



# **KLE LAW ACADEMY BELAGAVI**

(Constituent Colleges: KLE Society's Law College, Bengaluru, Gurusiddappa Kotambri Law College, Hubballi, S.A. Manvi Law College, Gadag, KLE Society's B.V. Bellad Law College, Belagavi, KLE Law College, Chikodi, and KLE College of Law, Kalamboli, Navi Mumbai)

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## **STUDY MATERIAL**

*for*

## **ADMINISTRATIVE LAW**

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

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## **Unit I**

**DEFINITION OF ADMINISTRATIVE LAW**

**NATURE & SCOPE OF ADMINISTRATIVE LAW**

**THE IMPACT AND IMPLICATIONS OF THE DOCTRINE OF  
SEPARATION OF POWER AND THE RULE OF LAW ON THE  
ADMINISTRATIVE LAW**

**CLASSIFICATION OF ADMINISTRATIVE ACTION- THE  
NECESSITY**

## INTRODUCTION

Administrative law is a heuristic science. It is a branch of public law which is essentially anti-authoritarian. It strives to develop a rule of law society based on fairness, reasonableness and justice. Administrative law deals fundamentally with law relating to administration and basic foundation of the administration.

Principles of administrative law are not extraconstitutional, they emerged from Articles 14 and 21 of the Constitution. It is true to say with Holland and Maitland that administrative law is part of Constitutional law. The general principles relating to the organization, powers and functions of the organs of the state legislative, executive and judicial and their relationships are *interalia* dealt with in the Constitution.

Administrative law deals with other powers and the functions of the administrative authorities it also includes the matters relating to civil service, public departments, public corporations, local authorities and other statutory bodies exercising quasi-judicial functions. As Ivor Jennings rightly points out the subject matter of administrative law is public administration. Administrative law defines and determines the organization, functions, powers and the duties of administrative authorities.

The most significant and outstanding development of the twentieth century is the rapid growth of administrative law. Though administrative law has been in existence, in one form or the other, before the 20th century, it is in this century that the philosophy as to the role and function of the State has undergone a radical change. Administrative law as a separate branch of legal discipline, especially in India, came to be recognized only by the middle of the 20th century.

The governmental functions have multiplied by leaps and bounds. Today, the State is not merely a police State, exercising sovereign functions, but as a progressive democratic State, it seeks to ensure social security and social welfare for the common man, regulates the industrial relations, exercises control over the production, manufacture and distribution of essential commodities, starts many enterprises, tries to achieve equality for all and ensures equal pay for equal work.

It improves slums, looks after the health and morals of the people, provides education to children and takes all the steps which social justice demands. In short, the modern State takes care of its citizens from 'cradle to grave'.

All these developments have widened the scope and ambit of administrative law. Today the administration is ubiquitous and impinges freely and deeply on every aspect of an individual's life. Therefore, administrative law has become a major area for study and research.

### **Growth of Administrative Law**

Administrative law has been characterized as the most outstanding legal development of the 20th century. It does not mean, however, that there was no administrative law in any country before the 20th century. Being related to public administration, administrative law should be deemed to have been in existence in one form or another in every country having some form of government. It is as ancient as the administration itself as it is a concomitant of organized administration.

The opening statement signifies that administrative law has grown and developed tremendously, in quantity, quality and a relative significance, in the 20th century that it has become more articulate and definite as a system in Democratic countries that it has assumed a more recognizable form in the present century so much so that it has come to be identified as a branch of public law by itself, distinct and separate from Constitutional law, if its subject matter is of independent study and investigation in its own right then rapid growth of administrative law in modern times is the direct result of the growth of administrative powers and functions.

Earlier the state was characterized as the law and order state and its role was conceived to be negative as its interest extended primarily to defending the country from external aggression, maintaining law and order within the country, dispensing justice to its subjects and collecting a few taxes to finance these activities. It was an era of free enterprise and minimum governmental responsibility and functions. The management of social and economic life was not regarded as government responsibility. This *laissez Faire* doctrine resulted in human misery.

But all the things changed with the advent of independence. A conscious effort to begin to be made to transform this country into a welfare state the philosophy of welfare state has been ingrained in the preamble to Indian Constitution and the directive principles stated therein. The emergence of the social welfare concept has affected the democracies very profoundly. It has led to state activism. There has occurred a phenomenal increase in the area of state operation it has taken over a number of functions which were previously left to private enterprise. The state today provides every aspect of human life, the functions of a modern state may broadly be placed into five categories, the state as protector, provider, entrepreneur, economic controller and arbitrator.

## Reasons for Growth of Administrative Law

Administrative law is considered as an intensive form of government. It deals with the pathology of functions. The functions that are discharged by the administrative authorities differ from time to time depending upon the changes in socio-economic conditions in any nation.

The following factors are responsible for the rapid growth and development of administrative law:

1. There is a radical change in the philosophy as to the role played by the State. The negative policy of maintaining 'law and order' and of '*laissez faire*' is given up. The State has not confined its scope to the traditional and minimum functions of defense and administration of justice, but has adopted the positive policy and as a welfare State has undertaken to perform varied functions.
2. Urbanization - Due to the Industrial Revolution in England and other countries and due to the emergence of the factory system in our country, people migrated from the countryside to the urban areas in search of employment in factories and large-scale industries. As a result of which there arose a need for increase in providing housing, roads, parks, effective drainage system etc. Legislations were enacted to provide all these basic facilities and accordingly administrative authorities were required to make rules and regulations, frame schemes for effective infrastructure and facilities which ultimately lead to the growth of administrative law.
3. To meet Emergency Situations – Enacting legislations, getting assent from the President is all a lengthy process, whereas it is very easy and quick to frame schemes and rules to meet any exigency that arise in a locality. Due to the flexibility of making the rules, obviously there is a constant growth of administrative law making in the country.
4. The judicial system proved inadequate to decide and settle all types of disputes. It was slow, costly, inexpert, complex and formalistic. It was already overburdened, and it was not possible to expect speedy disposal of even very important matters, e.g. disputes between employers and employees, lockouts, strikes, etc. These burning problems could not be solved merely by literally interpreting the provisions of any statute, but required consideration of various other factors and it could not be done by the ordinary courts of law. Therefore, Industrial Tribunals and Labour Courts were established, which possessed the techniques and expertise to handle these complex problems.
5. The legislative process was also inadequate. It had no time and technique to deal with all the details. It was impossible for it to lay down detailed rules and procedures, and even when detailed provisions were made by the legislature, they were found to be defective and inadequate, e.g., rate

fixing. And, therefore, it was felt necessary to delegate some powers to the administrative authorities.

6. There is scope for experiments in administrative process. Here, unlike legislation, it is not necessary to continue a rule until commencement of the next session of the legislature. Here a rule can be made, tried for some time and if it is found defective, it can be altered or modified within a short period. Thus, legislation is rigid in character while the administrative process is flexible.

7. The administrative authorities can avoid technicalities. Administrative law represents functional rather than a theoretical and legalistic approach. The traditional judiciary is conservative, rigid and technical. It is not possible for the courts to decide the cases without formality and technicality. The Administrative Tribunals are not bound by the rules of evidence and procedure and they can take a practical view of the matter to decide complex problems.

8. Administrative authorities can take preventive measures, e.g. licensing, rate fixing, etc. Unlike regular courts of law, they need not wait for parties to come before them with disputes. In many cases, these preventive actions may prove to be more effective and useful than punishing a person after committing of a breach of any provision of law or law. As Freeman says, " Meat inspection and grading respond more adequately to the consumer's needs than does the right to sue the seller after the consumer is injured."

9. Administrative authorities may take effective steps for enforcement of the aforesaid preventive measures, such as suspension, revocation and cancellation of licenses, destruction of contaminated articles, etc. which are not generally available through regular courts of law.

Today in India, the administrative process has grown so much that it will not be out of place to say that today we are not governed but administered. In this context, the Law Commission of India rightly observed the Rule of law and Judicial review acquire greater significance in a welfare state. The vast amount of legislation which has been enacted during the last three years by the union and states, a great deal of which impinges in a variety of ways on our lives and occupations. Much of it also confers large powers on the executive. The greater, therefore, is the need for ceaseless enforcement of the Rule of law, so that the executive may not, in a belief in its monopoly of wisdom and its zeal for administrative efficiency, overstep the bounds of its power and spread its tentacles into the domains, well the citizen should be free to enjoy the Liberty guaranteed to him by the Constitution.

Observations of Law Commission are no less relevant today when India has adopted the policy of liberalization, privatization and globalization in which administrative law has developed international dimensions. Though state is now withdrawing from business, yet its functions as a facilitator, enabler and regulator are bound to increase. Growth of new centers of economic power which often exercise power in total disregard of the fundamental rights of people, especially of the disadvantaged Sections of society, will put emphasis on the development of new norms of Rule of law and judicial review for reconciling economic growth with social justice.

In recent times a new branch of administrative law is emerging, which is popularly called as Global Administrative Law. According to this the WTO is dictating guidelines on subsidiaries, facilities and services to the people in different countries. The banks have also not been spared from the interference of the WTO guidelines. Thus, it may be submitted, that due to the emerging global administrative law, in the near future there is every possibility for the necessity to re look into the reasons for growth of administrative law.

### **Definition of Administrative Law**

It is indeed difficult to evolve a scientific, precise and satisfactory definition of Administrative Law. Many jurists have made attempts to define it, but none of the definitions has completely demarcated the nature, scope and content of administrative law. Either the definitions are too broad and include much more than necessary or they are too narrow and do not include all essential ingredients. For some it is the law relating to the control of powers of the government.

The main object of this law is to protect individual rights. Others place greater emphasis upon rules which are designed to ensure that the administration effectively performs the tasks assigned to it. Yet others highlight the principal objective of Administrative Law as ensuring governmental accountability, and fostering participation by interested parties in the decision-making process.

Administrative law besides touching all branches of government, touches administrative and quasi administrative agencies that is corporations, commissions, universities and sometimes even private organizations. Furthermore, administrative law is made up of not only of legislative and executive rules and a large body of precedents but also of functional formulations, for every exercise of discretion forms a rule for future action. Early English writers did not differentiate between administrative law and Constitutional law and, therefore, the definition they attempted was too broad and general.



In administrative law, the term Administration is used in its broadest possible sense and covers within its reach.

1. All executive actions, its programs and policies
2. All administrative aspects of parliament and judiciary
3. All actions of state like actors (agency and instrumentality of state)
4. All actions of non-state actors (private entities) exercising public functions.

**Sir Ivor Jennings** defines administrative law as the law relating to administration.

It determines the organization, powers and duties of administrative authorities. This formulation does not differentiate between Administrative and Constitutional law. It lays entire emphasis on the organization, power and duties to the exclusion of the manner of their exercise. For example, administrative law is not concerned with how a minister is appointed but only with how a minister discharges his functions in relation to an individual or a group. How the minister of housing and rehabilitation is appointed is not the concern of administrative law, but when this minister approves a scheme for a new township, which involves the acquisition of houses and lands of persons living in that area, questions of administrative law arise. Sir Ivor Jennings formulation also leaves many aspects of administrative law untouched, especially the control mechanism.

### **A.V. Dicey**

He did not recognize the independent existence of administrative law. He defined administrative law as denoting that portion of a nation's legal system which determines the legal status and liabilities of all state officials, which defines the rights and liabilities of private individuals in their dealings with public officials, and which specifies the procedure by which those rights and liabilities are enforced.

The definition is narrow and restrictive in so far as it leaves out of consideration many aspects of administrative law, Dicey opposed the French *droit administratif* and therefore his formulation mainly concentrated on judicial remedies against state officials. Therefore, this definition excludes the study of every other aspect of administrative law.

The American approach is significantly different from the early English approach, in that it recognized administrative law as an independent branch of the legal discipline.

According to **Kenneth Culp Davis**, Administrative law is a law that concerns the powers and procedure of administrative agencies, including especially the law governing judicial review of administrative action.

Davis includes the study of administrative rulemaking and rule adjudication but excludes rule application which according to him, belongs to the domain of public administration. In one respect, this definition is proper as it puts emphasis on procedure followed by administrative agencies in exercising their powers. It does not include the enormous mass of substantive law produced by the agencies. An administrative agency, according to Davis, is a governmental authority, other than a code and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.

The difficulty in accepting this definition however, is that it does not include many non-adjudicative and yet administrative functions of the administration which cannot be characterized as legislative or quasi-judicial. Another difficulty with this definition is that it puts an emphasis on the control of the administrative functions by the judiciary, but does not study other equally important controls, example parliamentary control or of delegated legislation, control through administrative appeals or revisions and the like.

**Garner** also adopts the American approach advocated by **Casey Davis** According to him, Administrative law may be described as those rules which are recognized by the courts as law and which relate to and regulate the administration of government.

According to **Wade**, administrative law is the law relating to the control of governmental power. According to him the primary object of administrative law is to keep the powers of the government within their legal bounds so as to protect the citizens against their abuse. The powerful engines of authority must be prevented from running amok.

Undoubtedly this definition places considerable emphasis on the object of Administrative law by touching the heart of the subject. It does not, however, define the subject. It also does not deal with the powers and duties of administrative authorities nor with the procedure required to be followed by them.

**Griffith and Street**, According to **Griffith and Street**, the main object of administrative law is the operation and control of administrative authorities. It must deal with three aspects

1. What sort of power does the administration exercise?
2. What are the limits of those powers?

3. what are the ways in which the administration is contained within those Limits?

According to the **Indian law Institute**, the following two aspects must be added to have a complete idea of present-day administrative law

1. what are the procedures followed by the administrative authorities?
2. What are the remedies available to a person affected by administration?

According to **Jain and Jain** Administrative law deals with the structure, powers and functions of the organs of administration, the limits of their powers, the methods and procedures followed by them in exercising their powers and functions, the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation.

Administrative law, according to this definition, deals with four aspects.

Firstly, it deals with composition and the powers of administrative authorities

Secondly, it fixes the limits of the powers of those authorities.

Thirdly, it prescribes the procedure to be followed by these authorities in exercising such powers

Fourthly, it controls these administrative authorities through judicial and other means.

The unenviable diversity in definitions of the term administrative law is also due to the fact that a vary Administrative law specialist tries to lay more emphasis on any one particular aspect of the whole administrative process, which according to his own evolution desires singular attention.

**Professor Upendra Bakshi** of India lays special stress on the protection of the little man from the arbitrary exercise of public power. According to him administrative law is a study of the pathology of power in a developing society. He defines administrative law as that portion of law which controls the abuse of powers by the administrative authorities so as to protect the rights of individuals.

On an analysis of the above definitions it may be submitted that there is no comprehensive and universally accepted definition of administrative law.

For our purposes, we may define administrative law as that branch of public law which deals with the organization and powers of administrative and quasi administrative agencies and prescribes principles and rules by which an official action is arranged and revealed in relation to

individual liberty and freedom. Thus defined, administrative law attempts to regulate administrative space, domestic and global, in order to infuse fairness and accountability in the administrative process necessary for securing equity and inclusiveness in the domestic and world order. It can be concluded that administrative law is that portion of law which determines the organization, powers and duties of administrative authorities, administrative agencies, quasi administrative authorities and the law that governs the judicial review of administrative activities.

### **Sources of Administrative Law**

Administrative law is not a codified, written or well-defined law like the Contract Act, Penal Code, Transfer of Property Act, Evidence Act, Constitution of India, etc. It is essentially an unwritten, uncodified or 'Judge-made' law. It has developed slowly in the wake of factual situations before courts. In a welfare State, administrative authorities are called upon to perform not only executive acts, but also quasi-legislative and quasi-judicial functions. They used to deem the rights of parties and have become the 'Fourth branch' of Government, a 'Government in miniature'. Legal scholars have compared administrative law to the rise of equity. It has its origin in need and necessity in protecting personal rights and in safeguarding individual interests.

In few legal systems, there are statutes laying down rules, principles and procedures to be followed by administrative agencies. But even in absence of specific enactments dealing with a particular situation, certain fundamental rules, basic principles and minimum requirements of law are well settled and all authorities are bound to observe them. A person adversely affected by any action of an administrative authority has right to challenge such action in an appropriate body or a court of law.

In **USA** the following are the sources of administrative law:

- Administrative Procedure Act, 1893
- Statutory Instrument Act, 1946
- Federal Tort Claim Act, 1947
- The Tribunals and Enquiries Act, 1958
- The Parliamentary Commissions Act, 1962

Apart from these legislations, the Constitution of USA is also considered as a source of administrative law in addition to the judgments delivered by the U.S Supreme Court.

In the UK, since there is no written Constitution, the bulk source of administrative law is derived from the decisions delivered by the superior courts, the customary practices that are followed in the course of administration and so on.

In India there is a written Constitution which is considered as a grund norm. Till today there is no legislation enacted either by the parliament or state legislature exclusively on administrative law. In the absence of legislations, the main sources of administrative law are rules, regulations, orders, notifications, bye-laws, schemes, governmental resolutions, memorandums, department circulars etc. There are also legislations which provide for the establishment of tribunals. For example, the Industrial Disputes Act, 1947 provides for the establishment of national tribunals, industrial tribunals and labour courts. There are other legislations for establishing special courts, but all these legislations provide different procedures and different powers for functioning of the tribunals. Therefore, for the purpose of attaining uniformity in maintaining procedures and for prescribing powers, there is a need for comprehensive legislation on administrative law in India.

### **Constitutional Law and Administrative Law**

Sometimes, a question is asked as to whether there is any distinction between Constitutional law and Administrative law. Till recently, the subject of administrative law was dealt with and discussed in the books of Constitutional law and no separate and independent treatment was given to it. In many definitions of Administrative law, it was included in Constitutional law.

Though in essence Constitutional law does not differ from administrative law in as much as both are concerned with functions of the Government and both are a part of public law in the modern State and the sources of both are the same and they are thus inter-related and complementary to each other belonging to one and the same family. Strict demarcation, therefore, is not possible, yet there is a distinction between the two. According to Maitland, while Constitutional law deals with structure and the broader rules which regulate the functions, the details of the functions are left to Administrative law.

According to **Hood Phillips**, “Constitutional law is concerned with the organization and functions of Government at rest while administrative law is concerned with that organization and those functions in motion.”

But the opinion of English and American authors is that the distinction between constitutional law and administrative law is one of degree, convenience and custom rather than that of logic and principle. It is not essential and fundamental in character. Keith rightly remarks: “It is logically impossible to distinguish administrative law from Constitutional law and all attempts to do so are artificial.”

India has a written Constitution. While Constitutional law deals with the general principles relating to the organization and power of the legislature, executive and judiciary and their functions inter se and towards the citizen. Administrative law is that part of Constitutional law which deals in detail with the powers and functions of the administrative authorities, including civil services, public departments, local authorities and other statutory bodies. Thus, while Constitutional law is concerned with Constitutional status of ministers and civil servants, administrative law is concerned with the organization of the service and the proper working of various departments of the Government.

