

(b) Has, for at least three years, held the post of a Joint Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Joint Secretary to the Government of India,

And shall, in either case, have adequate administrative experience.]

(4) Subject to the provisions of sub-section (7), the Chairman, Vice-Chairman and every other Member of the Central Administrative Tribunal shall be appointed by the President.

(5) Subject to the provisions of sub-section (7), the Chairman, Vice-Chairman and every other Member of an Administrative Tribunal for a State shall be appointed by the President after consultation with the Governor of the concerned State.

(6) The Chairman, Vice-Chairman and every other Member of a Joint Administrative Tribunal shall, subject to the terms of the agreement between the participating State Governments published under sub-section (3) of Section 4, and subject to the provisions of sub-section (7) be appointed by the President after consultation with the Governors of the concerned States.

(7) No appointment of a person possessing the qualifications specified in this section as the Chairman, a Vice-Chairman or a Member shall be made except after consultation with the Chief Justice of India.

Section 7. Vice-Chairman to act as Chairman or to discharge his functions in certain circumstances.

(1) In the event of the occurrence of any vacancy in the office of the Chairman by reason of his death, resignation or otherwise, the Vice-Chairman or, as the case may be, such one of the Vice-Chairmen as the appropriate Government may, by notification, authorize in this behalf, shall act as the Chairman until the date on which a new Chairman, appointed in accordance with the provisions of this Act to fill such vacancy enters upon his office.

(2) When the Chairman is unable to discharge his functions owing to absence, illness or any other cause, the Vice-Chairman, or, as the case may be, such one of the Vice-Chairmen as the

appropriate Government may, by notification, authorize in this behalf, shall discharge the functions of the Chairman until the date on which the Chairman resumes his duties.

8. Term of office. -The Chairman, Vice-Chairman or other Member shall hold office as such for a term of five years from the date on which he enters upon his office, but shall be eligible for re-appointment for another term of five years:

Provided that no Chairman, Vice-Chairman or other Member shall hold office as such after he has attained, -

- (a) In the case of the Chairman or Vice-Chairman, the age of sixty five years, and
- (b) In the case of any other Member, the age of sixty-two years.

Procedure and Powers of Tribunals

Section 22 deals with Procedure and Powers of Tribunals. –

(1) A Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of any rules made by the Central Government, the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its inquiry and decided whether to sit in public or in private.

(2) A tribunal shall decide every application made to it as expeditiously as possible and ordinarily every application shall be decided on a perusal of documents and written representations and after hearing such oral arguments as may be advanced.

(3) A Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely :

- (a) Summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) subject to the provisions of section 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
- (e) issuing commissions for the examination of witnesses or, documents;
- (f) reviewing its decisions;

- (g) dismissing a representation for default or deciding it ex parte;
- (h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and
- (i) any other matter which may be prescribed by the Central Government.

d. Principles of Natural Justice

In India there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making powers. This minimum fair procedure refers to the principles of natural justice. Natural justice is a concept of common law and represents higher procedural principles developed by the courts, which every judicial, quasi-judicial and administrative agency must follow while taking any decision adversely affecting the rights of a private individual. Natural justice implies fairness, equity and equality. In a welfare state like India, the role and jurisdiction of administrative agencies is increasing at a rapid pace. The concept of Rule of Law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging these functions in a fair and just manner.

In India, the principles of natural justice are firmly grounded in Article 14 & 21 of the Constitution. With the introduction of concept of substantive and procedural due process in Article 21, all that fairness which is included in the principles of natural justice can be read into Art. 21. The violation of principles of natural justice results in arbitrariness; therefore, violation of natural justice is a violation of Equality clause of Art. 14.

The principle of natural justice encompasses following two rules: -

- *Nemo judex in causa sua*- No one should be made a judge in his own cause or the *rule against bias*.
- *Audi alteram partem* - Hear the other party or the rule of fair hearing or the rule that no one should be condemned unheard.
- Reasoned decisions.

i. Rule Against Bias (*Nemo Judex Causa Sua*)

Bias means an operative prejudice, whether conscious or unconscious in relation to a party or issue. The rule against bias flows from following two principles: -

a) No one should be a judge in his own cause

b) Justice should not only be done but manifestly and undoubtedly be seen to be done.

Thus a judge should not only be impartial but should be in a position to apply his mind objectively to the dispute before him. The rule against bias thus has two main aspects: -

1. The administrator exercising adjudicatory powers must not have any personal or proprietary interest in the outcome of the proceedings.
2. There must be real likelihood of bias.

Real likelihood of bias is a subjective term, which means either actual bias or a reasonable suspicion of bias. It is difficult to prove the state of mind of a person. Therefore, what the courts see is whether there is reasonable ground for believing that the deciding factor was likely to have been biased.