### **Nature & Scope of Administrative Law**

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

As discussed above, the administrative process has come to stay and it has to be accepted as a necessary evil in all progressive societies, particularly in a welfare state, where many schemes for the progress of society are prepared and administered by the government. The execution and implementation of this programme may adversely affect the rights of citizens. The actual problem is to reconcile social welfare with the rights of individual subjects. As has been rightly observed by **Lord Denning**: “Properly exercised, the new powers of the executive lead to the Welfare State; but abused they lead to the Totalitarian State.”

The main object of the study of administrative law is to unravel the way in which these administrative authorities could be kept within their limits so that the discretionary powers may not be turned into arbitrary powers.

**Schwartz** divides Administrative Law in three parts;

1. The powers vested in administrative agencies;
2. The requirements imposed by law upon the exercise of those powers; and
3. Remedies available against unlawful administrative actions. It is a harsh fact of life that phenomenal growth of administrative power as a byproduct of an intensive form of government, do necessary for development and growth, at the times spells negation of people's rights and values.

Though administrative law may not be concerned with the substantive law as such, yet, as Griffith and Street themselves have somewhat recognized, a study of substantial law becomes necessary for appreciating the powers of the administration and for controlling the same. For instance, whether the principles of natural justice are to be observed by an authority or not depends, to a great extent, upon the kind of action it is empowered to take, and to find this, one will need to look into the statute under which it functions. Again, whether the authority has abused its power has to be decided with reference to the substantive provisions.

Here comes the need, importance and purpose of administrative law. Administrative law thus becomes Dharma which conduces to the stability and growth of society, maintenance of a just social order, and welfare of mankind by reconciling power with Liberty. It seeks to channelize administrative powers to achieve the basic aim of any civilized society, that is, growth with Liberty. Thus, Administrative law goes beyond legalism and the presence a principled regulation of administrative space, whether domestic or global, which can be practically regulated for the expansion of human freedoms. Therefore, today, Administrative law represents the way of conceptualizing and articulating a new domestic and global social economic order.

Without a good system of administrative law any society order dies because of its own administrative weight like a black hole which is a dying neutron star that collapses due to its own gravity. Administrative law, therefore, becomes that body of a reasonable limitations and affirmative action parameters which are developed and operationalized by the legislature and the courts to maintain and sustain a Rule of law Society.

Thus, four basic bricks of the foundation of any administrative law may be identified as

1. Checking abuse of administrative power
2. Ensuring citizens an impartial determination of their disputes by officials
3. Protecting citizens from an unauthorized encroachment on their rights and interest
4. Making those who exercise public power accountable to the people

1. Administrative law is a law, but it is not a law in the lawyer's sense of the term like property law or contract law. It is not in the realist sense of the term which includes statute law, administrative rulemaking, precedents, customs, administrative directions, etc. It also includes the study of something which may not be termed law in the true sense of the term such as administrative circulars, policy statements, memorandum and resolutions, etc. Besides this, it includes within its study higher law as well, like the principles of natural justice. However, in India, administrative law, basically and wholly, it remains a judge made law and, thus, suffers from the frailties and benefits from the strength of judicial lawmaking. Consequently, personal and institutional constraints make the growth of administrative law vulnerable to judicial meanderings and tentativeness.

2. Administrative law is a branch of public law in contradiction to private law which deals with the relationships of individuals *inter-se*. Therefore, Administrative law primarily deals with the relationship of individuals with the organized power.

3. Administrative law deals with the organization and powers of administrative and quasi administrative agencies. The stress on the study of organization is only to the extent that it is necessary to understand the powers, characteristics of actions, procedure for the exercise of those powers and the control mechanism provided therein. The study includes not only administrative agencies but also the quasi administrative agencies such as corporations, autonomous agencies, individuals, and civil society institutions, both national and global, and the like operating in public space and exercising public functions.

4. Administrative law includes the study of the existing principles and also of the development of certain new principles which administrative and quasi administrative agencies must follow while exercising their powers in relation to individuals that is the principles of natural justice, reasonableness and fairness.

5. Administrative Law primarily concerns itself with the official action which may be



- a. Rulemaking or quasi legislative action
- b. Quasi-judicial action
- c. Ministerial action or pure administrative action

6. One of the main thrusts of the study of administrative law is on the procedure by which the official action is original. If the means are not trustworthy, the end cannot be just. There is a bewildering variety in the procedure which the administrative agencies follow in reaching an action. Such procedure may be laid down.

- a. In the statute itself under which the administrative agency has been created

b. In the statute itself under which the administrative agency has been created in the separate procedure code which a very administrative agency is bound to follow that is Administrative Procedure Act, 1946 in the USA and Tribunals and Inquiries Act, 1958 in England.

However, in many more cases either the administrative agency is left free to develop its own procedure or it is required to render its actions according to the minimum procedure of the principles of natural justice.

7. Administrative law also includes within its study the control mechanism by which the administrative agencies are kept within bounds and made effective in the service of the individuals. This control mechanism is technically called the review process.

8. The study of administrative law is not an end in itself but a means to an end. The focal point of the study of administrative law is the re-consolation of power with liberty. When the administrative process started rising after the death of *laissez faire* at the birth of the 20th century, the stress on the study of administrative law was on circumscription of administrative powers. But now when the administrative process has come to stay, the emphasis has shifted to the regulation of administrative powers.

A satisfactory and a proper formulation to define the scope, content and ambit of administrative law appears to be as follows:

Administrative law deals with the structure, powers and functions of the organs of administration, the limits of their powers, the methods and procedures followed by them in exercising their powers and functions, the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation.

This statement has four limbs

1. The first limb deals with the composition and powers of organs of administration. This proposition is subject to the qualification stated earlier that the topics falling under the public administration or to be excluded. The term organs of administration have been used in a broad sense and includes all kinds of public or administrative authorities.

2. The second limb refers to the limits on the powers of administrative authorities. These limits may either be expressed or implied.

Express limits are laid down in the provisions of the parent statute. Implied limits or derived by the courts through the interpretative process. In doing so the courts play a very creative role because expressly limits are not usually laid down in statutory provisions and, therefore, the courts have to imply some limits on the administration.

3. The third limb refers to the procedures used in exercising those powers. The study of administrative law of today seeks to emphasize not only the extraneous control but also the processes and procedures which the administrative authorities themselves follow in the exercise of their powers. Evolving of fair procedures is a way of minimizing the abuse of vast discretionary powers conferred on the administration. For example, natural justice forms a significant component of administrative process today and in many situations, codes apply the concept of fairness.

4. The fourth limb refers to the control of the administration through judicial and other means. Under this head would fall judicial as well as extra judicial means of controlling the administration, example Tribunals, Ombudsman etc. It also includes a redressal of individual grievances against the administration.

This aspect of administrative law is based on two basic postulates, namely

- a. Power is conferred on the administration by law
- b. No power is absolute and uncontrolled howsoever broad the power conferred.

**The impact and Implications of the Doctrine of Separation of Power and The Rule of Law on the Administrative law.**

The rule of law is a viable and dynamic concept and, like many other such concepts, is not capable of any exact definition. This, however, does not mean that there is no agreement on the basic values which it represents. The term rule of law is used in contradiction to “Rule of man and Rule according to law”. Even in the most autocratic forms of government there is some law according to which the powers of the government are exercised, but it does not mean that there is the rule of law. Therefore, rule of law means that the law rules, which is based on the principles of freedom, equality, non-discrimination, fraternity, accountability and non-arbitrariness, and is certain, regular and predictable, using the word law in the sense of just and *Lex* both. In this sense the rule of law is an idea. It is a modern name for natural law. In history, man has always appealed to something higher than that which is his own creation.

The basic idea behind accountability is that the ruler’s rule without difference of the people and, therefore, must be accountable to them in the ultimate analysis. Forms of accountability may differ, but the basic idea must remain the same that the holders of public power must be able to publicly to justify the exercise of public power not only as legally valid but also socially just, proper and reasonable. In this manner the concept of the rule of law represents values and not institutions and connotes a climate of legal order which is just and reasonable, where in a very exercise of public power is chiefly designed to add something more to the quality of life of the people. Every legislative, executive and judicial exercise of power must, therefore, depend on this ideal for its validity. Consequently, it is the rule of law define law rather than the law defining the Rule of law.

The doctrine of separation of powers is an animation of the rule of law and its roots also lie in the concept of natural law because both aim at progressive diminution of the exercise of arbitrary power necessary for protecting the life, liberty and dignity of the individual. It is an organic flexible doctrine which can be molded to suit the requirements of governance, but it’s inherent fundamentals and the rationality must not be compromised. That is accumulation of power is a definition of tyranny.

According to Jain and Jain, “If the ‘Rule of Law’, as enunciated by Dicey, affected the growth of Administrative Law in Britain, the doctrine of ‘Separation of Powers’ had an intimate impact on the development of Administrative Law in USA.” Davis also stated, “Probably, the principal doctrinal barrier to the development of the administrative process has been the theory of separation of powers.”

## **DOCTRINE OF RULE OF LAW**

One of the basic principles of the English Constitution is the Rule of law. This doctrine is accepted in the US and Indian Constitution. The entire basis of administrative law is the doctrine of rule of law. Sir Edward Coke, Chief Justice in James I's reign, was the originator of this concept. In a battle against the King, he maintained successfully that the King should be under God and the Law, and he established the supremacy of the law against the executive. Dicey developed this theory of Coke in his classic work *the Law and the Constitution* published in the year 1885.

The concept of Rule of Law can be traced from the time of the Romans, who called it 'Just Law' - *Jus Naturale*, to the Medieval period where it was called the 'Law of God.' The social contract theorists, such as Hobbes, Locke and Rousseau, called the Rule of Law as the Contract law or Natural Law and the modern man calls it as Rule of law.

"Rule of law" is to be understood neither as a "rule" nor a "law". It is generally understood as a doctrine of "State political morality" which concentrates on the rule of law in securing a "correct balance" between "rights" and "powers", between individuals and the state in any free and civil society. This balance may be drawn by "law" based on freedom, justice, equality, and accountability. Therefore, it infuses law with moral qualities. "Rule of proper law balances the needs of the society and the individual."

The term "rule of law" is derived from the French Phrase *la principe de legalite* (the principle of legality) which refers to a government based on principles of law and not of men. In this sense *la principe de legalite* was opposed to arbitrary powers.

Rule of law is the supreme manifestation of human civilization and culture and is a new '*Lingua franca*' of global moral thought. It is an eternal value of Constitutionalism and an inherent attribute of democracy and good governance.

Rule of law Embodies the doctrine of supremacy of law. It is a basic and fundamental necessity for a disciplined and organized community.

The concept of the rule of law is an animation of natural law and remains as a historical ideal which makes a powerful appeal even today to be ruled by law not by a powerful man.

### **Dicey's Concept of Rule of Law**

According to Dicey, the Rule of Law is one of the fundamental principles of the English Legal System. In his book, 'The Law of the Constitution', he attributed the following three meanings to the said doctrine:

- I. Supremacy of law
- II. Equality before law
- III. Predominance of legal spirit.

#### **I. Supremacy of law**

Absence of discretionary power in the hands of the government officials. By this Dicey implies that justice must be done through known principles. Discretion implies absence of rules, hence in every exercise of discretion there is room for arbitrariness.

Explaining the first principle, Dicey stated that rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power or wide discretionary power. It excludes the existence of arbitrariness, of prerogative or even wide discretionary power on the part of the Government. According to him the Englishmen were ruled by the law and law alone. A man may be punished for a breach of law, but can be punished for nothing else. As Wade says the rule of law requires that the Government should be subject to the law, rather than the law subject to the Government.

According to this doctrine, no man can be arrested, punished or be lawfully made to suffer in body or goods except by due process of law and for a breach of law established in the ordinary legal manner before the ordinary courts of the land. Dicey described this principle as 'the central and most characteristic feature' of Common Law.

The first principle is the recognition of Cardinal principle of Democratic governments as opposed to arbitrary and autocratic governments which lays down that no functionary of the government should have wide arbitrary or discretionary powers to interfere with the liberty and freedom of the people. But here Dicey was not referring to a wide measure or discretion which is incapable in any modern government. He was certainly indicating the position in some countries where police authorities exercised wide arbitrary or discretionary power of imprisonment and punishment outside the ordinary legal system.

#### **II. Equality before law**

Explaining the second principle of the rule of law, Dicey stated that there must be equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts of law. According to him, in England, all persons were subject to one and the same law, and there were no separate tribunals or special courts for officers of the Government and other authorities.

No person should be made to suffer in body or deprived of office, property except for a breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law implies

- a. Absence of special privileges for a government official or any other person
  - b. All the persons irrespective of status must be subjected to the ordinary courts of the land
  - c. Everyone should be governed by the law passed by the ordinary legislative organs of the state
3. The rights of the people must flow from the customs and traditions of the people recognized by the courts in the administration of justice.

This principle enunciates Democratic principle of equal subjection of all persons to the ordinary law of the land as administered by the ordinary courts. This does not mean that the law must be the same for everybody irrespective of functions or service. Dicey's insistence was that a government officer must be under the same liability for acts done without legal justification as a private individual. Does he contrast the English legal system with that of France where government officials were protected by special rules in special administrative tribunals.

### **III. Predominance of legal spirit.**

Judge – made Constitution explaining the third principle, Dicey stated that in many countries' rights such as the right to personal liberty, freedom from arrest, freedom to hold public meetings, etc. are guaranteed by a written Constitution; in England, it is not so. Those rights are the result of judicial decisions in concrete cases which have actually arisen between the parties. Thus, Dicey emphasized the role of the courts of law as guarantors of liberty and suggested that the rights would be secured more adequately if they were enforceable in the courts of law than by mere declaration of those rights in a document, as in the latter case, they can be ignored, curtailed or trampled upon. He stated: "The Law of the Constitution, the rules which in foreign countries

naturally form part of a Constitutional Code, are not the source but the consequences of the rights of individuals, as defined and enforced by the courts.”

This principle, in fact, does not lay down any legal rule but merely explains one aspect of the British Constitutional system where common law is a source of fundamental freedoms of the people. He does distinguish the British system from that of many other countries which had written Constitutions with a chapter on individual rights. Dicey feared that if the source of the fundamental rights of the people was any document, the right could be abrogated at any time by Amending the Constitution this is what happened in India during 1975 emergency. When the Supreme Court ruled that even illegal acts of the government could not be challenged in a court because it was found that the source of personal liberty in India was Article 21 of the Constitution, which had been suspended by the presidential proclamation, and not any common law of the people<sup>1</sup>. This principle puts emphasis on the role of judiciary in enforcing individual rights and personal freedoms irrespective of their inclusion in a written Constitution. Dicey feared that mere declaration of such rights in any statute or in Constitution would be futile if they could not be enforced. He was right when he said that a statute or even Constitution can be amended and ‘Fundamental Rights’ can be abrogated. We have witnessed such a situation during the emergency in 1975 and realized that in absence of strong and powerful judiciary, a written Constitution is meaningless.

He criticized the French legal system of *droit-administratif* in which there were distinct administrative tribunals for deciding cases between the officials of the State and the citizens. According to him, exemption of the civil servants from the jurisdiction of the ordinary courts of law and providing them with the special tribunals was the negation of equality. Of course, Dicey himself saw that administrative authorities were exercising ‘judicial’ functions though they were not ‘courts’. He, therefore, asserted: “Such transference of authority slaps the foundation of the rule of law which has been for generations a leading feature of the English Constitution.”

According to Dicey, any encroachment on the jurisdiction of the courts and any restrictions on the subject's unimpeded access to them are bound to jeopardize his rights.

### **Application of Doctrine**

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<sup>1</sup>*ADM Jabalpur v. Shivakanth Shukla*, (1976) 2 SCC 521

In England, the doctrine of the rule of law was applied in concrete cases. If a man is wrongfully arrested by the police, he can file a suit for damages against them as if the police were private individuals. In *Wilkes v. Wood*, it was held that an action for damages for trespass was maintainable even if the action complained of was taken in pursuance of the order of the Minister. In the leading case of *Entick v. Carrington*, a publisher's house was ransacked by the King's messengers sent by the Secretary of State. In an action for trespass, £300 were awarded to the publisher as damages. In the same manner, if a man's land is compulsorily acquired under an illegal order, he can bring an action for trespass against any person who tries to disturb his possession or attempts to execute the said order.

### **Evaluation of Dicey's Thesis of Rule of Law**

By administrative law Dicey mean only a single aspect of the French *droit administratif*, namely administrative jurisdiction to the exclusion of ordinary civil and criminal process Dicey admitted after 1901, that he concealed his idea of the nature and existence of administrative law from De Tocqueville, Who himself later admitted his ignorance about the actual working of the *droit administratif*, in his own days. Dicey was historically correct up to the time of 1873, when executive law finally settled the jurisdiction of the *Council d' Etat* in all questions involving administrative matters.

However, Dicey misconceived the administrative law because he thought that the French system of administrative law is more than that. In fact, Dicey was concerned not with the whole body of law relating to administration, but with a single aspect of it, namely, administrative adjudication. His comparison was between the favorable position of an Englishman when in conflict with the state in contrast to that of a Frenchman. It may be emphasized that the difference between judicial and administrative agencies is not fundamental. Both apply the law to individual cases and thereby exercise discretion. But if the safeguards which protect the exercise of judicial functions are applied to administrative bodies, the quality of education will be the same. Dicey was also not right when he said that there is no administrative law in England because even during Dicey's time the Crown and its servants enjoyed special privileges on the basis of the doctrine that the King can do no wrong.

Even in the sense in which Dicey used his formulation of the rule of law, there is no essential contradiction between rule of law and administrative law. If the central thesis of Dicey's formulation is the absence of arbitrariness and equality before the law then in that sense there is no contradiction with administrative law.



## **Merits**

Dicey's thesis has its own advantages and merits. The doctrine of Rule of Law proved to be an effective and powerful weapon in keeping administrative authorities within their limits. It served as a touchstone to test all administrative actions. The broad principle of rule of law was accepted by almost all legal systems as a Constitutional safeguard.

The first principle (supremacy of law) recognizes a cardinal rule of democracy that every Government must be subject to law and not law subject to the Government. It rightly opposed arbitrary and unfettered discretion governmental authorities, which has tendency to interfere with rights of citizens.

The second principle (equality before law) is equally important in a system wedded to democratic polity. It is based on the well-known maxim -"However high you may be, Law is above you", and "All are equal before the law."

## **Demerits**

No doubt, Dicey's Rule of Law had its good points and the broad principle had been accepted in several legal systems as a 'necessary Constitutional safeguard'. But it has its own limitations and pitfalls as well. It has been said that the rules enunciated by Dicey and accepted in English legal system was the result of 'political struggle' and not 'logical deductions from a Rule of Law'.

The first rule was criticized on the ground that Dicey equated supremacy of Rule of Law with absence of not only arbitrary powers but even of discretionary powers. According to him, 'wherever there is discretion, there is room for arbitrariness.' He thus failed to distinguish arbitrary power from discretionary power. Though arbitrary power is inconsistent with the concept of rule of law, discretionary power is not, if it is exercised properly. No modern welfare State can work effectively without exercising discretionary powers.

Again, it cannot be said that once law ends, necessarily tyranny begins. As David said, 'where the law ends, discretion begins.' Exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness. It is impossible to find a government of laws alone and not of men in the sense of eliminating all discretionary powers.

The second principle propounded by Dicey was equally fallacious. Dicey misunderstood the real nature of *droit administratif*. He carried an impression that administrative courts of France, including *Counseild'Etat* conferred on Government officials' special rights, privileges and prerogatives as against private citizens. But it was not so. The French system in many respects proved to be more effective in controlling abuse of administrative powers than the Common Law system. *Counseild'Etat* technically speaking was a part of administration, but in substance and in reality, it was very much a court. The actions of administration were not immune from the judicial scrutiny of the Counsel, which consisted of 'real Judges'.

Moreover, even during Dicey's time, several administrative tribunals had come into existence which adjudicated upon the rights of subjects not according to Common Law and procedure of Crown's Courts but according to special laws applied to specific groups. The Crown enjoyed immunity under the well-known maxim 'The King can do no wrong'. It was, therefore, not correct to say that there was 'equality before law' in *strictosense* even in England.

Administrative law developed not to sanctify executive arbitrariness but to check it and protect the rights of the people against the administration's excesses. Therefore, the central theme of administrative law is also the reconciliation of Liberty with the power. Administrative law and the rule of law or not discrete series. Both aimed at the progressive diminution of arbitrariness and fostering a discipline of fairness and openness in the exercise of public power. However, the disease distrust of the administrative process and administrative education has been proved wrong in French context, it is still valid in the Indian situation where administrative action is often arbitrary and based on extraneous considerations and administrative justice is a euphemism for the denial of justice.

### **Modern concept of Rule of Law**

As stated earlier, Dicey's concept of the rule of law was not accepted fully in England even in 1885 when he formulated it, as in that., administrative law and administrative authorities were very much there. Today, Dicey's theory of rule of law cannot be accepted in its totality. Davis gives 7 principal meanings of the term rule of law

1. Law and order
2. Fixed rules
3. Elimination of discretion

4. Due process of law or fairness
5. Natural law or observance of the principles of natural justice
6. Preference for judges and ordinary courts of law to executive authorities and administrative tribunals
7. Judicial review of administrative actions.

The modern concept of the rule of law is fairly wide and, therefore, sets up an ideal for any government to achieve. This concept was developed by the International Commission of Jurists, known as Delhi declaration, 1959, which was later on confirmed at Lagos in 1961. According to this formulation, the rule of law implies that the functions of the government in a free society should be so exercised as to create conditions in which the dignity of man as an individual is upheld. The dignity requires not only the recognition of certain civil or political rights but also creation of certain political, social, economic, educational and cultural conditions which are essential to the full development of his personality and the protection of his dignity. For this purpose, the declaration puts emphasis on independence of the judiciary and effective government.

During the last few years, the Indian Supreme Court has developed some fine Principles of third world jurisprudence. Developing the same new Constitutionalism further, the Supreme Court in *Veena Sethi v State of Bihar*<sup>2</sup> Extended the reach of the rule of law to the poor and the downtrodden, The ignorant and the illiterate, who constitute the bulk of humanity in India, when it ruled that the rule of law does not exist merely for those who have the means to fight for their rights and very often do so for the perpetuation of the *status quo*, which protects and preserves their dominance and permits them to exploit a large section of the community. The opportunity for this ruling was provided by a letter written by the free legal aid committee, Hazaribagh, Bihar drawing its attention to unjustified and illegal detention of certain prisoners in jail for almost two or three decades.

International Commission of Jurists divided itself into certain working groups which tried to give content to the concept in relation to an individual area of activity in a society.

1. Committee on Individual Liberty and the Rule of law, which lays down
  - a. That the state should not pass discriminatory laws

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<sup>2</sup>(1982) 2 SCC 583

- b. That the state should not interfere with religious beliefs
  - c. That the state should not place undue restrictions on freedoms
2. Committee on government and the rule of law under this the rule of law means not only the adequate safeguards against abuse of power but effective government capable of maintaining law and order.
  3. committee on criminal administration and the rule of law

Committee on criminal administration and the rule of law rule of law here means

- a. Due criminal process
  - b. No arrest without the authority of law
  - c. Presumption of innocence
  - d. Legal aid
  - e. Public trial and fair hearing.
4. Committee on judicial process and the rule of law, under this the rule of law means
    - a. Independent judiciary
    - b. Independent legal profession
    - c. Standard of professional ethics

The secretary general of the United Nations in its 2004 report (5/2004/616) Describe rule of law to contain principles of governance and the measures necessary to ensure adherence to those principles.

1. Principles of governance include accountability of all persons, institutions and entities, public and private including state, to law which is publicly promulgated, equally enforced, independently adjudicated and is in consistent with the human rights values, norms and standards.
2. Measures necessary to enforce these principles of governance may include supremacy of law based on the above principles, equality before law and equal protection of law, fairness in the application of law, separation of powers, participation in the decision making, legal certainty, avoidance of arbitrariness, procedural transparency and accountability to law.

## **Rule of Law in India**

In India, the concept of the rule of law can be traced to the Upanishads. It provides “Law is the king of Kings. It is more powerful and rigid than Kings. There is nothing higher than law. By its power the weak shall prevail over the strong and justice shall triumph.”

The concept of rule of law is invoked and often to convey the sense that the administration cannot exercise arbitrary powers and that it should function according to Law.

The concept of the rule of law is an animation of natural law and remains as a historical ideal which makes a powerful appeal even today to be ruled by law not by powerful man.

Rule of law mandates that power must be made accountable, governance progressively just and equal, and state incrementally ethical.

The term rule of law can be used in two senses

1. Formalistic sense
2. Ideological sense

If used in the formalistic sense, it refers to organized power as opposed to a rule by one man and if used in an ideological sense it refers to the regulation of the relationship of the citizens and the government and in this sense, it becomes a concept of varied interest and contents.

In its ideological sense, the concept of rule of law represents an ethical code for the exercise of public power in any country. Strategies of this code may differ from society to society depending on the societal needs at any given time, but its basic postulates are universal covering all space and time. These postulates include equality, freedom and accountability.

Equality is not a mechanical under negative concept but has progressive and positive contents which obliged every government to create conditions; Social, economic, and political, where every individual has an equal opportunity to develop his personality to the fullest and to live with dignity.

Freedom postulates absence of a very arbitrary action, free speech, expression and association, personal Liberty, and many others. These basic rights of any society may be restricted only on the ground that the claims of these freedoms would be better by such circumscription.

Rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The necessary element of rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason.<sup>3</sup> Khanna J, has stated, “rule of law is the antithesis of arbitrariness. Rule of law is now the accepted norm of all civilized societies.”<sup>4</sup>

A significant derivative from rule of law in the sphere of administrative law is judicial review of administrative action to ensure that the administration acts according to law.

Absence of arbitrary power is the first essential of rule of law upon which our whole Constitutional system is based.<sup>5</sup> Rule of law may be said to be the sworn enemy of caprice. The Supreme Court put a stamp of approval on the observations made by Douglas J, “Law has reached its finest moments when it has freed man from unlimited discretion of some ruler... where discretion is absolute, man has always suffered”<sup>6</sup> and Lord Mansfield who stated in the classic terms, “discretion means sound discretion guided by law. It must be governed by rule, not humor, it must not be arbitrary, vague and fanciful.”<sup>7</sup>

The basic concept of the rule of law is not well-defined legal concept. The courts generally would not invalidate any positive law on the ground that it violates the contents of the rule of law. However, in *ADM Jabalpur v. Shivakanth Shukla*,<sup>8</sup> popularly known as *habeas corpus* case, an attempt was made to challenge their detention orders during the emergency on the ground that it violates the principles of the rule of law as the 'Obligation to act in accordance with the rule of law.... a central feature of our Constitutional system and is a basic feature of the Constitution.' Though the contention did not succeed and some justices even went on to suggest that during an emergency, the emergency provisions themselves constitute the rule of law, yet if the reasoning of on the fight opinions is closely read, it becomes clear that the contention was accepted, no matter it did not reflect in the final order passed by the court. Therefore, despite the unfortunate order to the effect that the doors of the court during an emergency are completely shut for the detenus, it is gratifying to note that the concept of the rule of law can be used as a legal concept.

In the opinion of some of the judges constituting the majority in case of a *Keshavanandabharati v. State of Kerala*,<sup>9</sup> The rule of law was considered as an aspect of the

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<sup>3</sup>*Bachan Singh v. State of Punjab, Air 1982 SC 1325*

<sup>4</sup>*A.D.M. Jabalpur v. Shivakanth Shukla, AIR 1967 SC 207*

<sup>5</sup>*S.G. Jaisinghani v. UOI, AIR 1967 SC 1427*

<sup>6</sup>*United states v. Wunderlich, (1951) 352 98.*

<sup>7</sup>*John W ilkies, In Re,*

<sup>8</sup>(1976) 2 SCC 521

<sup>9</sup>(1973) 4 SCC 225

doctrine of basic structure of the Constitution which even the plenary power of parliament cannot reach to amend.

In *Indira Nehru Gandhi v. Raj Narain*,<sup>10</sup> in which the Supreme Court invalidated clause 4 of Article 329-A inserted in the Constitution by the 39<sup>th</sup> Amendment Act 1975. To immunize the election disputed to the office of the Prime Minister from any kind of judicial review, Khanna and Chandrachud JJ. held that Article 329 A violated the concept of basic structure.

It is heartening to see that the courts are making all concerted efforts to establish a Rule of Law society in India by insisting on fairness in every aspect of the exercise of power by the state. Some of the recent decisions of the Supreme Court are clear indicators of this trend.

In *Sheela Barse v. State of Maharashtra*, the court insisted on fairness to women in police lockup and drafted a code of guidelines for the protection of prisoners in police custody, especially female prisoners.

In *State of M.P. v. Ramashanker Raghuvanshi*, the court secured fairness in public employment by holding that reliance on police reports is entirely misplaced in a Democratic Republic. Thus, Diverts of the courts in here illegitimizing undue Powers by operationalizing substantive and procedural norms and standards can be seen as a high benchmark of judicial activism for firmly establishing the concept of the rule of law in India.

Rule of law under the Constitution serves the needs of people without undoubtedly infringing their rights. It recognizes the social reality and tries to adjust itself from time to time avoiding authoritarian path. Rule of law under the Constitution has the glorious content. It embodies the concept of law involved over the centuries.<sup>11</sup> Doctrine of equality before the law is necessary corollary to the high concept of rule of law accepted by our Constitution. One of the aspects of rule of law is that every executive action if it operates to the prejudice of any person, must be supported by some legislative authority.<sup>12</sup>

Under our Constitution the rule of law prevails over the entire field of administration and every organ of the state is regulated by the rule of law. In a welfare state it is inevitable that jurisdiction of administrative bodies is increasing by a rapid rate. The concept of rule of law would lose its vitality if instrumentalities of the state are not charged with the duty of discharging their function in a fair and just manner.<sup>13</sup>

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<sup>10</sup> AIR 1975 SC 2299

<sup>11</sup> *Golaknath v. State of Punjab*, AIR

<sup>12</sup> *Satvant Singh Sawhney v. Ramarathanana*, AIR 1967 SC 1836

Rule of law requires that any abuse of power by public officers should be subject to control of Courts.<sup>14</sup> Principles of rule of law and the due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. Failure to accord fair hearing either to the accused or prosecution violates even minimum standards of due process of law.

Binding character of judgments pronounced by courts of competent jurisdiction is essential part of rule of law. Rule of law is obviously such basis of the administration of justice at which Constitution lays so much emphasis.<sup>15</sup>

Wisdom of issuing executive instructions in the matters which are governed by the provisions of law is doubtful. Even if it be considered necessary to issue instructions in such a matter, instructions cannot be so framed or utilized so as to override the provisions of law will stop such a method will destroy the very basis of rule of law and strike at the very root of orderly administration of law.

The rule of law is basic rule of governance of any civilized polity. The scheme of Constitution of India is based on the concept of rule of law. Everyone whether individually or collectively is unquestionably under the supremacy of law. It is only through the courts that rule of law unfolds its contents and establishes its concept.<sup>16</sup>

Obligation to act fairly on the part of administrative authorities was evolved to ensure rule of law and to prevent failure of justice. This is a doctrine which the quasi-judicial, authorities are also bound to observe.

The High Court is required to enforce rule of law, it therefore cannot pass order or direction contrary to what has been enjoined by law.<sup>17</sup>

In *Indira Sawhney II v. UOI*, the Supreme Court criticized the approach of the government and held that governments today tend to violate rule of law as a matter of political convenience so that burden of striking down unconstitutional provisions passed to the court. Such an approach of the government was deprecated.<sup>18</sup>

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<sup>13</sup>*A.K Kraipak v. UOI, AIR 1970 SC 150*

<sup>14</sup>*State of Punjab v. Khanchand, AIR 1974 SC 543*

<sup>15</sup>*Daryao v. State of U.P AIR 1961 SC 1457*

<sup>16</sup>*Arundathi Rai, AIR 2002 SC 1375*

<sup>17</sup>*KSRTC v. Ashrafullah Khan, AIR 2002 SC 629*

<sup>18</sup>*Indira Sawhney II v. UOI, AIR 2000 SC 498*



Our Constitution envisages a rule of law and not a rule of men. It recognizes that, howsoever high one maybe, he is under the law and the Constitution. All the Constitutional functionaries must, therefore, function within the Constitutional limits. In a system governed by rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository power. There is nothing like a power without any limits or constraints. That is so even when a court or other authority may be vested with wide discretionary power, for such discretion has to be exercised only along well recognized and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.<sup>19</sup>

Thus, the concept of rule of law in India is duly recognized by the Constitution and is firmly established by judicial pronouncements.

### **Rule of Law under Constitution of India**

We have adopted under our Constitution not the continental system but the British system under which rule of law prevails. Federal structure of the Indian Constitution is founded on certain fundamental principles. Undoubtedly, one of them being rule of law which includes judicial review of arbitrary executive action.<sup>20</sup>

Dicey's rule of law has been adopted and incorporated in the Constitution of India. The Preamble itself enunciates the ideals of Justice, Liberty and Equality. In Part III of the Constitution these concepts are enshrined as Fundamental Rights and are made enforceable. The Constitution is supreme and all the three organs of the Government, viz. Legislature, Executive and Judiciary are subordinate to and have to act in consonance with the Constitution. The doctrine of judicial review is embodied in the Constitution and the subjects can approach the High Courts and the Supreme Court for the enforcement of Fundamental Rights guaranteed under the Constitution. If the executive or the Government abuses the power vested in it or if the action is mala fide, the same can be quashed by the ordinary courts of law.

All rules, regulations, ordinances, bye-laws, notifications, customs and usages are 'laws' within the meaning of Article 13 of the Constitution and if they are inconsistent with or contrary to any of the provisions thereof, they can be declared ultra vires by the Supreme Court and by High Courts. The President and the Judges of the Supreme Court and High Courts are required to take an oath to preserve, protect and defend the Constitution. No person shall be deprived of his life or personal liberty except according to procedure established by law or of his property save by

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<sup>19</sup>*Maya Devi v. Raj Kumari Batra*, (2010) 9 SCC 486

<sup>20</sup>*State of M.P v. Thakur Bharat Singh*, AIR 1967 SC 1170

authority of law. Executive and legislative powers of States and the Union have to be exercised in accordance with the provisions of the Constitution. Government and public officials are not above law. The maxim 'The King can do no wrong' does not apply in India. There is equality before the law and equal protection of laws. Government and public authorities are also subject to the jurisdiction of ordinary courts of law and for similar wrongs are to be tried and punished similarly. They are not immune from ordinary legal process nor in any provision made regarding separate administrative courts and tribunals. In public service also the doctrine of equality is accepted. Suits for breach of contract and torts committed by public authorities can be filed in ordinary law courts and damages can be recovered from State Government or Union Government for the acts of their employees. Thus, it appears that the doctrine of rule of law is embodied in the Constitution of India, and is treated as the basic structure of the Constitution.

In spite of such apparently enviable position of subjects, in almost all the fields of industry, commerce, education, transport, banking, insurance, etc. there is interference by administrative authorities with actions of individuals, companies and other corporate and non-corporate bodies, observes Justice Ramaswamy. From the Constitutional point of view there is large-scale delegation of legislative and judicial powers to these administrative authorities. These authorities have been extending their tentacles into social, economic and political domains. Wide discretionary powers are conferred on these administrative authorities. For the purpose of national planning, the Executive is armed with vast powers in respect of land ceiling, control of basic industries, taxation, mobilization of labour, etc. Further, it is also erroneous to believe that individual liberty can be protected only by the traditional doctrine of rule of law. Experience shows that not only the Executive but even Parliament elected by the people may pass some demonic statutes like the Preventive Detention Act, or Maintenance of Internal Security Act, 1971 (MISA), National Security Act, 1980 (NSA) and encroach upon the liberty of subjects. Ultimately, as Prof. Harold Laski says: "Eternal vigilance is the price of liberty" and not a particular principle or doctrine of law.

### **Conclusion**

Thus, Rule of Law doctrine is a complicated and demanding criterion for evaluating the legitimacy of governance in any state. Nevertheless, it cannot be a ground to ignore it if benefits of a Constitutional democracy are to be secured for the present and future generations of people.

Recent aggressive judicial activism can only be seen as a part of the efforts of the Constitutional codes in India to establish a Rule of Law society which implies that no matter how

high a person may be, the law is always above him. Court is also trying to identify the concept of rule of law with human rights of the people. The court is developing techniques by which it can force the government not only to submit to the law but also to create conditions where people can develop capacities to exercise their rights properly and meaningfully. The public administration is responsible for effective implementation of the rule of law and Constitutional demands which effectuate fairly the objective standards laid down by law.<sup>21</sup> A every public servant is a trustee of society and is accountable for due effect creation of Constitutional goals. This makes the concept of rule of law highly relevant to our context.

Thus, the concept of Rule of Law has all the merits, the only negative side of the concept is that respect for law degenerates into the legalism from which its very rigidity works injury to the nation.

### **DOCTRINE OF SEPARATION OF POWERS**

If the rule of law hampered the recognition of administrative law in Britain for a while, the doctrine of separation of powers had an intimate impact on the growth of administrative process and administrative law in the United States. It has been characterized as the principal doctrinal barrier to the development of administrative law in the USA.