Bias can take many forms: -

- Personal Bias
- Pecuniary Bias
- Subject-matter bias
- Departmental bias
- Pre-conceived notion bias

In *A.K.Kraipak v. UOI*, Naquishband, who was the acting Chief Conservator of Forests, was a member of the Selection Board and was also a candidate for selection to All India cadre of the Forest Service. Though he did not take part in the deliberations of the Board when his name was considered and approved, the SC held that there was a real likelihood of a bias for the mere presence of the candidate on the Selection Board may adversely influence the judgment of the other members' SC also made the following observations: -

1. The dividing line between an administrative power and quasi-judicial power quite thin and is being gradually obliterated. Whether a power is Administrative or quasi-judicial, one has to look into -
 - a) the nature of power conferred
 - b) the person on whom it is conferred
 - c) the framework of the law conferring that power
 - d) the manner in which that power is expected to be exercised.
2. The principles of natural justice also apply to administrative proceedings,
3. The concept of natural justice is to prevent miscarriage of justice and it entails -
 - (i) No one shall be a judge of his own cause.
 - (ii) No decision shall be given against a party without affording him a reasonable hearing.
 - (iii) The quasi-judicial enquiries should be held in good faith and not arbitrarily or unreasonably.

ii. *Audi Alteram Partem* or Rule of Fair Hearing

The principle of *audi alteram partem* is the basic concept of principle of natural justice. The expression *audi alteram partem* implies that a person must be given opportunity to defend himself. This principle is *sine qua non* of every civilized society. This rule covers various stages through which administrative adjudication pass starting from notice to final determination. Right to fair hearing thus includes:-

1. Right to notice
2. Right to present case and evidence
3. Right to rebut adverse evidence
 - (i) Right to cross examination
 - (ii) Right to legal representation
4. Disclosure of evidence to party
5. Report of enquiry to be shown to the other party
6. Reasoned decisions or speaking orders

iii. Reasoned decisions

Post decisional hearing means hearing after the decision is reached. The idea of post decisional hearing has been developed by the SC in *Maneka Gandhi v. UOI* to maintain the balance between administrative efficiency and fairness to the individual.

The SC in *Maneka Gandhi vs. UOI* held that though the impoundment of the passport was an administrative action yet the rule of fair hearing is attracted by the necessary implication and it would not be fair to exclude the application of this cardinal rule on the ground of administrative convenience. The court did not outright quash the order and allowed the return of the passport because of the special socio-political factors attending the case.

The technique of post decisional hearing was developed in order to balance these factors against the requirements of law, justice and fairness. The court stressed that a fair opportunity of being heard following immediately the order impounding the passport would satisfy the mandate of natural justice.

Pre-decisional hearing is the standard norm of rule of *audi alteram partem*. But post-decisional hearing at least affords an opportunity to the aggrieved person and is better than no hearing at all. However, post-decisional hearing should be an exception rather than rule. It is acceptable in the following situations:—

1. where the original decision does not cause any prejudice or detriment to the person affected;
2. where there is urgent need for prompt action;
3. where it is impracticable to afford pre-decisional hearing.

The decision of excluding pre-decisional hearing is justifiable.

Requirement Of Cross Examination

Cross-examination is used to rebut evidence or elicit and establish truth. In administrative adjudication, as a general rule, the courts do not insist on cross-examination unless the circumstances are such that in the absence of it, an effective defence cannot be put up.

In the case of *Town Area Committee vs. Jagdish Prasad*, the department submitted the charge, got an explanation and thereafter straightaway passed the dismissal order. The court quashed the

order holding that the rule of fair hearing includes an opportunity to cross-examine the witness and to lead evidence.

Right of Legal Representation

Legal representation is not considered as an indispensable part of the rule of fair hearing in administrative proceedings. This denial of legal representation is justified on the ground that -

- a) the lawyers tend to complicate matters, prolong hearings and destroy the essential informality of the hearings.
- b) it gives an edge to the rich over the poor who cannot afford a good lawyer.

Whether legal representation is allowed in administrative proceedings depends on the provisions of the statute. Factory laws do not permit legal representation, Industrial Disputes Act allows it with the permission of the tribunal and some statutes like Income Tax permit representation as a matter of right. The courts in India have held that in following situations, some professional assistance must be given to the party to make his right to defend himself meaningful: -

- a) Illiterate
- b) Matter is technical or complicated
- c) Expert evidence is on record
- d) Question of law is involved
- e) Person is facing trained prosecutor

Requirement of Passing a Speaking Or Reasoned Order

In India, unless there is specific requirement of giving reasons under the statute, it is not mandatory for the administrative agencies to give reasons for their decisions. Reasons are the link between the order and mind of the maker. Any decision of the administrative authority affecting the rights of the people without assigning any reason tantamount to violation of principles of natural justice. The requirement of stating the reasons cannot be under emphasized as it serves the following purpose: -

1. It ensures that the administrative authority will apply its mind and objectively

- look at the facts and evidence of the case.
2. It ensures that all the relevant factors have been considered and that the irrelevant factors have been left out.
 3. It satisfies the aggrieved party in the sense that his view point have been examined and considered prior to reaching a conclusion.
 4. The appellate authorities and courts are in a better position to consider the appeals on the question of law.