Though the doctrine is traceable to Aristotle, but the writings of Locke and Montesquieu gave it a base on which modern attempts to distinguish between legislative, executive and judicial power is grounded. Locke distinguish between what he called

1. Discontinuous legislative power
2. Continuous executive power
3. Federative power

Locke and Montesquieu derived the contents of this doctrine from the developments in the British Constitutional history of the early 18<sup>th</sup> century. The theory of Separation of Powers was enunciated by Montesquieu in his book 'The Spirit of the Laws'. Writing in 1748, Montesquieu said;

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no Liberty; apprehensions may arise, Let's the same monarch are saying it should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is

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<sup>21</sup>*State of Punjab v. G.S. Gill, (1997) 6 SCC 129*

no Liberty, if the judiciary power be not separated from the legislative and executive. Where it joined it without the legislative, the life and Liberty of the subject would be exposed to arbitrary control; For the judge would be then the legislator. Where it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people come out to exercise those three powers, that of executing laws, that of exhibiting the public resolutions, and of trying the causes of individuals.

### **Importance**

The basic purpose of the doctrine of separation of power is to divide governance against itself by creating a distinct centre of power so that they could prevent each other from threatening tyranny.

The aim of the doctrine of separation of power is to guard against tyrannical and arbitrary powers of the state. The rationale underlying the doctrine has been that if all power is concentrated in one and the same organ or person there would arise the danger that it may enact tyrannical laws, execute them in a despotic manner, and interpret them in an arbitrary fashion without any external control.

The doctrine of separation of powers is based on four different principles

1. Exclusivity principle which suggests structural division in all the three organs of state as it is in the USA
2. Functional principle which prohibits amalgamation and usurpation but not interaction of all the organs of state.
3. Check and balance principle, meaning, thereby, that each organ of state may check the other to keep it within constitutional bounds.
4. Mutuality principle which aims at creating Concord not discord, cooperation not confrontation, engagement not estrangement amongst different organs of state to create a Society of constitutional image, which is a free, equalitarian, inclusive and the rule of Law Society.

### **This doctrine can be further used in two senses**

1. Negative sense, in which this doctrine puts limits on the exercise of power by each organ of state

2. Positive sense in which it not only demarcates limits but also defines the minimum contents of power within those limits which a court can enforce to achieve constitutional values.

**The theory of separation of powers signifies three formulations of structural classification of governmental powers**

1. The same person should not form part of more than one of the three organs of the government.
2. One organ of the government should not interfere with any other organ of the government.
3. One organ of the government should not exercise the function assigned to any other organ.

It is generally accepted that there are three main categories of governmental functions – Legislative, Executive, and Judicial. Likewise, there are three main organs of the Government in a State - Legislature, Executive and Judiciary. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and be exercised by three separate organs of the Government. Thus, the Legislature cannot exercise executive or judicial power; the Executive cannot exercise legislative or judicial power and the Judiciary cannot exercise legislative or executive power of the Government.

On the whole, the doctrine of Separation of Powers in the strict sense is undesirable and impracticable and, therefore, it is not fully accepted in any country. Nevertheless, its value lies in the emphasis on those checks and balances which are necessary to prevent an abuse of enormous powers of the executive. The object of the doctrine is to have “Government of Law rather than of official will or whim.” Montesquieu's great point was that if the total power of the government is divided among autonomous organs, one will act as a check upon the other and in the check liberty can survive. Again, almost all the jurists accept one feature of this doctrine that the judiciary must be independent of and separate from the remaining two organs of the Government, viz., Legislature and Executive.

**Doctrine of separation of powers in USA**

The doctrine of separation of powers is implicit in the American constitution. It emphasizes the mutual exclusiveness of the three organs of the government. According to this

doctrine, the legislature cannot exercise executive or judicial power, the executive cannot exercise legislative or judicial power, and the judiciary cannot exercise the other two powers.

The form of government in the USA characterized as the presidential, is based on the theory that there should be separation between executive and the legislature. This is different from the system prevailing in Britain or India where the parliamentary form of government operates and which is based on coordination of the executive and legislature

The doctrine of separation has influence over, and has itself been influenced by, the growth of administrative law in the USA. In the face of new demands on the government to solve we need complex socio economic problems of the modern society, new institutions have been created and the new procedures evolved by which the doctrine of separation has been largely diluted but the character of administrative law itself has been influenced and conditioned to some extent by this doctrine.

By force of circumstances, administrative law has inevitably grown in the United States, but the separation doctrine did not generate an attitude of indifference towards it, as happened in Britain under the spell of the Dicean concept of rule of law. In the USA the attitude was that of examination and criticism of the advisability and propriety of the new development.

### **Doctrine of separation of powers in United Kingdom**

The United Kingdom does have a kind of separation of powers but unlike the United States it is informal. Blackstone's theory of mixer government with checks and balances is more relevant to the UK separation of powers is not an absolute or predominant feature of the UK constitution. The three branches are not formally separated and continue to have significant overlap.

Though No separation of powers in the strict sense of the term exists in England and the US, it the curious fact is that this doctrine has attracted the makers of most modern constitutions, especially during the 19th century. Thus, in France, the doctrine has produced a situation in which the ordinary codes are precluded from revealing the validity not only of legislative enactments but even of the actions of the administration. The void has been filtered by the establishment of special administrative quotes.

### **Doctrine of separation of powers in India**

In India, the doctrine of separation of powers has not been accorded a Constitutional status. It has no place in strict sense in the constitution of India. But the functions of different organs of the government have been clearly marked, so that one organ of the government does not usurp the functions of another.

On a casual glance at the provisions of the Constitution of India, one may be inclined to say that the doctrine of Separation of Powers is accepted in India. Under the Indian Constitution, executive powers are with the President, legislative powers with the Parliament and judicial powers with the Judiciary (Supreme Court, High Courts and subordinate courts). The President holds his office for a fixed period. His functions and powers are enumerated in the Constitution itself. Parliament is competent to make any law subject to provisions of the Constitution and there is no other limitation on its legislative power. It can amend the law prospectively or even retrospectively but it cannot declare a judgment delivered by a competent court void or of no effect. The Parliament has also inherited all the powers, privileges and immunities of the British House of Commons. Similarly, the Judiciary is independent in its field and there can be no interference with its judicial functions either by the Executive or by the Legislature. The Supreme Court and High Courts are given the power of judicial review and they can declare any law passed by Parliament or Legislature ultra vires or unconstitutional.

In *In re Delhi Laws Act* case,<sup>22</sup> Honourable Chief Justice, Kania Observe that although in the Constitution of India there is no express separation of power, it is clear that a legislature is created by the constitution and detailed provisions are made for making that legislature passed laws. Is it then too much to say that under the constitution the duty to make laws, the duty to exercise its own wisdom, judgment and patriotism in making law is primarily cast on the legislature? does it not imply that unless it can be gathered from other provisions of the constitution, other bodies executive or judicial are not intended to discharge legislative functions.

The Indian Constitution has not indeed recognized the doctrine of separation of powers in the absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well said that our Constitution does not contempt its assumption, by one organ or part of the state, of functions that essentially belong to another.<sup>23</sup>

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<sup>22</sup>1912, re, AIR 1951 SC 332

<sup>23</sup>*Ram Jawaya Kapoor v. State of Punjab*, AIR, 1955 SC 549

In the absence of specific provision for separation of powers in our constitution, such as there is under the American constitution, some such a division of powers legislative, executive and judicial- is nevertheless implicit in our constitution.<sup>24</sup> In the celebrated case of *Keshavananda Bharathi*,<sup>25</sup> It was observed “Separation of powers between the legislature, executive and the judiciary is a part of the basic structure of the constitution; this structure cannot be destroyed by any form of amendment.

In *Indira Nehru Gandhi*,<sup>26</sup> it was observed that in the Indian constitution there is separation of powers in a broad sense only. No constitution can survive without a conscious adherence to its fine checks and balances. A rigid separation of powers as under the US constitution or the Australian constitution does not apply to India.

In India, not only is there a functional overlapping but there is personal overlapping also. Taking into account these factors, some jurists are of the opinion that the doctrine of Separation of Powers has been accepted in the Constitution of India and is a part of the basic structure of the Constitution. Separation of functions is not confined to the doctrine of Separation of Powers. It is a part of essential structure of any developed legal system. In every democratic society, the process of administration, legislation and adjudication are more clearly distinct than in a totalitarian society.

But if one studies the Constitutional provisions carefully, it is clear that the doctrine of Separation of Powers has not been accepted in India in its strict sense. There is no provision in the Constitution itself regarding the division of functions of the Government and the exercise thereof. Though, under Articles 53(1) and 154(1), the executive power of the Union and of the States is vested in the President and the Governors respectively, there is no corresponding provision vesting the legislative and judicial power in any particular organ. The President has wide legislative powers. He can issue Ordinances, make laws for a State after the State Legislature is dissolved, adopt the laws or make necessary modifications and the exercise of this legislative power is immune from judicial review. He performs judicial functions also. He decides disputes regarding the age of a judge of a High Court or the Supreme Court for the purpose of retiring him and cases of disqualification of members of any House of Parliament.

Likewise, Parliament exercises legislative functions and is competent to make any law not inconsistent with the provisions of the Constitution, but many legislative functions are delegated

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<sup>24</sup>*Ram Krishna Dalmia v. Justice Tendolkar*, AIR 1958 SC 538

<sup>25</sup>*Keshvananda Bharthi v. State of Kerala*, AIR 1973 SCC 1461

<sup>26</sup>*Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299



to the executive. In certain matters, Parliament exercises judicial functions also. Thus, it can decide the question of breach of its privilege and, if proved, can punish the person concerned. In case of impeachment of the President, one House acts as a prosecutor and the other House investigates the charges and decides whether they were proved or not. The latter is a purely judicial function.

On the other hand, many powers which are strictly judicial have been excluded from the purview of courts. Though judiciary exercises all judicial powers, at the same time, it exercises certain executive or administrative functions also. The High Court has supervisory powers over all subordinate courts and tribunals and also power to transfer cases. The High Courts and the Supreme Court have legislative powers, they also frame rules regulating their own procedure for the conduct and disposal of cases.

Thus, the doctrine of separation of powers is not accepted fully in the Constitution of India, and one may agree with the observations of Mukherjea, J. in *Ram Jawaya v. State of Punjab*,<sup>27</sup> “The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.

### **Drawbacks**

Though, theoretically, the doctrine of separation of powers was very sound, many defects surfaced when it was sought to be applied in real life situations. Mainly, the following defects were found in this doctrine:

1. Historically speaking, the theory was incorrect. There was no separation of powers under the British Constitution. At no point of time, was this doctrine adopted in England. As Prof. Ullman says, “England was not the classic home of separation of powers.” Donoughmore Committee also observed, “In the British Constitution there is no such thing as the absolute separation or legislative, executive and judicial powers.”
2. This doctrine is based on the assumption that the three functions of the Government, viz. legislative, executive and judicial are independent and distinguishable from one another. But in

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<sup>27</sup>*Ram Jawaya Kapoor v. State of Punjab*, AIR, 1955 SC 549

fact, it is not so. There are no watertight compartments. It is not easy to draw a demarcating line between one power and another with mathematical precision.

3. It is impossible to take certain actions if this doctrine is accepted in its entirety. Thus, if the legislature can only legislate, then it cannot punish anyone, committing a breach of its privilege; nor can it delegate any legislative function even though it does not know the details of the subject-matter of the legislation and the executive authority has expertise over it; nor could the courts frame rules of procedure to be adopted by them for the disposal of cases. Separation of Powers, thus, can only be relative and not absolute.

4. Modern State is a welfare State and it has to solve complex socio-economic problems and in this state of affairs also, it is not possible to stick to the doctrine.

5. The modern interpretation of the doctrine of Separation of Powers means that discretion must be drawn between 'essential' and 'incidental' powers and one organ of the Government cannot usurp or encroach upon the essential functions belonging to another organ, but may exercise some incidental functions thereof.

6. The fundamental object behind Montesquieu's doctrine was liberty and freedom of an individual; but that cannot be achieved by mechanical division of functions and powers. In England, theory of Separation of Powers is not accepted and yet it is known for the protection of individual liberty. For freedom and liberty, it is necessary that there should be the Rule of Law and impartial and independent judiciary and eternal vigilance on the part of the subjects.

In conclusion, doctrine of separation of powers in today's context of liberalization, privatization and globalization cannot be interpreted to mean either separation of powers is checked in balance or principle of restraint, but community of powers exercised in the spirit of cooperation by various organs of the state in the best interest of the people.

## **CLASSIFICATION OF ADMINISTRATIVE ACTION ---- ANATOMY OF ADMINISTRATIVE ACTION**

There are three organs of the State – the Legislature, the Executive and the Judiciary. The function of the legislature is to enact the law; the executive is to administer the law and the judiciary is to interpret the law and to declare what the law is.

But as observed by the Supreme Court in *Jayantilal Amratlal v. F. N. Rana*<sup>28</sup> it cannot be

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<sup>28</sup> AIR 1964 SC 684

assumed that the legislative functions are exclusively performed by the legislature, executive functions by the executive and judicial functions by judiciary. In Halsbury's Laws of England also, it is stated that howsoever term 'the Executive' or 'the Administration' is employed, there is no implication that the functions of the executive are confined exclusively to those of executive or administrative character.

Today, the executive performs variegated functions, viz. to investigate, to prosecute, to prepare and to adopt schemes, to issue and cancel licences, (administrative); to make rules, regulations and bye-laws, to fix prices, (legislative); to adjudicate on disputes, to impose fine and penalty, etc. (judicial) Schwartz rightly states that rule-making (quasi legislative) and adjudication (quasi-judicial) have become the chief weapons in the administrative armoury.

#### Classification of Administrative Actions

1. Legislative Functions- Rule making action or quasi-legislative action- Legislative power which in administrative law parlance is known as Delegated Legislation.
2. Rule decision action or quasi- judicial action- Adjudicative power
3. Rule-application action or administrative action.
4. Ministerial action or pure administrative action- Administrative power which is non - legislative and non-adjudicative power

#### 1. Legislative Functions

Legislative functions of the executive consist of making rules, regulations, bye-laws, etc. It is, no doubt, true that any attempt to draw a distinct line between legislative and administrative functions is difficult in theory and impossible in practice. Though difficult, it is necessary that the line must be drawn as different legal rights and consequences ensue.

As Schwartz said, "If a particular function is termed 'legislative' or 'rule-making' rather than 'judicial' or 'adjudication', it may have substantial effects upon the parties concerned. If the function is treated as legislative in nature, there is no right to a notice and hearing unless a statute expressly requires them."

In the leading case of *Bates v. Lord Hailsham*, Megarry, J. observed that "the rules of natural justice do not run in the sphere of legislation, primary or delegated." Wade also said, "There is no right to be heard before the making of legislation, whether primary or delegated, unless it is provided by statute."

Fixation of price, declaration of a place to be a market yard, imposition tax, establishment of Municipal Corporation under the statutory provision, extension of limits of a town area committee, etc. are held to be legislative functions.

Rulemaking action of the administration partakes all the characteristics which in normal legislative action processes. Such characteristics maybe generality, prospectivity, and a behaviour which basis action on policy consideration and gives a right or a disability. These characteristics are not without exception.

2. Rule decision action or quasi- judicial action- Adjudicative power -Quasi – Judicial Functions

### **Judicial Functions**

According to the Committee on Ministers' Powers, a pure judicial function presupposes an existing dispute between two or more parties and it involves four requisites

1. The presentation (not necessarily oral) of their case by the parties to the dispute;
2. If the dispute is a question of fact, the ascertainment of fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties, on evidence;
3. If the dispute between them is a question of law, the submission of legal argument by the parties; and
4. A decision which disposes of the whole matter by finding upon the facts in dispute and 'an application of the law of the land to the facts found, including, where required, a ruling upon any disputed question of law.'

Thus, these elements are present, the decision is a judicial decision even though it might have been made by any authority other than a court, e.g. by Minister, Board, Executive Authority, Administrative Officer or Administrative Tribunal.

The word 'quasi' means 'not exactly.' Generally, an authority is described as 'quasi-judicial' when it has some of the attributes or trappings of judicial functions, but not all. In the words of the Committee on Ministers' Powers, "the word 'quasi', when prefixed to a legal term, generally means that the thing, which is described by the word, has some of the legal attributes denoted and connoted by the legal term, but that it has not all of them" e.g. if a transaction is

described as a quasi-contract, it means that the transaction in question has some but not all the attributes of a contract.

According to the Committee, a quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2) above but does not necessarily involve (3) and never involves (4). The place of (4) is, in fact, taken by administrative action, the character of which is determined the Minister's choice.

For instance, suppose a statute empowers a Minister to take action if certain facts are proved, and in that event gives him an absolute discretion whether or not to take action. In such a case, he must consider the representations of parties and ascertain the facts – to that extent the decision contains a judicial element. But, the facts once ascertained, his decision does not depend on any legal or statutory direction, for *ex hypothesis* is he is left free within the statutory boundaries to take such administrative action as he may think fit: that is to say that the matter is not finally disposed of by the process of (4) This test has, however, been subject to criticism by jurists. It does not give a complete and true picture. It is based on a wrong hypothesis. The Committee characterized the judicial function as being devoid of any discretionary power but obliged to merely apply the law to the proved facts. In reality, it is not so. The courts of law also exercise discretion. It may be more persuasive in administrative actions than in judicial functions but the difference is of degree only. A quasi-judicial function stands mid-way between a judicial function and an administrative function. A quasi-judicial decision is nearer the administrative decision in terms of its discretionary element and nearer the judicial decision in terms of procedure and objectivity of its end-product.

It is also not true that in all quasi-judicial decisions, two characteristics are common

1. presentation of their case by the parties; and
2. the decision on questions of fact by means of evidence adduced by the parties.

Firstly, in many cases, the first characteristic is absent and the authority may decide a matter not between two or more contesting parties but between itself and another party, e.g. an authority effecting compulsory acquisition of land. Here the authority itself is one of the parties and yet it decides the matter. It does not represent its case to any court or authority.

Secondly, there may be cases in which no evidence is required to be taken and yet the authority has to determine the questions of fact after hearing the parties, e.g. ratemaking or price-fixing. Thirdly, after ascertainment of facts, unlike a regular court, an authority is not bound to apply the law to the facts so ascertained, and the decision can be arrived at according to considerations of public policy or administrative discretion, which factors are unknown to an ordinary court of law.

Today the bulk of decisions which affect a private individual come not from codes but from administrative agencies exercising adjudicatory powers. The reason seems to be that since administrative decision-making is also a by-product of the intensive form of government, the traditional judicial system cannot give to the people that quantity and quality of justice which is required in a welfare state. Administrative decision making may be defined as a power to perform acts administrative in character comma but requiring incidentally some characteristics of judicial traditions.

### 3. Rule-application action or administrative action.

Administer do action may be statutory, having the force of law or Non statutory, devoid of such legal force. The bulk of the administrative action is statutory because a statute or the constitution gives it illegal force, but in some cases, it may be non-statutory, such as issuing directions to subordinates not having the force of law, but it's violation may be visited with disciplinary action. Though by and large administrative action is discretionary and is based on subjective satisfaction, however, the administrative authority must act fairly, impartially and reasonably.

### 4. Administrative Functions - Ministerial action or pure administrative action- Administrative power which is non -legislative and non-adjudicative power

In *Ram Jawaya v. State of Punjab*, the Supreme Court observed, "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away."

Thus, administrative functions are those functions which are neither legislative nor judicial in character. Generally, the following ingredients are present in administrative functions:

1. An administrative order is generally based on governmental policy or expediency.

2. In administrative decisions, there is no legal obligation to adopt a judicial approach to the questions to be decided, and the decisions are usually subjective rather than objective.

3. An administrative authority is not bound by the rules of evidence and procedure unless the relevant statute specifically imposes such an obligation.

4. An administrative authority can take a decision in exercise of a statutory power or even in the absence of a statutory provision, provided such decision or act does not contravene provision of any law.

5. Administrative functions may be delegated and sub-delegated unless there is a specific bar or prohibition in the statute.

6. While taking a decision, an administrative authority may not only consider the evidence adduced by the parties to the dispute, but may also use its discretion.

7. An administrative authority is not always bound by the principles of natural justice unless the statute casts such duty on the authority, either expressly or by necessary implication or it is required to act judicially or fairly.

8. An administrative order may be held to be invalid on the ground of unreasonableness.

9. An administrative action will not become a quasi-judicial action merely because it has to be performed after forming an opinion as to the existence of any objective fact.

10. The prerogative writs of certiorari and prohibition are not always available against administrative actions.

### **Need for Classification**

A question which arises for our consideration is whether the function performed by the executive authorities are purely administrative, quasi-judicial or quasi-legislative in character. The answer is indeed difficult, as there is no precise, perfect and scientific test to distinguish these functions from one another. Administrative and quasi-judicial decisions tend to merge in legislative activity and, conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. A further difficulty arises in a case in which a single proceeding may at times combine various aspects of the three functions. The courts have not been able to formulate any definite test for the purpose of making such classification.

Yet, such classification is essential and inevitable as many consequences flow from it, e.g. if the executive authority exercises a judicial or quasi-judicial function, it must follow the principles of natural justice and is amenable to a writ of certiorari or prohibition, but if it is a legislative or quasi-legislative function, natural justice has no application. If the action of the executive authority is legislative in character, the requirement of publication, laying on the table, etc. should be complied with, but it is not necessary in the case of a pure administrative action. Again, if the function is administrative, delegation is permissible, but if it is judicial, it cannot be delegated. An exercise of legislative power may not be held invalid on the ground of unreasonableness, but an administrative decision can be challenged as being unreasonable. It is, therefore, necessary to determine what type of function the administrative authority performs.

### **Distinction between Judicial and Quasi-Judicial Functions**

A quasi-judicial function differs from a purely judicial function in the following respects

1. A quasi-judicial authority has some of the trappings of a court, but not all of them; nevertheless, there is an obligation to act judicially.
2. A *lis inter partes* is an essential characteristic of a judicial function, but this may not be true of a quasi-judicial function.
3. A court is bound by the rules of evidence and procedure while a quasi-judicial authority is not.
4. While a court is bound by precedents, a quasi-judicial authority is not.
5. A court cannot be a judge in its own cause (except in contempt cases), while an administrative authority vested with quasi-judicial powers may be a party to the controversy but can still decide it.

The distinction between judicial and quasi-judicial functions rests mainly on the fact that in deciding cases, courts apply pre-existing law whereas administrative authorities exercise discretion. This is, however, fallacious. 'The most that can be said is that the discretions of the courts may differ in nature and extent from the discretions of the administrator. Nevertheless, the asserted discretion is reduced to one of degree only.

### **Distinction between Administrative and Quasi-Judicial Functions**

#### **General**



Actions of an administrative authority may be purely administrative or may be legislative or judicial in nature. Decisions which are purely administrative stand on a wholly different footing from judicial as well as quasi-judicial decisions and they must be distinguished. This is a very difficult task. “Where does the administrative end and the judicial begin? The problem here is one of demarcation and the courts are still in the process of working it out.”

### **Object**

With the increase of power of administrative authorities, it may be necessary to provide guidelines for the just exercise thereof. To prevent abuse of power and to see that it does not become a ‘new despotism,’ courts have evolved certain principles to be observed by adjudicating authorities.

### **Lis**

To appreciate the distinction between administrative and quasi-judicial functions, we have to understand two expressions

- (i) ‘lis’, and
- (ii) ‘quasi-Lis’

One of the major grounds on which a function can be called ‘quasi-judicial’ as distinguished from pure ‘administrative’ is when there is a *lis inter parte* and an administrative authority is required to decide the dispute between the parties and to adjudicate upon the lis. Prima facie, in such cases the authority will be regarded as acting in a quasi-judicial manner.

Certain administrative authorities have been held to be quasi-judicial authorities and their decisions regarded as quasi-judicial decisions, wherein such lis was present, e.g. a Rent Tribunal determining ‘fair rent’ between a landlord and tenant, an Election Tribunal deciding an election dispute between rival candidates, an Industrial Tribunal deciding an industrial dispute, a Licensing Tribunal granting a licence or permit to one of the applicants.

### **Quasi-lis**

But it is not in all cases that the administrative authority is to decide a *lis inter partes*. There may be cases in which an administrative authority decides a lis not between two or more contesting parties but between itself and another party. But there also, if the authority is empowered to take any decision which will prejudicially affect any person, such decision would be a quasi-judicial decision provided the authority is required to act judicially.

Thus, where an authority makes an order granting legal aid, dismissing an employee, refusing to grant, revoking, suspending or cancelling a licence, cancelling an examination result of a student for using unfair means, rustication of a pupil, etc. such decisions are quasi-judicial in character.

In all these cases there are no two parties before the administrative authority, 'and the other party to the dispute, if any, is the authority' itself. Yet, as the decision given by such authority adversely affects the rights of a person there is a situation resembling a *lis*. In such cases, the administrative authority has to decide the matter objectively after taking into account the objections of the party before it, and if such authority exceeds or abuses its powers, a writ of *certiorari* can be issued against it. Therefore, Lord Greene, M.R. rightly calls it a 'quasi-*lis*.'

**Duty to act judicially** The real test which distinguishes a quasi-judicial act from an administrative act is the duty to act judicially, and therefore, in considering whether a particular statutory authority is a quasi-judicial body or merely an administrative body, what has to be ascertained is whether the statutory authority has the duty to act judicially.

The question which may arise for our consideration is as to when this duty to act judicially arises. As observed by Parker, J. "the duty to act judicially may arise in widely different circumstances which it would be impossible, and indeed, inadvisable, to attempt to define exhaustively."

Whenever there is an express provision in the statute itself which requires the administrative authority to act judicially, the action of such authority would necessarily be a quasi-judicial function. But this proposition does not say much, for it is to some extent a tautology to say that the function is quasi-judicial (or judicial) if it is to be done judicially.

Generally, statutes do not expressly provide for the duty to act judicially and, therefore, even in the absence of express provisions in the statutes the duty to act judicially should be inferred from 'the cumulative effect of the nature of the rights affected, the manner of the disposal provided, the objective criterion to be adopted, the phraseology used, the nature of the power conferred, of the duty imposed on the authority and the other indicia afforded by the statute.

### **Duty to Act Fairly**

Since 'fairness in action' is required from Government and all its agencies, the recent trend is from 'duty to act judicially' to 'duty to act fairly.' 'Duty to act fairly' is indeed a broader notion and can be applied even in those cases where there is no *lis*. It is this concept ('duty to act fairly'),

which has given rise to certain new doctrines, e.g. 'fair play in action', legitimate expectations, proportionality etc.

### **Cases**

*Province of Bombay v. Khushaldas S. Advani* was the first leading Indian decision on the point. Under Section 3 of the Bombay Land Requisition Ordinance, 1947, the Provincial Government was empowered to requisition any land for any public purpose "if in the opinion of the Government" it was necessary or expedient to do so. It was contended that the Government while deciding whether requisition was for a public purpose, had to act judicially. The High Court of Bombay upheld the said contention. Reversing the decision of the High Court, the Supreme Court held by a majority that the governmental function of requisitioning property was not quasi-judicial, for the decision was based on the subjective satisfaction of the Government and it was not required to act judicially.

Similarly, in *R. v. Metropolitan Police Commr., ex p. Parker*, a cab driver's licence was revoked on the ground of alleged misconduct without giving reasonable opportunity to him to rebut the allegations made against him. The court upheld the order on the ground that the licence was merely a permission which could be revoked at any time by the grantor, and in doing so he was not required to act judicially.

### **Test**

No 'cut and dried' formula to distinguish quasi-judicial functions from administrative functions can be laid down. The dividing line between the two powers is quite thin and being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power, one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised.

The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of quasi-judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years, the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.

Whether a particular function is administrative or quasi-judicial must be determined in each case on an examination of the relevant statute and the rules framed thereunder and the decision depends upon the facts and circumstances of the case.

At one time prerogative remedies of certiorari and prohibition were confined to 'judicial' functions pure and simple of public bodies. They both are now available in relation to functions which may be regarded as 'administrative' or even 'legislative.' As it is said, it is not the label that determines the exercise of jurisdiction of the court but the quality and attributes of the decision. "On the whole the test of justiciability has replaced that of classification of function as a determinant of the appropriateness of a decision for judicial review."

## UNIT II

- INTRODUCTION
- DEFINITION
- HISTORICAL DEVELOPMENT OF GROWTH OF DELEGATED LEGISLATION
- FACTORS (REASONS) FOR GROWTH OF DELEGATED LEGISLATION
- FORM OF DELEGATED LEGISLATION
- DELEGATED LEGISLATION IN ENGLAND, USA, INDIA.
- CONSTITUTIONALITY OF DELEGATED LEGISLATION.
- EXCESSIVE DELEGATION
- FUNCTIONS WHICH MAY BE DELEGATED (PERMISSIBLE DELEGATION)
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- TAXING STATUTES
- SUB-DELEGATION
- DELEGATED LEGISLATION (CONTROL AND SAFEGUARDS)
- JUDICIAL CONTROL OVER DELEGATED LEGISLATION
  1. SUBSTANTIVE ULTRA VIRUS
  2. PROCEDURAL ULTRA VIRUS
- LEGISLATIVE CONTROL.
- OTHER CONTROL.
- ADVANTAGES AND DISADVANTAGES OF DELEGATED LEGISLATION.

## **INTRODUCTION**

According to the traditional theory, the function of the executive is to administer the law enacted by the legislature, and in an ideal state, legislative power must be exercised exclusively by the legislators who are directly responsible to the electorate. But a trend very much in vogue at the present time in all democratic countries is that only relatively small parts of the total legislative output emanates directly from the legislature

The matter of the fact that apart from the "Pure" administrative function, the executive performs many legislative and judicial functions also the bulk of legislation is promulgated by the executive as a delegate of the legislature, and it is known as the "Delegated legislation".

In England theoretically it is only parliament which can make laws. Looking to the legislative process however one would see that it is really the government which makes the laws subject to parliamentary control in addition to the common law and statute law the law of land includes a great deal of what may be termed as subordinate or delegated legislation. It comprises orders in Council, departmental circulars, rules, regulations, schemes, bye laws, etc. made in exercise of statutory powers.

Even in US where the doctrine of delegated legislation has not been accepted in theory under the doctrine of separation of powers in practice the legislature has entrusted legislative powers to the executive due to several reasons there has been rapid growth in administrative legislation.

In India between 1973 and 1977 Parliament enacted about 300 statutes but the total number of statutory rules and orders reached more than 25000 So it has been rightly said that the delegated legislation is so multitudinous that a statute book would not only be incomplete but misleading unless it be read along with delegated legislation which amplifies and supplements the law of land.

## **DEFINITION.**

There is no precise definition of the expression delegated legislation. It is equally difficult to state with certainty the scope of such delegated legislation.

According to Salmond, "The expression delegated legislation is that which proceeds from any authority other than sovereign power and is therefore dependent for its continued existence and validity on some superior or supreme authority".

Mukherjea says that “delegated legislation is an expression which covers a multitude of confusion. It is an excuse for the legislators, shield for the administrators and procreation to the constitutional jurist”.

According to the M P Jain and S N Jain, the term “Delegated legislation” is used in two sense:

- (1) exercise by subordinate agency of the legislative power delegated to it by the legislature, or
- (2) the subordinate rules which themselves which are made by the subordinate authority in the pursuance of the power conferred on it by the legislature.

In its 1<sup>st</sup> application it means that the authority making the legislation is subordinate to the Legislature legislative powers are exercise by an authority other than the Legislature exercise of the powers delegated or conferred on them by the legislature itself this is known as subordinate legislation because the power of authority which makes is are limited by the statute which conferred the powers and consequently it is valid only insofar as it keeps within those limits.

2<sup>nd</sup> connotation the “Delegated legislation” means and includes all rules, regulations, bye laws, orders etc.

In simple words or meaning the expression “Delegated legislation” may be given as when the function of legislation is entrusted to two organs other than the Legislature itself the legislation made by such organs is called delegated legislation.

Thus, the delegated legislation made by the body or person other than the sovereign in Parliament by virtue of powers conferred by such a sovereign under the statute. The statute enacted by the legislature conferring the legislative power upon the executive is known as the “Parent Act” or the “Primary law”, and the rules, regulation, bye laws, orders, etc. made by the executive in pursuance of the legislative powers conferred by the legislature are known as “Subordinate Laws or subsidiary laws or the “Child Legislation”.

## **HISTORICAL DEVELOPMENT**

No doubt, the twentieth century has witnessed rapid growth of delegated legislation in almost all legal systems of the world. But that does not mean that it is a new phenomenon or that there was no delegation of legislative power by Legislature to Executive in the past. Ever since statute came to be enacted by Parliament, there was delegation of legislative function. The statute of 1337 contained a clause which made it felony to export wool, unless it was ordained by the King and his Council. In fifteenth and sixteenth centuries, there was frequent use of Henry VIII Clause. The Statute of Sewers of 1531 empowered Commissioners to make, re-make, repeal and

amend laws, to pass decrees and to levy cess. Thus, the Commissioners used to exercise legislative, administrative and judicial powers at a time. Mutiny Act, 1717 conferred on the Crown power to legislate for the Army without the aid of Parliament. In nineteenth century, delegated legislation became more common and considerably increased due to social and economic reforms. In the twentieth century, output of delegated legislation by executive is several times more than the output of enactments by a competent legislature.

## **REASONS FOR THE GROWTH OF THE DELEGATED LEGISLATION**

Many factors are responsible for the rapid growth of delegated legislation in every modern democratic State. The function of the state has long since ceased to be confined to preservation of the public peace, the execution of laws and defence of the frontiers. The functions of the state are now secure and to its citizen's objectives set in part III and IV of the Constitution. The desire to achieve these objectives leads to intense legislative activity. The traditional theory of '*laissez faire*' has been given up by every State and the old 'police State' has now become a 'welfare State.' Because of this radical change in the philosophy as to the role to be played by the State, its functions have increased.

The parliament and the state legislatures have neither time nor expertise to deal with technical and situational intricacies. The parliament and the state legislatures cannot visualize and provide for new strange, unforeseen and unpredictable situations, arising out of the complexity of modern life. Consequently, delegated legislation has become essential and inevitable.

According to the committee on the Minister's powers, it would be impossible to produce the amount and kind of legislation which parliament desires to pass and which the people of this country are supposed to want, if it comes necessary to inserts in the acts of the parliament themselves any considerable portion of what is now left to delegated legislation.

The factors responsible for the growth of the delegated legislation are

### **1. Pressure upon Parliamentary Time**

As a result of the expanding horizons of State activity, the bulk of legislation is so great that it is not possible for the legislature to devote sufficient time to discuss all the matters in detail (even if the parliament sits all the 365 days and 24/7, it may not be able to give the quality of the legislation which is required for the proper functioning of the modern government. Therefore, legislature formulates the general policy "the skeleton" and empowers the executive to fill in the details by issuing necessary rules, regulations, bye-laws, etc. In the words of Sir Cecil Carr, delegated legislation is "a growing child called upon to relieve the parent of the strain of overwork



and capable of attending to minor matters, while the parent manages the main business.” The truth is, that the parliament were not willing to delegate the law- making power, parliament would be unable to pass the kind and quality of law which the modern public opinion requires.

## **2. Technicality**

Sometimes, the subject-matter on which legislation is required is so technical in nature that the legislator, being himself a common man, cannot be expected to appreciate and legislate on the same, and the assistance of experts may be required. Members of Parliament may be the best politicians but they are not experts to deal with highly technical matters which are required to be handled by experts. Here the legislative power may be conferred on expert to deal with the technical problems, e.g. gas, atomic energy, drugs, electricity, etc.

## **3. Flexibility**

At the time of passing any legislative enactment, it is impossible to foresee all the contingencies, and some provision is required to be made for these unforeseen situations demanding exigent action. A legislative amendment is a slow and cumbersome process, but by the device of delegated legislation, the executive can meet the situation expeditiously, e.g. bank-rate, police regulation export and import, foreign exchange, etc. for the purpose, in many statutes, a “removal of difficulty” clause is found empowering the administration to overcome difficulties by exercise of the delegated power.

## **4.Experiment**

The practice of delegated legislation enables the executive to experiment. This method permits rapid utilization of experience and implementation of necessary changes in application of the provisions in the light of such experience, e.g. in road traffic matters, an experiment may be conducted and in the light of its application necessary changes could be made. Delegated legislation thus allows employment and application of past experience.

## **5.Emergency**

In times of emergency, quick action is required to be taken. The legislative process is not equipped to provide for urgent solution to meet the situation. Delegated legislation is the only convenient remedy. Therefore, in times of war and other national emergencies, such as

aggression, break-down of law and order, strike, 'bandh', etc. the executive is vested with special and extremely wide powers to deal with the situation. There was substantial growth of delegated legislation during the two World Wars. Similarly, in situation of epidemics, floods, inflation, economic depression, etc. immediate remedial actions are necessary which may not be possible by lengthy legislative process and delegated legislation is the only convenient remedy.

## **6. Complexity of Modern Administration**

The complexity of modern administration and the expansion of the functions of the State to the economic and social sphere have rendered it necessary to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions. By resorting to traditional legislative process, the entire object may be frustrated by vested interests and the goal of control and regulation over private trade and business may not be achieved at all. The practice of empowering the executive to make subordinate legislation within the prescribed sphere has evolved out of practical necessity and pragmatic needs of the modern welfare State. Therefore, it's been the rapid growth in the delegated legislation in all the countries and it has become indispensable in the modern administrative era.