In short, reasons reveal the rational nexus between the facts considered and the conclusions reached. However, mere recording of reasons serves no purpose unless the same are communicated either orally or in writing to the parties. In fact mere communication of reasons has no meaning unless the corrective machinery is in place. Whether the reasons should be recorded or not depends on the facts of the case. In *Tarachand v. Municipal Corporation*, an assistant teacher was dismissed on the ground of moral turpitude. The Enquiry fully established the charge. The Asst. Education Commissioner confirmed the report w/o giving reasons. The Apex Court held that where the disciplinary authority disagrees with the report of the enquiry officer, it must state the reasons. In other words, the sighting of reasons is not mandatory where the disciplinary authority merely agrees with the report of enquiry officer.

e. Rules of evidence- no evidence, some evidence and substantial evidence

Criminal Justice reflects the responses of the society to crimes and criminals. The key components engaged in this role are the courts, police, prosecution, and defence. Administering criminal justice satisfactorily in a democratic society governed by rule of law and guaranteed fundamental rights is a challenging task. It is in this context that the subordinate judiciary assumes great importance.

Right to speedy trial is implicit in the right to life and liberty guaranteed by Article 21 of the Constitution of India. However, there is a huge pendency of criminal cases and inordinate delay in the disposal of the same on the one hand and very low rate of conviction in cases involving serious crime.



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As per the latest amendment, Section 309 of the Cr.P.C. has been inserted with an explanation to its sub-clause. With an aim to speed-up trials, the amendment states that no adjournment should be granted at the party's request, nor can the party's lawyer being engaged in another court be ground for adjournment. Section 309 contains a mandatory provision that in every inquiry or trial the proceedings shall be held as expeditiously as possible and in particular when the examination of witnesses has once begun the same shall be continued from day to day until all witnesses in attendance have been examined unless the court finds the adjournment of the case beyond the following day to be necessary for reasons to be recorded. When the enquiry or trial relates to an offence under Section 376 to 376D IPC, the same shall be completed within a period of two months from the date of commencement of the examination of witnesses. The introduction of Plea Bargaining included under sections 265A to 265L of the Code of Criminal Procedure has also been noticed very effectively. Judicial Officers must be aware of "offences affecting the socioeconomic condition of the country" for the purpose of Section 265A.

Fair Trial to Accused: Co-Relative Duties Of Magistrate

It is well settled today that the accused has fundamental right to know the grounds of his arrest, right to legal aid in case he is indigent, right to consult his lawyer and such other rights guaranteed by Constitution and equivalent safeguards incorporated in CrPC. Article 22(2) provides that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest and no one shall be detained in custody beyond the said period without the authority of a magistrate. The magistrate can pass order of remand to authorise the detention of the accused in such custody as such magistrate thinks fit, for a term not exceeding 15 days in the whole. Right to know the ground of arrest is conferred the status of fundamental right under article 22(1). It is reasonable to expect that grounds of arrest communicated in language understood by the accused. Further, the accused has right to inform his friend or relative of his arrest.

Magistrates have been given the fundamental duty under amended section 50A of the Criminal Procedure to satisfy that the police has informed the arrested person of his rights and made an entry of the fact in book to be maintained in the police station. There have been frequent complaints about the police's noncompliance of the above mentioned requirements. The magistrates are empowered under section 97 to issue search warrant which is in the nature of a

writ of habeas corpus for rescue of a wrongfully confined person by intervention of police directed by a magisterial order. If magistrate has reason to believe that any person is confined under circumstances that amounts to an offence, he may issue a search warrant and person if found shall be immediately taken before a magistrate. The accused has a right to be medically examined and if such a request is made, the Magistrate shall direct examination of the body unless he considers it is made for purpose of delay or defeating the ends of justice.

Recording Confessions & Dying Declaration

Confessions and dying declarations recorded by magistrate constitute valuable evidence as they may form the basis of conviction of the accused. Although there is no hard and fast rule as to proper manner of recording the same, the Magistrate must follow certain broad guidelines to ensure that the document inspires confidence of the court assessing it. Just as the FIR recorded is of great importance because it is the earliest information given soon after the commission of a cognizable offence before there is time to forget, fabricate or embellish. Similarly the confession made to magistrate is highly valuable evidence. Section 164 empowers magistrate to record even when he has no jurisdiction in the case. Before recording any such confession, the magistrate is required to explain to the person making confession that

- a) He is not bound to make such a confession
- b) If he does so it may be used as evidence against him

Law on Electronic Evidence

The proliferation of computers, the social influence of information technology and the ability to store information in digital form have all required Indian law to be amended to include provisions on the appreciation of digital evidence. In the year 2000 Parliament enacted the Information Technology (IT) Act 2000, which amended the existing Indian statutes to allow for the admissibility of digital evidence. The IT Act is based on the United Nations Commission on International Trade Law which adopted the Model Law on Electronic Commerce together with providing amendments to the Indian Evidence Act 1872, the Indian Penal Code 1860 and the Banker's Book Evidence Act 1891, recognizing transactions that are carried out through electronic data interchange and other means of electronic communication. Digital knowledge has become prerequisite for effective judgship.



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Summary Trials: Role of Magistrates in Delivering Swift Justice

The magistrates are empowered to deal with summons cases and few specific warrant cases in a summary way with the clear intention of ensuring speedy justice. They can give an abridge version of regular trial in offences like petty thefts, house trespass, cattle trespass, insult to provoke breach of peace and other such offences punishable with imprisonment not exceeding 2 years.