## **CLASSIFICATION OF ADMINISTRATIVE OR RULE MAKING/ FORMS / TYPES OF DELEGATED LEGISLATION**

Administrative rule making or delegated legislation in India is commonly expressed by the term rules and orders however this classification is not exhaustive as it appears in other forms also delegated legislation may take the several forms they may be normal or of exceptional, that they may be used or unusual, positive or negative, skeleton or Henry VIII clause. Broadly delegated legislation may be classified into different forms:

### **1. Title based classification:**

Delegated legislation may be in the form of rule, regulations, bye laws, notifications, schemes, order, ordinances, directions, except "rule" in the sense it is exercise of power conferred by the enactment and shall include the regulation made as a root under any enactment these rules can be read applicable particular individual or two other general public it may include rules of procedure for rules of substantive law in nature regulation clean an instrument by which decisions Orders and acts of the government are known to the public such as situation where power is given to fix the date for the enforcement of an act or to grant exception from the act or fix prices etc.

Direction is an expression of Administrative rule making under the authority of law or rules orders made under they may be recommendatory or mandatory.

## **2. Discretion based classification:**

Condition for conditional legislation may be defined as a statute that provides control but specifies that they are to go into effect only when a given administrative authority find the existence of conditions defined in the statute itself. Condition for conditional legislation is a fact finding and subordinate legislation is discretionary legislation. In simple words it can be expressed as the legislation which provides the gun and the gunpowder is provided by the legislature and the administrative authority is the only required to pull the trigger but in subordinate legislation the administrative authority is to manufacture the gunpowder also. This noted that distinction is hardly real.

Discretion may be conferred on the executive to bring the act into operation on fulfilment of certain conditions such legislation is called conditional or contingent legislation. The distinction between conditional legislation and delegated legislation exist in this that where a conditional legislation contains no element of delegation of Legislative powers and is therefore not open to attack on the ground of excessive delegation delegated legislation does confirm some legislative power on some outside authorities and is therefore open to attack on the ground of excessive delegation.

In the case of *King emperor v. Benoari Lal Sharma (1944) AIR 1945 PC 48* the Privy Council for the first time upheld the validity of the Governor Generals Ordinance of special course which had delegated the bar to extend the duration of Ordinance on provisional governments in case of an emergency on the ground of conditional legislation. The Privy Council observe that it was a piece of conditional legislation as the legislation was what's complete and what had been dedicated was the power to apply the act on the fulfilment of certain conditions.

The supreme court also in the case of *Inder Singh v. State of Rajasthan (1980) 2 SCC 295* append the validity of the Rajasthan Tenants Protection Ordinance on the ground that it is conditional legislation. The ordinance was promulgated for 2 years, but Section 3 had authorised the Governor to extend its life by issuing notification if required. In the same manner in *I. T. C. Bhadrachalam paper boards v. Mandal Revenue officer (1996) 6 SCC 634* the court held that power conferred on government to bring an act into existence to grant exemption under it is a conditional legislation and not delegated legislation.

*Union of India v. Shri Gajanan Maharaj Sansthan 2002 5 SCC 44* the court was of the view that start youth providing that a certain provision there off would come into force on a date

to be notified by the government is a conditional legislation and such a power did not enable the government to decide whether to bring or not to bring that provision into force. However, no mandamus can be issued against the government to provide weather provision should be enforced and when the government would be able to do it.

### **3. Authority based classification (Sub- delegation):**

When the rule-making authority delegates to itself or to some other subordinate authority a further power to issue rules, such exercise of rule-making power is known as sub-delegated legislation. Rule-making authority cannot delegate power unless such power of delegation is contained in the enabling Act. Such authorization may be either express or by necessary implication.

Maxim '*delegatus non potest delegare*' indicates that sub-delegation of power is normally not allowable, though the legislature can always provide for it. If the authority further delegates its law-making power to some other authority and retains a general control of a substantial nature over it, there is no delegation as to attract the doctrine of '*delegatus non potest delegare*.' The maxim was originally invoked in the context of delegation of judicial powers and implied that in the entire process of adjudication, a judge must act personally except in so far as he is expressly absolved from his duty by a statute. Sub-delegation in very wide language is improper and some safeguard must be provided before the delegate is allowed to sub-delegate his power.

### **4. Nature-based classification:**

Classification of the administrative rule making may be based on the nature and extent of delegation

#### **I. Normal delegation**

- (a) Positive- where the limits of delegation are clearly defined in the enabling Act.
- (b) Negative- where power delegated does not include power to do certain things, i.e., legislate on matters of policy.

#### **II. Exceptional delegation**

Instances of exceptional delegation may be:

- power to legislate on matters of principle
- power to amend Acts of Parliament
- power conferring wide discretion that is almost impossible to know the limits
- power to make rules without being challenged in a court of law

Such exception is known as the Henry VIII clause to indicate executive autocracy. The King of England in the 16<sup>th</sup> century imposed his autocracy will through the instrumentality of the parliament. Under this clause, very wide range of the powers is given to the administrative agencies to make rules, including the power to amend and repeal the laws.

The classical illustration of Henry VIII clause is found in the Constitution itself U/A 372(2) of the Indian Constitution, where the president has been the power to adopt, amend and repeal any law in force to bring it in line with the provision of the constitution, and exercise of such power has been made immune from the scrutiny of the courts.

### **5.Purpose based classification:**

On the basis of different purposes it is made to serve.

- (i) Enabling Act: such Acts contain an ‘appointed day’ clause under which the power is delegated to the executive to appoint a day for the Act to come into operation.
- (ii) Extension and Application of Act: extension and application of Act in respect of a territory or for duration of time or for any other such object.
- (iii) Dispensing and Suspending Acts: power is delegated to the administrative authority to make exemptions from all or any provision of the Act in a particular case or class of cases or territory, when at the discretion of the authority, circumstances warrant it.
- (iv) Alteration Acts: Alteration is a broad term and includes both modification and amendment. The power of modification is limited to consequential changes, but if overstepped it suffers challenge on the ground that it is not within the legislative intent of modification. Sometimes includes the power to remove difficulties so that the various statutes may coexist. Amendment- e.g. power to change the schedule of an Act.
- (v) Taxing Act: The policy of the taxing statute must be clearly laid down by the legislature.
- (vi) Supplementary Acts: Power is delegated to the authority to make rules to carry out the purposes of the Act.
- (vii) Approving and Sanctioning Acts: Power is delegated not to make rules, but to approve the rules framed by another specified authority.
- (viii) Classifying and Fixing Standard Acts: Power is given to administrative authority to fix standard of purity, quality or fitness for human consumption. Courts have upheld on grounds of necessity.
- (ix) Penalty for Violation of Acts: Power may be delegated to administrative authority to prescribe punishment for violation of rules.

(x) Clarify the provisions of the statute' Act: Power is delegated to the administrative authority to issue interpretation on various provisions of the enabling Act.

## **DELEGATED LEGISLATION IN ENGLAND**

England Parliament is sovereign, in principle it is only the Parliament which can enact laws. But as observed by C. K. Allen, "Nothing is more striking in the legal and social history of 19<sup>th</sup> Century in England than the development of subordinate legislation" so it is observed that the subordinate government of England is becoming more and more important than the movement set in with the Reform bill of 1832 it has gone for already and absurdly it will go further we are becoming a much governed Nation governed by all manner of councils and boards and officials Central and local, high and low exercising the powers which have been committed to them by modern statutes.

The Reasons for growth of delegated legislation in other countries were equally responsible for the development of delegated legislation in England. Parliament had no time to deal with the various matters in detail of complexity technicality, emergency and expediency compelled Parliament to delegate its legislative work to the government. Traditionally, administrative legislation was looked upon as it is but gradually it came to be regarded as justifiable in principle it was realise that legislation and administration one not two fundamentally different forms of power.

Test formulated to distinguish legislative and administrative functions proved insufficient and inappropriate. But at the same time administrative law had not been accepted as developed and recognised branch of law. It was during the two world wars that there was a tremendous increase in delegated legislation to stop massive inroads were made into comparatively personal matters of citizens example housing, education, employment, pension, health, planning, production, preservation and distribution of essential commodities social security etc. In the 18<sup>th</sup> century Parliament was obliged to delegate extensive law-making power in favour of the government. A hue and cry were raised against the growth of delegated legislation.

Then the matter was referred refer to the Committee on Ministers Power, known as Donoughmore Committee in 1929. The committee submitted its report in 1932 it was observed that the Parliament itself has fully realised how extensive the practice of delegated legislation has become or the extent to which it has surrendered its own functions in the in the process or how easily the practice might be abused but the committee rightly stated that the system of delegated legislation is both legitimate by permissible and Constitutionally desirable for certain purposes within certain limits and under certain safeguards.

## DELEGATED LEGISLATION IN THE USA

In theory under the US Constitution, delegated legislation is not accepted because of two doctrines, viz., Separation of Powers and *Delegatus non protest delegare*

### 1. Separation of Powers

This Doctrine is recognised by the U.S Constitution and by Article 1 legislative powers is expressly conferred on the Congress. Article II states that the executive power shall be vested in the President and under Article III the Judiciary has power to interpret the Constitution and declare any statute unconstitutional if it does not conform to the provisions of the constitution.

In the leading case of *Field v. Clark 1892* the US Supreme Court observed that Congress cannot delegate legislative powers to the President is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the constitution.

### 2. *Delegatus non protest delegare* (a delegate cannot further delegate)

According to this Doctrine, a delegate cannot further delegate his power. As the Congress gets power from the people and is a delegate of the people in that sense it cannot for the delegate its legislative powers to the executive or to any other agency. A power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another is a general and admitted rule. Legislatures stand in this relation to the people whom they represent. Hence it is a cardinal principle of representative government that the legislature cannot delegate the power to make laws to any other body or authority.

In Practice, though in theory it was not possible for the Congress to delegate its legislative powers to the executive, strict adherence thereto was not practicable. Governmental functions had increased and it was impossible for the Congress to enact all the statutes with all particular. The Supreme Court could not shut its eyes to this reality and try to create a balance between the two conflicting forces: (I) Doctrine of separation of powers barring delegation and (II) Inevitability of delegation due to the exigencies of the Modern Government.

*In Panama Refining Company vs Ryan 79 L Ed. 446: 293 US 338 (1934)*, popularly known as the hot oil case under Section 9(c) of the National Industrial Recovery Act 1933 (NIRA) the President was authorised by the Congress to prohibit transportation of oil in interstate commerce in excess of the quota fixed by the state concerned. The policy of the Act was to recover encourage National industrial recovery and to foster fair competition. The Supreme Court by the

majority held that the delegation was invalid. According to the court the Congress had not declared any legislative policy or standard.

In *Schechter Poultry Corp. v. United States* 1935 (Sick Chicken Case) the Supreme Court unanimously struck down Section (3) of NIA Act, 1933 which authorised the President to approve codes of fair competition and violation thereof who was made punishable. The court held that the discretion of the president was virtually unfettered. And this was delegation running riot.

After the two cases mentioned above the Supreme Court took a liberal view in many cases upheld delegation of legislative power. Thus, in *National Broadcasting Company v. United States*, 1943 vast powers were conferred upon the Federal Communication Committee (FCC) to licence broadcasting stations under the Communications Act, 1934 the criterion was “Public Interest, Convenience or Necessity” though it was vague and ambiguous, the supreme court held it to be a valid standard.

Similarly in *Yakus v. United States*, 1944 under the Emergency Price Control Act, 1942 the price administrator was given the power to fix such maximum price which is “in his judgement will be generally fair and equitable and will effectuate the purpose of the Act” administrator was required so far as practicable to give due consideration to the prices prevailing between 1st October and 15th October 1941 but was allowed to consider a later date if necessary data were not available and yet the supreme court sustained the delegation, holding that the standards were adequate and as rightly observed by the majority judgement of sick chickens case was overruled.

**The U.S. sentencing commission under the Sentencing Reforms Act 1984:** The guidelines in *Mistretta v. United States*, 1988 (Mistretta), sentencing guidelines were promulgated by provided range to determine sentences for categories of offences and offenders according to various factors specified by the commission. Mistretta who was indicated for sale of cocaine, challenged the guidelines contending that Congress delegated excessive authority to the commission to structure the guidelines. The Supreme Court concluded that the contention of the petitioner that the commission had significant description in formulating guidelines could not be disputed. It has also power to determine which crimes should be punished leniently or severely. But that did not mean that there was a no policy. Congress well conferring power on the commission neither delegated legislative powers to the executive nor upset the constitutionally mandated balance of powers among the co-ordinate branches.

In *Whitemen vs American Trucking Association*, 2001 the legislature delegated legislative powers to the Environmental Protection Agency (EPA) to promulgate “air quality criteria” the



relevant act or also authorised EPA to review such standard and make such revisions as may be appropriate. The provision was challenged on the ground of excessive delegation of Legislative powers to EPA without providing “intelligible principle” the court of appeal upheld the contention. The Supreme Court however held the delegation valid observing that a certain degree of discretion to the agency could be allowed referring to *Mistretta*, the court stated that to require the EPA to set quality standards at the level that is ‘quite’ that is not lower or higher than is necessary to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by a precedent.

From the above decisions it clearly emerges that the traditional theory has been given up and the Supreme Court has also adopted a liberal approach. Thus, pragmatic considerations have prevailed over theoretical objections.

## **DELEGATED LEGISLATION IN INDIA.**

The discussion can be divided into two stages:

- 1.Pre-Constitution period.
- 2.Post-Constitution period.

### **Pre-Constitution Period**

*R v. Burah*, 1878 is considered to be the leading authority on the subject the area of Garro Hills was removed from the jurisdiction of civil and criminal courts and by Section 9 the lieutenant-governor was empowered to extend civil or criminal all or any of the provisions of the Act applicable to Kashi Janata and Naga Hills in the Garros Hills and to fix the date of such application. By notification dated 14<sup>th</sup> October 1871, the Lieutenant Governor extended all the provisions of the Act to the district of Kashi, Jaintia and Naga hills. The applicant who were convicted of Murder and sentenced to death challenged the notification.

The High court of Calcutta by the majority upheld the contentions of the appellant and held that Section 9 of the Act was *ultra-virus* the powers of the Indian legislature. According to the court the Indian legislature was a delegate of Imperial Parliament and therefore further delegation that is (sub-delegation) was not permissible. On the appeal Privy Council, it was held

that the Indian legislature was not an agent or delegate of the Imperial Parliament it had plenary powers of legislation as those of the Imperial Parliament itself. It agreed that the Governor General in Council could not, by legislation, create a new legislative power in India not created or authorised by the council's Act. But in fact it was not done it was only a case of conditional legislation, as the Governor was not authorised to pass any new law but merely to extend the provisions of the Act enacted by the competent Legislature upon fulfilment of certain conditions.

*In Jitendra Nath Gupta v. Province of Bihar*, 1949 the Bihar maintenance of public order Act 1948 was to remain in force for one year. However the power was conferred on the provincial government to extend the operation of the Act for a further period of one year by a majority, of the federal court held that the power to extend the operation of the act beyond the period of 1 year was a legislative act and therefore, could not be delegated. However in a dissenting judgement, Faysal Ali upheld the provision as the extension of the Act, for a further period of 1 year could not amount to its re-enactment. It nearly amounted to a continuance of the Act for which the maximum period was an contemplated by the legislature itself. It is submitted that the minority view was correct and subsequently in *Sardar Inder Singh v. State of Rajasthan*, 1957 the Supreme Court upheld a similar provision.

### **Post Constitution Period**

*In re Delhi Laws Act, case 1951* was the first leading case decided by the Supreme Court on delegated legislation after the constitution came into force. A reference was made to the Supreme Court by the President of India under Article 143 of the Constitution. In the circumstances enumerated therein Central Government was authorised by Section 2 of the Part 'C' States 'laws' Act, 1952 to extend the laws to any part 'C' state with such notifications and restrictions as if thinks fit, any enactment in force in a part a state well doing so it could repeal or amend any corresponding law "other than a Central Act" which might be in force in part C state. The Supreme Court was called upon to decide the legality of aforesaid provision. All the seven judges who heard by reference gave their separate opinions "exhibiting a cleavage of judicial opinions" on the question of limits to which the legislature in India could be permitted to delegate its legislative power.

**The majority held the provision valid subject to two limitations:**

1. The executive cannot be authorised to repeal a law in force and thus, the provision which empower the central government to repeal a law already in force in the part C state was bad.
2. By exercising the power of modification, the legislative policy should not be changed and thus, before applying any law to the part C state the central government cannot change the legislative policy.

Importance of Delhi laws case cannot be underestimated, as on the one hand it permitted delegation of legislative powers by the legislature to executive while on the other hand it demarcated the extent of such permissible delegation of powers by the Legislature.

Principle formulated in this case by the seven judges give their separate opinions many a time a question is asked whether any principal was formulated by the majority opinion answer is not simple as there is difference of opinion amongst jurist on this point. Authors Jain and Jain are right when they state that on two points there was a similarity in the outlook evidenced in the opinions. One, keeping the exigencies of the Modern Government in view, Parliament and state legislature in India need to delegate legislative power if they are to be able to cope with the multitudinous problems facing the country for it is neither practicable nor feasible to expect that each of the legislative bodies could turn out complete and comprehensive legislation on all subjects that need to be legislated upon. Second, since legislatures derive their powers from the written Constitution which creates them, they could not be allowed the same freedom as the British Parliament in the matter of delegation some limits should be set on their capacity to delegate. The major difficulty was, and it was on this point that the judges differed where to set the limit and what was the permissible counters within which and Indian legislature could delegate its legislative powers.

In *Hari Shankar bagla v. State of MP* 1955, U/S 3 of the Essential Supplies (Temporary Powers) Act 1946 the central government was empowered to issue an order for the regulation of production distribution of essential commodities. By Section 6, it was provided that the order made under Section 37 have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act. Both the Sections were challenged on the ground of excessive delegation of legislative power. The Supreme Court held that the object of Section 6 was not to repeal or abrogate any existing law, but to bypass the same where the provisions thereof are inconsistent with the provisions of the Act. The court also held that the legislative policy was laid down in the Act and there was no excessive delegation. Thus, very broad delegation of legislative power was judicially sanctioned.

After the Delhi Laws Act case, in *Hamdard Dawakhana v. Union of India*, 1960 Supreme Court was probably the first case in which Central Act was held *ultra-virus* on the ground of excessive delegation to stop the Drugs and Magic Remedies Objectionable Advertisements Act, 1954 was enacted by Parliament to control advertisement of certain drugs. Section 3 laid down a list of diseases for which advertisement was prohibited and authorised the central government to include any other disease in the list. The supreme court held Section 3 as invalid as no criteria, standards or principles had been laid down therein, and the power delegated was an unguided and uncontrolled.

In *Gwalior Trade and Silk Manufacturing Company limited v. CST*, 1976, under Section 82 (b) of the Central Sales Tax Act, in 1956 Parliament did not fix rate of Central sales tax but adopted the rate applicable to the sale or purchase of goods within the appropriate state in case such rate exceeded 10%. This Section was challenged on the ground that parliament in not fixing the rate itself and in adopting the rate applicable within the appropriate state has not laid down any legislative policy and had abdicated its legislative function.

This Section was upheld by all the five judges, observing that sufficient guideline was provided in the Act by the Parliament but this case is noteworthy for the diverse approaches adopted by Kanna J. (for three judges) and Justice Mathew (for two judges) in respect of the following: contention on behalf of sales tax department a pre-emptive argument was put forward that, well conferring power upon a delegate to make subordinate legislation, the legislature need not disclose any policy, principle or standard because if the legislature can prepare can repeal an enactment, as it normally can, it retains sufficient control over the authorities making the subordinate legislation. Kanna J. (For himself, Alagiriswami and for Justice Bhagwati) rejected the argument and reiterated that the legislature must lay down policy principle for standard for the guidelines of the delegate.

The rule against excessive delegation of Legislative authorities flows from the sovereignty of the people. This contemplates that it is not permissible to substitute in the matter of Legislative policy, review of individual officers or other authorities, however competent they maybe, for that of the popular will as expressed by the representatives of the people.

The acceptance of the view canvassed by the department would lead to startling results. If parliament were to enact that, as the crime situation in the country has deteriorated, criminal law to be enforced in the country it would be such as is framed by an officer mentioned in the enactment, can it be said that there has been any excessive delegation of legislative power? to say that if element does not approve the laws made by the officer concerned, it can repeal the same or

the parent Act is no answer. The delegation Section was however held valid on the ground that the Act was clearly enacted with a view to prevent evasion of the payment of Central sales tax.

The conquering judgement of Mathew J (for himself and Ray CJ) accepted the said argument and observed that delegation involves the granting of discretionary power to another, but ultimate power always remains with the legislature. What is prohibited is -application, that is conferment of arbitrary power by the legislature upon a subordinate body without reserving for itself control over that body relying upon the decisions in *R. v. Burra* and *Cobb and Co. Ltd. V. Kropp*, Mathew J observed that legislature cannot be said to abdicate its legislative function if it could at any time repeal the legislation and withdraw the authority and discretion it had vested in in the delegate.

In *M. K. Papiiah and Sons v. Excise commr.* , Section 22 of The Karnataka Excise Act, 1966 conferred on the government power to fix the rates of excise duty and Section 71 empowered the government to make rules made under the Act were to be laid before the state legislature as soon as practicable after they had been made. Both the Sections were challenged on the ground of impermissible delegation of legislative power. Mathew J speaking for unanimous Court of three judges observed that the laying of the rules before the legislature was a sufficient check on the power conferred on the delegate. The petitioners thereupon argued that the rules would come into force as soon as they were framed and that the power of the Legislature to repeal rules subsequently could not be regarded as a sufficient control over delegated legislation. Rejecting this argument, justice Mathew J observed that considering the compulsions and complexities of modern life such control must be regarded as sufficient.

This case showed after 25 years of wandering in the legal maze of its own creation, the Supreme Court of India, like the supreme court of the United States have come round to the view expressed by the privy council in 1878.

In *Hansraj L. chulani v. Bar Council of Maharashtra and Goa* , the State Bar Council framed a rule as “right to practice” legal profession and disqualified persons if they were engaged in any other occupation. It was contended by the petitioner who was in the medical profession that the rule was bad as there was excessive delegation of Legislative function by the legislature. However, it was held that the rule effectuated the object, purpose and the scheme of the Act and provided enough guidelines and was valid.

In *St. John Teachers Training Institute v. National Council for Teachers Education* 2003 SCC, the Supreme Court emphasised on the need and necessity of delegated legislation. It was observed that the legislature cannot possibly foresee every administrative difficulty that may arise in operating a statute. Delegated legislation fills those gaps and details. Rules framed by the

executive in exercise of delegated power, however cannot supplant the law enacted by the legislature but can supplement it. Delegated legislation made in exercise of power under the parent Act is supporting legislation and has the force and effect, if validly made, as the Act itself.

In *Bombay Dyeing and manufacturing co. Ltd. V. Bombay Environmental Action Group* 2006 SCC, the Supreme Court held that presumption as regards the constitutionality of law is available not only in case of law enacted by the Parliament or state legislature but also in case of delegated legislation.

In *M.P. High Court Bar Association v. Union of India* 2004 SSC, the Supreme Court declared that under the Constitution, the power to legislate lies with the legislature. Hence the power to make laws, cannot be delegated by the legislature to the executive. In other words, a legislature can neither create a parallel legislature nor destroy its legislative character. Essential legislative function must be retained by the legislature itself as such function consists of determination of Legislative policy and its formulation as a binding rule of conduct. But it is equally well-settled that once essential legislative functions is performed by the legislature and the policy has been laid down, it is always open to the legislature to dedicate to the executive ancillary and subordinate powers necessary for carrying out policy and purpose of the Act as may be necessary to make the legislation complete, effective and useful.

## **EXCESSIVE DELEGATION**

It is well settled that essential and primary legislative function must be performed by the legislature itself and they cannot be delegated to the executive. Essential legislative functions consist of determination of Legislative policy and its formulation as a rule of conduct. In other words, a legislature has to discharge the primary duty entrusted to it. Once essential legislative powers are exercised by the legislature, all ancillary and incidental functions can be delegated to the executive.

As observed in *Arvinder Singh v. State of Punjab* 1979 SSC, the founding document of the nation that is Constitution has created three great instrumentalities and entrusted them with certain basic powers-legislative, executive and judicial system. Abdication of these powers by any organ would amount to do betrayal of the Constitution itself and it is intolerable in law.

## **Nature and scope**

It is accepted that Parliament does not possess a legislative power as an inherent and original power but as power delegated to it by the Constitution. Parliament thus cannot delegate as it will, but is entrusted with a competence that the Constitution obliges it to exercise itself. It

cannot legally delegate its legislative functions to the executive as that would be unconstitutional. In Great Britain, excessive delegation of parliamentary powers is a political concern; In US and in India, it is primarily judicial.

### **Abdication**

Abdication means abandonment. Abdication of sovereignty in favour of executive. When the legislature does not legislate and entrust the primary function to the executive or to any outside agency, there is abdication of legislative power. Abdication may be partial or total. The power to delegate is subject to the qualifications that the legislature does not abdicate or effaces itself by setting up a parallel legislature.

But delegation of legislative power need not necessary amount to abdication or complete effacement. What constitutes abdication and what class of cases are covered by that expression is always a question of fact and it cannot be defined or a rule of universal application can be laid down.

### **Principles:**

The question whether there is excessive delegation or not, has to be examined in the light of three broad principles:

1. Essential legislative function to enact laws and to determine legislative policy cannot be delegated.
2. In the context of modern conditions and complexities of situations, it is not possible for the legislature to enact laws in detail every possibility and make provisions for them. The legislature, therefore, has to delegate the certain functions provided it lays down legislative policy.
3. If the power is conferred on the executive in a manner which is lawful and permissible, the delegation cannot be held to be excessive merely on the ground that a legislature could have made more detailed provisions.

### **Test:**

In dealing with the challenge to the vires of any statute on the ground of excessive delegation, it is necessary to enquire whether the impugned delegation involved surrender of essential legislative function and whether the legislature has a left enunciation of policy and principle to the delegate. If the reply is in the affirmative, there is excessive delegation but if it is in the negative, the challenge must necessarily fail.

Statute challenged on the ground of excessive delegation must be subjected to two tests:

1. Whether it delegates essential legislative function.
2. Whether the legislature has enunciated its policy and principle for the guidelines of the executive.

In deciding whether the legislature is enacting statute has exceeded the limits of its authority to enunciate policy and principle, regards should be had not to mere matters of form but to the substance of what is done.

### **Powers and duties of courts**

The founding fathers of the constitution have entrusted the power of legislation to the representatives of the people so that the power maybe exercised not only in the name of the people but also by the people speaking through their respective representatives. The rule against excessive delegation thus flows from and it is a necessary postulate of the sovereignty of the people.

At the same time however, it also cannot be over looked that in view of the multifarious activities of a modern welfare state, the legislature can hardly find time and expertise to enter into matters of detail for stock subordinate legislation within a prescribe spear is a practical necessity and pragmatic need of the day. The principal justification in favour of delegated legislation is that the legislature is overburdened and the needs of modern-day society are complex.

Legislature is, thus, unable to foresee administration through delegated legislation. Delegation of law-making power is a Dynamo of Modern Government. If legislative policy is enunciated by the legislature and a standard has been laid down, the court will not interfere with the discretion to delegate non-essential function to the executive.

It is submitted that the following observations of Justice Subbarao in the leading case of *VasanLal Maganbhai Sajanwala v. State of Bombay* 1961 laying down correct law on the point and therefore worth noting. The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously, it cannot abdicate its functions in favour of another. But in view of multifarious activities of a welfare state, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out details to the executive or any other agency.

But there is a danger inherent in such a process of delegation. And overburdened legislature for one controlled by a powerful executive may unduly overstepped the limits of



delegation. It may not lay down any policy at all. It may declare its policy in a week and general terms, it may not set down any standard for guidance of the executive, it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of a legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation.

### **PERMISSIBLE DELEGATED LEGISLATION.**

The following are the permissible delegation:

#### **(a) Commencement**

Several statutes contain an ‘appointed day’ clause, which empowers the Government to appoint a day for the Act to come into force. In such cases, the operation of the Act depends on the decision of the Government e.g. Section 1(3) of the Consumer Protection Act, 1986 provides that the Act ‘shall come into force on such date as the Central Government may by notification appoint.’ The Legal Services Authorities Act, 1987 was brought into force only in 1997. Here the Act comes into force when the notification is published in the Official Gazette. Such a provision is valid for, as Sir Cecil Carr remarks. “the legislature provides the gun and prescribes the target, but leaves to the executive the task of pressing the trigger”.

#### **(b) Supplying Details**

If the legislative policy is formulated by the legislature, the function of supplying details may be delegated to the executive for giving effect to the policy. This is the most usual form of delegation and is found in several statutes. In all such cases, a legislation enacted by the Legislature is ‘skeleton legislation’ and the legislature lays down general principles in the statute. What is delegated here is an ancillary function in aid of the exercise of the legislative function e.g. Section 3 of the All India Services Act, 1951 authorizes the Central Government to make rules to regulate conditions of service in the All India Services.

The Committee on Ministers' Powers, however, was conscious of dangers of such provision and had rightly commented: “The precise limits of the law-making power which Parliament intends to confer on a Minister should always be defined in clear language by the statute which confers it; when discretion is conferred its limits, should be defined with equal clearness.”

#### **(c) Inclusion and Exclusion.**

##### **Inclusion**

Sometimes, the legislature passes an Act and makes it applicable, in the first instance, to some areas and classes of persons, but empowers the Government to extend the provisions thereof to different territories, persons or commodities, etc., e.g., the Transfer of Property Act, 1882 was made applicable to the whole of India except certain areas, but the Government was authorized to apply the provisions of the Act to those areas also.

Likewise, the Essential Commodities Act, 1955 was made applicable to certain specified commodities but empowered the Central Government to declare any other commodity as an 'essential commodity' and to make the Act applicable to such commodity. By Section 146 of the Indian Railways Act, 1890, the Government was authorized to apply the provisions to tramways.

This device provides flexibility to law without interfering with legislative policy. In *Hamdard Dawakhana*, however, such provision was held ultra-virus.

### **Exclusion**

There are some statutes which empower the Government to exempt from their operation certain persons, territories, commodities, etc. Section 36 of the Payment of Bonus Act, 1965 empowers the Government to exempt any establishment or a class of establishments from the operation of the Act. Such provision introduces flexibility in the scheme of the legislation. The Legislature which is burdened with heavy legislative work is unable to find time to consider in detail hardships and difficulties likely to result in enforcing the legislation. Such power can be exercised by executive in public interest.

The Minimum Wages Act, 1948 has been enacted as stated in its preamble, "to provide for fixing minimum wages in certain employments". The Act applies to employment mentioned in the schedule, but government is given power to add any other employment thereto and, thus, to extend the Act to that employment. The Act lays down norms on which government may exercise its power to add any employment to the schedule. Nevertheless, in *Edward Mills Co. v. State of Ajmer* AIR 1955, the Supreme Court upheld the provision arguing that the policy was apparent on the face of the Act which was to fix minimum wages in order to avoid exploitation of labour in those industries where wages were very low because of unorganised labour or other causes.

### **(d) Suspension**

Some statutes authorize the Government to suspend or relax the provisions contained therein, e.g. under Section 48(1) of the Tea Act, 1953, the Central Government is empowered under certain circumstances to suspend the operation of all or any of the provisions of the said Act.

### **(e) Application of existing laws**

Some statutes confer the power on the executive to adopt and apply statutes existing in other States without modifications (with incidental changes) to a new area. There is no unconstitutional delegation in such cases, as the legislative policy is laid down in the statute by the competent legislature.

### **(f) Modification**

Sometimes, provision is made in the statute authorizing the executive to modify the existing statute before application. This is really a drastic power as it amounts to an amendment of the Act, which is a legislative function, but sometimes, this flexibility is necessary to deal with local conditions. Thus, under the powers conferred by the Delhi Laws Act, 1912, the Central Government extended the application of the Bombay Agricultural Debtors' Relief Act, 1947 to Delhi. The Bombay Act was limited in application to the agriculturists whose annual income was less than Rs 500 but that limitation was removed by the Government.

While conferring a power on Executive to modify a statute, two factors ought to be considered:

1. The need and necessity of delegating such power, and
2. The danger or risk of misuse of such power by the executive,

It is, therefore, necessary for the legislature to formulate policy in clear and unambiguous terms before such power is delegated to the administration.

### **(g) Prescribing Punishments**

In some cases, the legislature delegates to the executive the power to take punitive action, e.g. under Section 37 of the Electricity Act, 1910, the Electricity Board is empowered to prescribe punishment for breach of the provisions of the Act subject to the maximum punishment laid down in the Act. By Section 59(7) of the Damodar Valley Act, 1948, the power to prescribe punishment is delegated to a statutory authority without any maximum limit fixed by the parent Act.

According to the Indian Law Institute, this practice is not objectionable, provided two safeguards are adopted:

1. The legislature must determine the maximum punishment which the rule-making authority may prescribe for breach of regulations; and
2. If such power is delegated to any authority other than the State or Central Government, the exercise of the power must be subject to the previous sanction or subsequent approval of the State or Central Government.

### **Framing of Rules**

A delegation of power to frame rules, bye-laws, regulations, etc. is not unconstitutional, provided that the rules, bye-laws and regulations are required to be laid before the legislature before they come into force and provided further that the legislature has power to amend, modify or repeal them.

1. Henry VIII clause (Removal of difficulties) Power is sometimes conferred on the Government to modify the provisions of the existing statutes for the purpose of removing difficulties. When the legislature passes an Act, it cannot foresee all the difficulties which may arise in implementing it. The executive is, therefore, empowered to make necessary changes to remove such difficulties. Such provision is also necessary when the legislature extends a law to a new area or to an area where the socio-economic conditions are different. Generally, two types of 'removal of difficulties' clauses are found in statutes.

A narrow one, which empowers the executive to exercise the power of removal of difficulties consistent with the provisions of the parent Act; e.g. Section 34(1) of the Administrative Tribunals Act, 1985 reads thus: "If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by an order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty."

Such a provision is not objectionable. According to the Committee on Ministers' Powers, the sole purpose of Parliament in enacting such a provision is 'to enable minor adjustments of its own handiworks to be made for the purpose of fitting its principles into the fabric of existing legislation, general or local.' Sir Cecil rightly says, "the device is partly a draftsman's insurance policy in case he has overlooked something, and partly due to the immense body of local Acts in England creating special difficulties in particular areas." By exercising this power, the Government cannot modify the parent Act nor can it make any modification which is not consistent with the parent Act.

Another type of 'removal of difficulties' clause is very wide and authorizes the executive in the name of removal of difficulties to modify even the parent Act or any other Act. The classic illustration of such a provision is found in the Constitution itself. Usually, such a provision is for a limited period. This provision has been vehemently criticized by Lord Hewart and other jurists. It is nicknamed as the Henry VIII clause to indicate executive autocracy. Henry VIII was the King of England in the 16<sup>th</sup> century and during his regime he enforced his will and got his difficulties

removed by using instrumentality of a servile Parliament for the purpose of removing the difficulties that came in his way. According to the Committee on Ministers' Powers, the King is regarded popularly as the impersonation of executive autocracy and such a clause 'cannot but be regarded as inconsistent with the principle of parliamentary Government.'

In *Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Sabha* AIR 1967, the Supreme Court was called upon to decide the legality of such a clause. Section 37(1) the Payment of Bonus Act, 1965 empowered the Central Government to make such orders not inconsistent with the purposes of the Act, as might be necessary or expedient for the removal of any doubts or difficulties. The Court by a majority of 3: 2 held Section 37 *ultra vires* on the ground of excessive delegation inasmuch as the Government was made the sole judge of whether any difficulty or doubt had arisen, whether it was necessary or expedient to remove such doubt or difficulty and whether the order made was consistent with the provisions of the Act. Again, the order passed by the Central Government was made 'final'. Thus, in substance, legislative power was delegated to the executive authority, which was not permissible.

The minority, however, took a liberal view and held that the functions to be exercised by the Central Government were not legislative functions at all but were intended to advance the purpose which the legislature had in mind. In the words of Hidayatullah, J: "Parliament has not attempted to set up another legislature. It has stated all that it wished on the subject of bonus in the Act. Apprehending, however, that in the application of the new Act doubts and difficulties might arise and not leaving their solution to Courts with the attendant delays and expense, Parliament has chosen to give power to the Central Government to remove doubts and differences by a suitable order."

It is submitted that the minority view was correct and after *Jalan Trading Co.*, the Supreme Court adopted a liberal approach. In *Gammon India Ltd. v. Union of India* AIR 1974, a similar provision was held constitutional by the Court. Distinguishing *Jalan Trading Co.*, the Court observed: "In the present case, neither finality nor alteration is contemplated in any order under Section 34 of the Act. Section 34 is for giving effect to the provisions of the Act. This provision is an application of the internal functioning of the administrative machinery." It, therefore, becomes clear that after *Jalan Trading Co.*, the Court changed its view and virtually overruled the majority judgment. It is submitted that by using a 'removal of difficulties' clause, the Government may slightly tinker with the Act to round off irregularities and smoothen the joints or

remove minor obscurities to make it workable, but it cannot change or disfigure the basic structure of the Act.