UNIT-IV

Administrative Discretion and Judicial Control of Administrative Action

Administrative Discretion: Meaning

Discretion in layman's language means choosing from amongst the various available alternatives without reference to any predetermined criterion, no matter how fanciful that choice may be. Discretion in the context of the term 'administrative' means choosing from amongst the various available alternatives, but with reference to the rules of reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful but legal and regular.

a. Need and its relationship with rule of law

Due to the complexity of socio-economic conditions which the administration in modern times has to contend with, it is realized that a government having only ministerial duties with no discretionary functions will be extremely rigid and unworkable and that, to some extent, officials must be allowed a choice as to when, how, and whether they will act. The reason for this attitude is that, more often than not, the administration is required to handle intricate problems which involve investigation of facts, making of choices and exercise of discretion before deciding what action has to be taken. Therefore, the modern tendency is to leave a large amount of discretion with various authorities. Statute books are now full of provisions giving discretion of one kind or the other to the government or officials for various purposes. The need for 'discretion' arises because of the necessity to individualize the exercise of power by the administration, i.e. the administration has to apply a vague or indefinite statutory provision from case to case. Following are some good reasons for conferring discretion on administrative

authorities :

- (a) The present day problems which the administration is called upon to deal with are of complex and varying nature and it is difficult to comprehend them all within the scope of general rules;
- (b) Most of the problems are new, practically of the first impression. Lack of any previous experience to deal with them does not warrant the adoption of general rules;
- (c) It is not always possible to foresee each and every problem but when a problem arises it must in any case be solved by the administration in spite of the absence of specific rules applicable to the situation;
- (d) Circumstances differ from case to case so that applying one rule mechanically to all cases may itself result in injustice.

However, from the point of view of the individual, there are several disadvantages in the administration following the case to case approach as compared to with the adoption of a general rule applicable to all similar cases. First, whereas case to case decisions operate on the past facts, a general rule usually avoids retroactivity and operates in future so that one has prior notice of the rules and thus may regulate his conduct accordingly. In case to case approach, the individual may be caught by surprise and may not be able to adjust his affairs in the absence of his ability to foresee future administrative action. Second, the case to case approach involves the danger of discrimination amongst various individuals; there arises a possibility of not getting like treatment under like circumstances. Third, the process is time consuming and involves decision in a multiplicity of cases. Moreover, there is a danger of abuse of discretion by administrative officials. In view of these disadvantages, a general rule is to be preferred to the case to case approach and ought to be adopted wherever possible. It is desirable to have administrative uniformity to the extent possible, because, as a matter of general principle, substantial lack of uniformity would lead not only to administrative chaos but also to collapse of public confidence in administrative fairness. In any individual case, it is highly relevant to take into account what has been done in other cases of a similar nature, otherwise a decision may result which could be regarded as being improper or discriminatory. This objective can be advised by several ways. First, law conferring discretion may itself seek to lay down the elements and standards which the authority has to apply in exercising its discretion and selecting a course of action. This means that the degree of discretion should be restricted by law itself as far as possible, or, in other words discretion should be properly "confined and structured". Second, if a statute leaves a large

amount of discretion in the hands of administration, the administration itself lay down criteria with respect to which the discretion is to be exercised. It would help in predicting administrative decision in individual cases, making individual's rights somewhat certain and reducing chances of abuse of administrative discretion. It would also help in uniform application of the law in a large number of cases which may have to be handled, especially when a number of parallel and co-equal administrative authorities have to cope with cases arising under a particular scheme. Third, on a lower plane, to some extent administrative discretions and norms of practice can be used, instead of the rules, for the purpose of achieving uniformity in discretionary decisions, but these should be resorted to only when the scheme is too much in an experimental stage and constant adjustment may have to be made for some time to come otherwise rules are preferable to directions as they can be enforced judicially. But it needs to be emphasized that while laying down standards make the discretion somewhat less than absolute, no amount of rules or directions can really eliminate the need for discretion because administration functions in a very broad area and individual cases and situations are bound to arise which may fall outside the guiding norms and the administration will have to take some decision therein. Not all acts of the administration can be bound by fixed rules. Many a times, it may not be possible to prescribe intelligible standards for the administration to follow. All these factors make it inevitable that discretion be vested in the administration to take care of individual cases. But it also brings in the question of judicial and other control over discretionary powers.

b. Judicial Review of Administrative Action and Grounds of Judicial Review

There has been tremendous growth in the administrative process. This is quite natural in a welfare state as a welfare state is basically an administrative state. So expansion in the administrative power is a consequence of the concept of welfare state., according to Professor Wade, ' All legal power as opposed to duty, is inevitably discretionary to a greater or lesser extent.' So, in order to maintain rule of law it is absolutely necessary to control this discretionary element in the administrative power. The judicial control over the administrative action becomes imperative. There are two types of remedies against the administrative wrongs – private law remedy of suit and judicial review through writs. Civil law remedy could be effective if the procedure is simple cheap and expeditious, which is not so in India. Therefore, this remedy is not

effective against the administration. There is tremendous scope For this remedy in administrative matters since it lies at the door-step of a litigant. It is the public law remedy of judicial review through writs which is very effective and expeditious, though it is costly as only High Courts and the Supreme Court have the power to issue these writs. The power of judicial review is a supervisory power and not a normal appellate power against the decisions of administrative authorities. The recurring theme of the Supreme Court's decision relating to nature and scope of judicial review is that it is limited to consideration of legality of decision making process and not legality of order per se. That mere possibility of another view cannot be a ground of interference.

Powers of the Supreme Court

The Power of judicial review is a constitutional power since it is the Constitution which invests these powers in the Supreme Court and the High Courts in the States. So far the Supreme Court is concerned the relevant Articles are 32 with Articles 12 and 13 and Article 136. Article 32 empowers the Supreme Court to issue directions, orders or writs (which are specifically mentioned therein) for the enforcement of fundamental rights. What is unique about Article 32 is that the right to move the Supreme Court under this Article is itself a Fundamental Right. Thus the Supreme Court is made guarantor or protector of the fundamental rights. The Supreme Court has further expanded the scope of this Article even in cases where no fundamental right is involved. In *M.C.Mehta v. Union of India*, it was held that where a person manipulated facts in order to get a decree by a court to defeat the ends of justice, in such a situation petition was held to be maintainable under Article 32. Though Article 32 is called cornerstone of the democratic edifice, it becomes inconvenient for the Supreme Court to entertain petitions under original jurisdiction since it could overload the court. Therefore, sometimes the Supreme Court suggests that the petitioner should first approach the High Court under Article 226 before coming to the Supreme Court under Article 32.

Article 136-A Special Power of Judicial Review

Under Article 136, the Supreme Court may grant special leave to appeal against any decision of a Tribunal. What is a Tribunal is not defined, but the Supreme Court has interpreted it in a liberal way. A tribunal is a body or authority which is vested, with judicial power to adjudicate on question' of law or fact, affecting the rights of citizens in a judicial manner. Such authorities or bodies must have been constituted by the state and vested with judicial as distinguished from administrative or executive functions.

Article 136 does not confer a right of appeal as such but a discretionary power on the Supreme Court to grant special leave to appeal. The Supreme Court has held that even in cases where special leave is granted, the discretionary power continues to remain with the court even at the stage when the appeal comes up for hearing. Generally, the court does not, grant special leave to appeal, unless it is shown that exceptional and special circumstance exist, that substantial and grave injustice has been done and the case in question presents sufficient gravity to warrant a review of the decision appealed against. It confers a very wide discretion on the Supreme Court to be exercised for satisfying the demands of justice.

Powers of the High Courts

Article 226 (1) empowers the High Courts in the States or Union Territories to issue to any person or authority including any Government within their territories, directions, orders or writs for the enforcement of the fundamental rights or for any other purpose.

The power of judicial review of the High Court under Article 226 is wider than the Supreme Court's power under Article 32 of the Constitution. The expression 'for any other purpose' enables the High Court to exercise their power of judicial review for the enforcement of ordinary legal rights which are not fundamental rights. High Court can issue a writ to a person or authority not only when it is within the territorial jurisdiction of the court but also when it is outside its jurisdiction provided the cause of action wholly or partly arises within its territorial jurisdiction. This power of the High Court under Article 226 is concurrent with the power of the Supreme Court under Article 32 of the Constitution.

Article 227 clause (1) confers the power of 'superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. However, this power does not extend, like Article 136, over any court or tribunal constituted under any law relating to the Armed Forces.

This power is in addition to the power conferred upon the High Court under Article 226 which is of a judicial nature. Is this power of superintendence, administrative or judicial? Under the Government of India Act, 1935 this power extended only to the courts and was of administrative nature only. Under the Constitution it is extended to the tribunals and section 224 (2) of the Government of India Act, 1935, which made it of administrative nature, was not retained in

Article 227. Therefore, the power of superintendence under Article 227 is of an administrative as well as judicial nature. The parameters of this power are well settled and it is exercised on the same grounds as the power of judicial review. They are:

- (i) It can be exercised even in those cases where no appeal or revision lies to the High Court;
- (ii) The power should not ordinarily be exercised if any other remedy is available even if it involved inconvenience or delay.
- (iii) The power is available where there is want or excess of jurisdiction, failure to exercise jurisdiction violation of principles of natural justice and error of law apparent on the face of the record;
- (iv) In the exercise of this power the High Court does not act as appellate tribunal.

It does not invest the High Court with an unlimited prerogative to interfere in cases where wrong decisions have been arrived at by judicial or quasi-judicial tribunals on questions of law or fact. There has to be grave miscarriage of justice or flagrant violation of law calling for interference. Administrative Discretion and fundamental rights: No law can clothe administrative discretion with a complete finality, for the courts always examine the ambit and even the mode of its exercise for the angle of its conformity with fundamental rights. The fundamental rights thus provide a basis to the judiciary in India to control administrative discretion to a large extent. There have been a number of cases in which a law, conferring discretionary powers, has been held violative of a fundamental right. The following discussion will illustrate the cases of judicial restraints on the exercise of discretion in India.

Administrative Discretion and Article 14: Article 14 prevents arbitrary discretion being vested in the executive. Equality is antithetic to arbitrariness. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. Right to equality affords protection not only against discretionary laws passed by legislature but also prevents arbitrary discretion being vested in the executive. Often executive or administrative officer or Government is given wide discretionary power. In a number of cases, the Statute has been challenged on the ground that it conferred on an administrative authority wide discretionary powers of selecting persons or

objects discriminately and therefore, it violated Article 14. The Court in determining the question of validity of such statute will examine whether the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification. The Court will not tolerate the delegation of uncontrolled power in the hands of the Executive to such an extent as to enable it to discriminate.

Under Article 19: Article 19 guarantees certain freedoms to the citizens of India, but they are not absolute. Reasonable restrictions can be imposed on these freedoms under the authority of law. They cannot be contended merely on executive action. The reasonableness of the restrictions is open to judicial review. These freedoms can also be afflicted by administrative discretion. Such cases can be examined below. A number of cases have come up involving the question of validity of law conferring discretion on the Executive to restrict the right under Article 19(1) (b) and (e). The State has conferred powers on the Executive to extern a person from a particular area in the interest of peace and safety in a number of statutes.

Under Article 31(2): Article 31(2) of the Constitution provided for acquisition of private property by the Government under the authority of law. It laid down two conditions, subject to which the property could be requisitioned _1) that the law provided for an amount (after 25th Amendment) to be given to the persons affected, which was non-justifiable; and (2) that the property was to be acquired for a public purpose. In an early case, where the law vested the administrative officer with the power to acquire estates of food grains at any price, it was held to be void on the grounds, inter alia, that it failed to fix the amount of compensation or specify the principles, on which it could be determined. Since the matter was entirely left to the discretion of the officer concerned to fix any compensation it liked, it violated Article 31(2). The property under Article 31(2) could be acquisitioned for a public purpose only. The Executive could be made the sole judge to decide a public purpose. No doubt, the Government is in best position to judge as to whether a public purpose could be achieved by issuing an acquisition order, but it is a justifiable issue and the final decision is with the courts in this matter. Hence, in India the administrative discretion may be reviewed by the court on the following grounds.

I. Abuse of Discretion

These days, the administrative authorities are conferred wide discretionary powers. There is a great need of their control so that they may not be misused. The discretionary power is required to be exercised according to law. When the mode of exercising a valid power is improper or unreasonable there is an abuse of power. The abuse of the discretionary power is inferred in the following conditions: -

i) Use for improper purpose: - The discretionary power is required to be used for the purpose for which it has been given. If it is given for one purpose and used for another purpose. It will amount to abuse of power.

ii) Malafide or Bad faith: - If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court. Malafide exercise of discretionary power is always bad and taken as abuse of discretion. Malafide may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently. If its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest.

iii) Irrelevant consideration: - The decision of the administrative authority is declared void if it is not based on relevant and germane considerations. The considerations will be irrelevant if there is no reasonable connection between the facts and the grounds.

iv) Leaving out relevant considerations: - The administrative authority exercising the discretionary power is required to take into account all the relevant facts. If it leaves out relevant consideration, its action will be invalid.

Mixed consideration: - Sometimes the discretionary power is exercised by the authority on both relevant and irrelevant grounds. In such condition the court will examine whether or not the exclusion of the irrelevant or non-existent considerations would have affected the ultimate decision. If the court is satisfied that the exclusion of the irrelevant considerations would have affected the decision, the order passed by the authority in the exercise of the discretionary power will be declared invalid but if the court is satisfied that the exclusion of the irrelevant considerations would not be declared invalid.

vi) Unreasonableness: - The Discretionary power is required to be exercised by the authority reasonably. If it is exercised unreasonably it will be declared invalid by the court. Every authority is required to exercise its powers reasonably.

vii) Colourable Exercise of Power: - Where the discretionary power is exercised by the authority on which it has been conferred ostensibly for the purpose for which it has been given but in reality for some other purpose, it is taken as colorable exercise of the discretionary power and it is declared invalid.

viii) Non-compliance with procedural requirements and principles of natural justice: - If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or directory is decided by the court. Principles of natural justice are also required to be observed.

ix) Exceeding jurisdiction: - The authority is required to exercise the power within the limits or the statute. Consequently, if the authority exceeds this limit, its action will be held to be *ultravires* and, therefore, void.

II. Failure to exercise Discretion

In the following condition the authority is taken to have failed to exercise its discretion and its decision or action will be bad.

i) Non-application of mind: - Where an authority is given discretionary powers it is required to exercise it by applying its mind to the facts and circumstances of the case in hand. If he does not do so it will be deemed to have failed to exercise its discretion and its action or decision will be bad.

ii) Acting under Dictation: - Where the authority exercises its discretionary power under the instructions or dictation from superior authority. It is taken, as non-exercise of power by the authority and its decision or action is bad. In such condition the authority purports to act on its own but in substance the power is not exercised by it but by the other authority. The authority entrusted with the powers does not take action on its own judgment and does not apply its mind.

iii) Imposing fetters on the exercise of discretionary powers: - If the authority imposes fetters on its discretion by announcing rules of policy to be applied by it rigidly to all cases coming before it for decision, its action or decision will be bad. The authority entrusted with the discretionary power is required to exercise it after considering the individual cases and if the authority imposes fetters on its discretion by adopting fixed rule of policy to be applied rigidly to all cases coming before it, it will be taken as failure to exercise discretion and its action or decision or order will be bad.

iii) **Illegality, Irrationality, Procedure Impropriety**

Illegality

A decision may be illegal for many different reasons. There are no hard and fast rules for their classification, but the most common examples of cases where the courts hold administrative decisions to be unlawful are the following:

- The decision is made by the wrong person (unlawful sub-delegation)
- Jurisdiction: Error of law or error of fact
- The decision maker went beyond their power: ultra vires
- Ignoring relevant considerations or taking irrelevant considerations into account
- Fettering discretion

Irrationality

Under Lord Diplock's classification, a decision is irrational if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.

Procedural impropriety

A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute have not been followed or if the "rules of natural justice" have not been adhered to.

c. Doctrine of legitimate expectation

Legitimate expectation as ground of judicial review

The concept of legitimate expectation in administrative law has nowadays, undoubtedly, gained sufficient importance. These days the courts resort to legitimate expectation for the review of administrative action and this creation takes its place besides such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future, perhaps, the unreasonableness, the proportionality.

Legitimate expectation gives the applicant sufficient locus standi for judicial review. The doctrine of legitimate expectation is to be confined mostly to right of fair hearing before a decision, which results in negative a promise, or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as

no crystallized right as such is involved. The protection of such legitimate does not require the fulfillment of the expectation where an overriding public interest requires otherwise. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation, which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits. A person, who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is foundation and thus he has locus standi to make such a claim. There are stronger reasons as to why the legitimate expectation should not be substantively protected than the reason as to why it should be protected. If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or arbitrary, discriminatory unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends much on the facts and the concept of legitimate expectation for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case.

d. Evolution of Concept of Ombudsmen

Use of the term began in Sweden, with the Swedish Parliamentary Ombudsman instituted by the Instrument of Government of 1809, to safeguard the rights of citizens by establishing a supervisory agency independent of the executive branch. The predecessor of the Swedish Parliamentary Ombudsman was the Office of Supreme Ombudsman ("Högste Ombudsmannen"), which was established by the Swedish King, Charles XII, in 1713. The Parliamentary Ombudsman is the institution that the Scandinavian countries subsequently developed into its contemporary form, and which subsequently has been adopted in many other parts of the world. The word ombudsman and its specific meaning have since been adopted in various languages, including Spanish, Dutch and Czech. The German language uses *Ombudsmann*, *Ombudsfrau* and *Ombudsleute*. Notable exceptions are French and Finnish, which use translations instead.



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Modern variations of this term include "ombud," "ombuds," "ombudsperson," or "ombudswoman," and the conventional English plural is *ombudsmen*.

An ombudsman or public advocate is usually appointed by the government or by parliament, but with a significant degree of independence, who is charged with representing the interests of the public by investigating and addressing complaints of maladministration or a violation of rights. In some nations an Inspector General, Citizen Advocate or other official may have duties similar to those of a national ombudsman, and may also be appointed by a legislature. Below the national level an ombudsman may be appointed by a state, local or municipal government. Unofficial ombudsmen may be appointed by, or even work for, a corporation such as a utility supplier, newspaper, NGO, or professional regulatory body.

The typical duties of an ombudsman are to investigate complaints and attempt to resolve them, usually through recommendations (binding or not) or mediation. Ombudsmen sometimes also aim to identify systematic issues leading to poor service or breaches of people's rights. At the national level, most ombudsmen have a wide mandate to deal with the entire public sector, and sometimes also elements of the private sector (for example, contracted service providers). In some cases, there is a more restricted mandate, for instance, with particular sectors of society. More recent developments have included the creation of specialized Children's Ombudsman and Information Commissioner agencies.

In some jurisdictions an ombudsman charged with handling concerns about national government is more formally referred to as the "Parliamentary Commissioner" (for e.g. the United Kingdom Parliamentary Commissioner for Administration, and the Western Australian state Ombudsman). In many countries where the ombudsman's responsibility includes protecting human rights, the ombudsman is recognized as the national human rights institution. The post of ombudsman had by the end of the 20th century been instituted by most governments and by some intergovernmental organizations such as the European Union.

Lokpal and Lokayukta Act and other Anti corruption Bodies and



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their Administrative Procedures

Lokpal and Lokayukta

The Indian Lokpal is synonymous to the institution of Ombudsman existing in the Scandinavian countries. The office of the ombudsman originated in Sweden in 1809 AD, and adopted eventually by many nations as a bulwark of democratic government against the tyranny of officialdom. Ombudsman is a Swedish word that stands for an officer appointed by the legislature to handle complaints against administrative and judicial action. Traditionally the ombudsman is appointed based on unanimity among all political parties supporting the proposal. The incumbent, though appointed by the legislature, is an independent functionary-independent of all the three organs of the state, but reports to the legislature. The Ombudsman can act both on the basis of complaints made by citizens, or suo moto. It can look into allegations of corruption as well as mal-administration. The existing devices for checks on elected and administrative officials have not been effective, as the growing instances of corruption cases suggest.

The Central Vigilance Commission is designed to inquire into allegations of corruption by administrative officials only. The CBI, the premier investigating agency of the country, functions under the supervision of the Ministry of Personnel Public Grievances and Pensions (under the Prime Minister) and is therefore not immune from political pressures during investigation. Indeed, the lack of independence and professionalism of CBI has been castigated by the Supreme Court often in recent times. All these have necessitated the creation of Lokpal with its own investigating team in earliest possible occasion. Hence, there is a need for a mechanism that would adopt very simple, independent, speedy and cheaper means of delivering justice by redressing the grievances of the people. Working of Ombudsmam in various countries suggests that the institution of ombudsman has very successfully fought against corruption and unscrupulous administrative decisions by public servants, and acted as a real guardian of democracy and civil rights.

The Lokpal

In early 1960S, mounting corruption in public administration set the winds blowing in favour of an Ombudsman in India too. The Administrative Reforms Commission (ARC) set up in 1966 recommended the constitution of a two-tier machinery of a Lokpal at the Centre, and Lokayukts in the states. The ARC while recommending the constitution of Lokpal was convinced that such

an institution was justified not only for removing the sense of injustice from the minds of adversely affected citizens but also necessary to instill public confidence in the efficiency of administrative machinery. Following this, the Lokpal Bill was for the 1 first time presented during the fourth Lok Sabha in 1968, and was passed there in 1969. However, while it was pending in the Rajya Sabha, the Lok Sabha was dissolved, resulting the first death of the bill. The bill was revived in 1971, 1977, 1985, 1989, 1996, 1998, 2001 and most recently in 2004. Each time, after the bill was introduced to the house, it was referred to some committee for improvements a joint committee of parliament, or a departmental standing committee of the Home Ministry and before the government could take a final stand on the issue the house was dissolved. The Lokpal was visualized as the watchdog institution on ministerial probity. Broadly the provisions of different bills empowered the Lokpal to investigate corruption cases against political persons at the Central level.

The purpose of Lokpal is to provide speedy, cheaper form of justice to people.

Lokpal is to be a three member body with a chairperson who is or has been a chief justice or judge of the Supreme Court; and its two other members who are or have been judges or chief justices of high courts around the country.

In order to ensure the independence of functioning of the august office, the following provisions have been incorporated:

- Appointment is to be made on the recommendation of a committee.
- The Lokpal is ineligible to hold any office of profit under Government of India or of any state, or similar such posts after retirement.
- Fixed tenure of three years and can be removed only on the ground of proven misbehavior or incapacity after an inquiry made by CJI and two senior most judges of SC
- Lokpal will have its own administrative machinery for conducting investigations.
- Salary of Lokpal is to be charged on the Consolidated Fund of India.
- PM relation to matters functions of national security and public order. Complaints of offence committed within 10 years from the date of complaint can be taken up for investigation, not beyond this period.
- Any person other than a public servant can make a complaint. The Lokpal is supposed to complete the inquiry within a period of six months. The Lokpal has the power of a civil

court to summon any person or authority. After investigation, the ombudsman can only recommend actions to be taken by the competent authority.

- He can order search and seizure operations.
- He shall present annually to the President the reports of investigation and the latter with the action take report has to put it before the both houses of parliament.
- It may be noted that the Lokpal is supposed to investigate cases of corruption only, and not address himself to redressing grievances in respect of injustices and hardship caused by maladministration.

Lokayuktas in the States

The power, function and jurisdiction of Lokayuktas are not uniform in the country. In some states it has been applicable to all the elected representatives including the CM. In some other states legislators have been deliberately kept out of his purview.

Lokayuktas have not been provided with their independent investigative machinery making them dependent on the government agencies, which leaves enough scope for the politicians and the bureaucrats to tinker with the processes of investigation.

Central Bureau of Investigation

The Central Bureau of Investigation (CBI) , functioning under Dept. of Personnel, Ministry of Personnel, Pension & Public Grievances, Government of India, is the premier investigating police agency in India. It is an elite force playing a major role in preservation of values in public life and in ensuring the health of the national economy. It is also the nodal police agency in India which coordinates investigation on behalf of Interpol Member countries. The CBI has to investigate major crimes in the country having interstate and international ramifications. It is also involved in collection of criminal intelligence pertaining to three of its main areas of operation, viz., Anti-Corruption, Economic Crimes and Special Crimes.

The Anti-Corruption Division of the CBI has handled cases against Chief Ministers, Ministers, Secretaries to Government, Officers of the All India Services, CMDs of Banks, Financial Institutions, Public Sector Undertakings, etc.

CBI investigations have a major impact on the political and economic life of the nation. The

following broad categories of criminal cases are handled by the CBI:

- Cases of corruption and fraud committed by public servants of all Central Govt. Departments, Central Public Sector Undertakings and Central Financial Institutions.
- Economic crimes, including bank frauds, financial frauds, Import Export & Foreign Exchange violations, large-scale smuggling of narcotics, antiques, cultural property and smuggling of other contraband items etc.
- Special Crimes, such as cases of terrorism, bomb blasts, sensational homicides, kidnapping for ransom and crimes committed by the mafia/the underworld.

The CBI is headed by a Director. The other police ranks in CBI are Special Director/Addl. Director, Joint Director, Dy. Insp. General of Police, Inspector, Sub-Inspector, Assistant Sub-Inspector, Head Constable and Constable.

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