In no case can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act. The Committee on Ministers' Powers rightly opined that it would be dangerous in practice to permit the executive to change an Act of Parliament and made the following recommendation: 'The use of the so-called Henry VIII clause conferring power on a Minister to modify the provisions of Acts of Parliament should be abandoned in all but the most exceptional cases and should not be permitted by Parliament except upon special grounds stated in a ministerial memorandum to the Bill. Henry VIII clause should never be used except for the sole purpose of bringing the Act into operation but subject to the limit of one year.'

### **FUNCTIONS WHICH CANNOT BE DELEGATED (IMPERMISSIBLE DELEGATION)**

The following functions shall not be delegated by the legislature to the executive on the other hand

#### **(a) Essential legislative functions**

Even though there is no specific bar in the Constitution of India against the delegation of legislative power by the legislature to the executive, it is now well-settled that essential legislative functions cannot be delegated by the legislature to the executive. In other words, legislative policy must be laid down by the legislature itself and by entrusting this power to the executive; the legislature cannot create a parallel legislature.

#### **(b) Repeal of law**

Power to repeal a law is essentially a legislative function, and therefore, delegation of power to the Executive to repeal a law is excessive delegation and is ultra vires.

#### **(c) Modification**

Power to modify the Act in its important aspects is an essential legislative function and, therefore, delegation of power to modify an Act without any limitation is not permissible. However, if the changes are not essential in character, the delegation is permissible.

#### **(d) Exemption**

The aforesaid principle applies in case of exemption also, and the legislature cannot delegate the power of exemption to the executive without laying down the norms and policy for the guidance of the latter.

#### **(e) Removal of difficulties**

Under the guise of enabling the executive to remove difficulties, the legislature cannot enact a Henry VIII clause and thereby delegate essential legislative functions to the executive, which could not otherwise have been delegated.

**(f) Retrospective operation**

The legislature has plenary power of law making and in India, Parliament can pass any law prospectively or retrospectively subject to the provisions of the Constitution. But this principle cannot be applied in the case of delegated legislation. Giving an Act retrospective effect is essentially a legislative function and it cannot be delegated.

**(g) Future Acts**

The legislature can empower the executive to adopt and apply the laws existing in other States, but it cannot delegate the power by which the executive can adopt the laws which may be passed in future, as this is essentially a legislative function.

**(h) Imposition of Taxes**

The power to impose a tax is essentially a legislative function. Under Article 265 of the Constitution no tax can be levied or collected save by authority of law, and here 'law' means law enacted by the competent legislature and not made by the executive. Therefore, the legislature cannot delegate the essential legislative function of imposition of tax to executive authority.

**(i) Ouster of jurisdiction of courts**

The legislature cannot empower the executive by which the jurisdiction of courts may be ousted. This is a pure legislative function.

**(j) Offences and Penalty**

The making of a particular act into an offence and prescribing punishment for it is an essential legislative function and cannot be delegated by the legislature to the executive. However, if the legislature lays down the standards or principles to be followed by the executive in defining an offence and provides the limits of penalties, such delegation is permissible.

## **TAXING STATUTES**

### **CONSTITUTIONALITY OF DELEGATION OF TAXING POWER**

Power to tax is an inherent power of any state. It is also considered as an essential legislative function. Power to tax can be exercised not only for raising revenue of the state but also for regulating social, economic and political structure of the country. Therefore, the delegation of taxing power by the legislature deserves special attention for stop the permissible limits of a valid legislation of taxing power can be comprehended by analysing the following decisions of the Supreme Court.

1. *Orient Wvg. Mills Private Ltd. v. Union of India* AIR1963 SC in this case the supreme court upheld the constitutionality of the delegation of power to the government to exempt any exercisable item from the duty.
2. *Banarasi Das Bhanot v. State of M. P.* AIR 1958 SC, the delegation of power to the government to bring certain sale transaction under the Central Provinces and Berar Sales Tax Act,1947 was held against the challenge of excessive delegation.
3. *Devi Das v. State of Punjab* 1967 SC the delegation of power to the executive to determine the rate of tax between the maximum and minimum laid down in the enabling Act was upheld. The terminal tax on Railway passengers Act, 1958 authorised the executive to import sales tax at rate between 1% to 2% the court held that the discretion in fixing the tax rate is too limited to hold it to the excessive delegation.
4. *MCD v. Birla cotton spinning and weaving Mills* AIR 1968 SC in this case power delegated to the corporation to impose electricity tax without prescribing any maximum limit was held on the ground that corporation is also representative and responsive body which stands a guarantee against misuse of power.
5. *Corpn.of Calcutta v. Liberty Cinema* AIR 1965 in the same manner, in this case the constitutionality of the delegation of power to the corporation to levy a licence fee on cinema at such a rate as may be prescribed by the corporation was upheld.
6. *Cantonment Board v. Western Indian theatres Ltd.* AIR 1954 the power given to the corporation (of the city of Pune), in terms very wide, to levy “any other tax” came to be considered from the point of view of abdication of Legislative function. The negation of this argument was based on the key words of limitation contained therein namely “for the purpose of the Act”, and it was held that this provide sufficient guidelines for the imposition of the tax.
7. *Jullunder Rubber Goods Manufacturers Association v. Union of India* 1969 SCC, the court in this case upheld the constitutionality of Section 12 of the Rubber Act, 1947 which empowered the rubber board to levy an excise duty either on producers of rubber or the manufacturers of rubber goods. The court negated the challenge of excessive delegation on the ground of inherent checks on the exercise of such power, namely, the representative character of the board and the control of the Central Government. The Act had provided that tax can be levied only according to the rules made by the government subject to the laying procedure.
8. *Avinder Singh v. State of Punjab* 1979 SCC in this case, the supreme court upheld the Constitutionality of delegation of taxing power even in the face of a board statement which was considered as sufficient guidelines. The State of Punjab acting under Section 90(4) of the Punjab Municipal Corporation Act, 1976 required various municipality to impose a tax of rupees 1 per



bottle of foreign liquor. On the failure of the municipalities to take an action in the matter, the Government of Punjab compose the same tax. The power to impose tax was challenged on the ground of excessive delegation. The contention was rejected on the ground that the words “for the purpose of the Act” lay down sufficient guidelines for the imposition of the tax. Section 90(2) of the impugned Act enables the Corporation to Levy “any other tax” which the state legislature has the power to impose under the constitution. Sub-Section (3) leaves the rate of Levy to the determination of the State Government. Sub-Section (5) empowers the State Government to notify the tax which the corporation shall levy. The court observed that these provisions show that the Levy of taxes shall be only “for the purpose of the Act”, an expression which sets a ceiling on the total Quantum that may be collected and also canalises the objects for which levies can be spent and, therefore, it provides a sufficient guideline. Constitutionality of delegation was reinforced by the argument of responsive and representative character of Municipal Corporation.

Applying the same principle, the supreme court in *Darshan Lal Mehra v. Union of India* 1992 SCC held that Section 172 (2), U P Nagar Mahapalika Adhiniyam, 1959 as constitutional. This Section had authorised the municipalities to impose tax mentioned in the Act “for the purpose of Act”. The court held that the words “for the purpose of the Act” lays down sufficient policy for the guidelines of the municipalities to impose tax and, therefore, so long as the tax has reasonable relation to the purpose of the Act, the same cannot be held to be excessive delegation. It may be pointed out that even in the USA, courts have made an exception in favour of municipality on the question of constitutionality of delegated legislation.

With regard to delegation in taxing legislation, the following principles may be treated as well settled principles.

1. The power to impose a tax is essentially a legislative function. Under Article 265 of the Constitution no tax can be levied or collected saved by the authority of law and here law means law enacted by the competent legislature and not made by the executive. Therefore, the legislature cannot delegate the essential legislative function of imposition of tax to an executive authority.
2. Subject to the above limitation, a power can be conferred on the government to exempt a particular commodity from the levy of taxes. A power may also be delegated to bring certain commodities under the levy of tax.
3. The power to fix the rate of tax is a legislative function, but if the legislative policy has been laid down, the said power can be delegated to the executive.

4. It is open to the legislature or executive to select different rates of tax for different commodities.
5. Commodities belonging to the same category should not, however, be subjected to different and discretionary rates in the absence of any rational basis.
6. Needs of the taxing body is not a test for determining whether the guidelines, was furnished by the legislature in exercising power of tax.
7. The circumstances that the affairs of the taxing body (panchayats, municipality, corporations etc.) are administered by the elected representatives responsible to the people is wholly a irrelevant and immaterial in determining whether the delegation legislation is excessive or otherwise.
8. Taxing statute should be construed strictly. If a provision is ambiguous, the interpretations that favour the assesses should be accepted.
9. A distinction, however, should always be made between charging provisions and machinery provision. Machinery provisions should be construed liberally so as to make charging provisions effective and workable.
10. General principles of delegated legislation applied to taxing statutes also.

### **SUB-DELEGATION**

When a statute confers some legislative powers on an executive authority and the latter further delegates those powers to another subordinate authority or agency, it is called 'sub-delegation.' Thus, in sub-delegation, a delegate delegates further. This process of sub-delegation may go through many stages.

An important illustration of sub-delegation is found in the Essential Commodities Act, 1955. Section 3 of the Act empowers the Central Government to make rules. This can be said to be the first-stage delegation. Under Section 5, the Central Government is empowered to delegate powers to its officers, the State Governments and their officers. Usually under this provision, the powers are delegated to State Governments. This can be said to be the second-stage delegation (sub-delegation). When the power is further delegated by State Governments to their officers, it can be said to be the third-stage delegation (sub-sub-delegation). Thus, under Section 3 of the Essential Commodities Act, 1955, the Sugar Control Order, 1955 was made by the Central Government (first-stage delegation). Under the Order, certain functions and powers are conferred on the Textile Commissioner (second-stage delegation). Clause 10 empowered the Textile Commissioner to authorize any officer to exercise on his behalf all or any of his functions and powers under the Order (third-stage delegation).

## Object

The necessity of sub-delegation is sought to be supported, inter alia, on the following grounds:

1. Power of delegation necessarily carries with it power of further delegation; and
2. Sub-delegation is ancillary to delegated legislation.
3. Any objection to the said process is likely to subvert the authority which the legislature delegates to the executive.

Sub-delegation of legislative power can be permitted either when such power is expressly conferred by the statute or may be inferred by necessary implication.

## Express Power

Where a statute itself authorizes an administrative authority to sub-delegate its powers, no difficulty arises as to its validity since such sub-delegation is within the terms of the statute itself. Thus, in *Central Talkies Ltd. v. Dwarka Prasad*, the U.P. (Temporary) Control of Rent and Eviction Act, 1947 provided that no suit shall be filed for the eviction of a tenant without permission either of a District Magistrate or any officer authorized by him to perform any of his functions under the Act. An order granting permission by the Addl. District Magistrate to whom the powers were delegated was held Valid.

On the other hand, in *Allingham v. Minister of Agriculture and fisheries*, AIR 1948 under the relevant statute, the committee was empowered by the Ministry of Agriculture to issue directions. The committee Sub-delegated its powers to its subordinate officer, who issued a direction which was challenged. The court held that Sub delegation of power by the committee was not permissible and the direction issued by the subordinate officer was there for ultra-virus.

Similarly, in *Ganpati Singhji v. State of Ajmer*, AIR 1955 the parent Act empowered the chief commissioner to make rules for the establishment of proper system of conservancy and sanitation at fairs. The rules made by the Chief Commissioner, however empowered the district magistrate to device his own system and see that it was observed. Supreme Court declared the rules ultra-virus as the parent Act conferred the power on the Chief Commissioner and not on the District Magistrate and therefore the action of the chief commissioner sub-delegating that power to district magistrate was invalid.

In *A K Roy v. State of Punjab*, AIR 1986 the power to prosecute under the Prevention of Food Adulteration Act, 1954 was conferred on the State Government. The State Government in exercise of delegated legislation namely Prevention of Food Adulteration (Punjab) Rules, 1958

delegated the said power to food authority. The Food authority by issuing a notification sub delegated the power to Food Inspector, who prosecuted the accused. The Supreme Court held that sub delegation unauthorised and squashed the notification. “Sometimes, statues permit sub-delegation to authorities or officers not below a particular rank or in a particular manner only. As per settled law if the statute direct that certain acts shall be done in a specified manner or by a specified for certain persons performance in any other manner then the specified or by any other person that one of those named is impliedly prohibited”.

In other words, where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.

In *Ajaib Singh v. Gurbachan Singh* AIR, 1965 under the relevant statute the Central Government was empower to make rules for the detection of any person by an authority not below the rank of District Magistrate. Where the order of detention was passed by an Additional District Magistrate the action was held bad again. Where the law lays down Mode, Manner or method of exercise of power of sub delegation, it would be exercised by the said mode itself. Thus, if sub delegation is to be made through regulations, it cannot be affected by passing a resolution.

In *Barium Chemicals Limited v. Company Law Board* AIR, 1967 the rules framed by the Central Government empowered the chairman to distribute the business of board among himself as well as other members. The chairman passed an order vesting certain powers in him alone the Supreme Court by a majority of 3:2 upheld the said Act. In a dissenting judgement it was observed that "The statute having permitted the delegation of powers to the board only as the statutory authority, the power so delegated have to be exercised by the board and not by its components".

### **Implied Power**

What would happen if there is no specific or express provision in the statute permitting sub-delegation? The answer is not free from doubt.

In *Jackson v. Butterworth*, All ER 1948, Scott, L.J. held that the method (of sub-delegating power to issue circulars to local authorities) was convenient and desirable, but the power to sub-delegate was, unfortunately, absent. The other view, however, is that even if there is no provision in the parent Act about sub-delegation of power by the delegate, the same may be inferred from necessary implication.

Griffith rightly states, “if the statute is so widely phrased that two or more ‘tiers’ of sub-delegation are necessary to reduce it to specialized rules on which action can be based, then it may be that the courts will imply the power to make the necessary sub-delegated legislation.”

In *United States v. Barenco*, 1943 the parent Act conferred on the President the power to make regulations concerning exports and provided that unless otherwise directed the functions of the President should be performed by the Board of Economic Warfare. The Board sub-delegated the power to its Executive Director, who further sub-delegated it to his assistant, who in turn delegated it to some officials. The court held all the sub-delegations valid.

### **Criticisms**

The practice of sub-delegation has been heavily criticized by jurists. It is well established that the maxim *delegatus non potest delegare* (a delegate cannot further delegate) applies in the field of delegated legislation also and sub-delegation of power is not permissible unless the said power is conferred either expressly or by necessary implication. The author De Smith says, “there is strong presumption against construing a grant of delegated legislative power as empowering the delegate to sub-delegate the whole or any substantial part of the law-making power entrusted to it.”

Bachawat, J. in the leading case of *Barium Chemicals Ltd. v. Company Law Board* states: “The naming of a delegate to do an act involving a discretion indicates that the delegate was selected because of his peculiar skill and the confidence reposed in him, and there is a presumption that he is required to do the act himself and cannot redelegate his authority.” It is also said, ‘sub-delegation at several stages removed from the source dilutes accountability of the administrative authority and weakens the safeguards granted by the Act. It becomes difficult for the people to know whether the officer is acting within his prescribed sphere of authority. It also transfers power from a higher to a hierarchically lower authority. It is, therefore, necessary to limit in some way the degrees to which sub-delegation may proceed.’

Finally, there are serious difficulties about publication of sub-delegated legislation. Such legislation, not being an Act of Legislature, there is no general statutory requirement of publicity. ‘Though casually made by a minor official, sub-delegation creates a rule and sets up a standard of a conduct for all to whom the rule applies. No individual can ignore the rule with impunity. But at the same time the general public must have access to the law and they should be given an opportunity to know the law. In case of such delegated and sub-delegated legislation, proper publication is lacking.

### **JURISPRUDENCE OF DELEGATED LEGISLATION EMERGING FROM THE DECISIONS.**

1. The power of delegation is a constituent element of legislative power as a whole under Article 245 of the Constitution and other relative articles. Delegation of some part of legislative power has become a compulsive necessity due to the complexities of modern legislation.
2. Essential legislative functions cannot be delegated by the Legislature.
3. Essential legislative functions mean laying the policy of the Act and enacting that policy into a binding rule of conduct. In other words, the legislature must lay down legislative policy and purpose sufficient to provide a guideline for administrative rule-making. The policy of law may be express or implied and can be gathered from the history, Preamble, title, scheme of the Act or object and reason Clause, etc.
4. After the legislature has exercised the essential legislative functions, it can delegate non-essentials, however numerous and significant they may be.
5. In order to determine the Constitutionality of the delegation of Legislative powers, every case is decided in the special sitting.
6. Courts travelled to the extreme in holding every broad general statement as sufficient policy of the Act to determine the question of Constitutionality.
7. There are various forms of Administrative rule-making. However, the parameter for determining the question of constitutionality is the same, namely the legislature must lay down the policy of the Act.
8. Delegated legislation must be consistent with the parent Act and must not violate legislative policy and guidelines. Delegatee cannot have more legislative powers than that of the delegator.
9. Sub-delegation of Legislative powers in order to be valid must be expressly authorised by the parent Act.
10. The delegated legislation in order to be valid must not unreasonable must not violate any procedural safeguards if provided in the parent Act.
11. In determining the validity of delegated legislation, if it is within the competence of the authority, motive of the delegated legislation is not taken into account.
12. When the law allows delegation of Administrative power by an officer to another officer subordinate to him, he does not divest himself of all the powers. The delegating authority will retain not only the power to revoke the grant but also the power to act con-currently on the matters within the area of delegated authority, except insofar as it may already have bound himself by an act of the delegate.

13. While deciding on the constitutionality of delegated legislation, court may take into consideration relevance of context and background in which power of rule-making has been exercised.
14. Court has imported the principle of "proportionality" in determining the constitutionality of delegated legislation especially in cases involving serious violation of public interest where this new doctrine may produce better results.
15. If the parent Act is repealed, notifications issued under it would also stand repealed unless saved by the repealing Act.
16. Rules and regulations validly made by the administrative authority become part of the parent Act.
17. Court decision cannot be nullified by the administrative authority by changing its rules. It would amount to contempt of court.
18. Power to repeal and amend (in essential respect) cannot be delegated.

## **DELEGATED LEGISLATION (CONTROL AND SAFEGAURDS)**

### **Introduction:**

It is doubtful whether Parliament itself has fully realised how extensive the practice of delegation has become, or the extent to which it has surrendered its own functions in the process, or how far it is really the practice might be abused.

Today the question is not whether delegated legislation is desirable or not, but it is what controls and safeguards can and ought to be introduced, so that the rule making power conferred on the administration is not misused or misapplied.

Justice Subbarao observes that, it is for a court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the liberal construction should not be carried by the courts to the extent of always trying to discover dormant or latent legislative policy to sustain an arbitrary power conferred on the executive authorities. It is the duty of the court to strike down without any hesitation any blanket power conferred on the executive by the Legislature.

Whatever prejudices might have existed against delegated legislation in the past, today it has come to stay. At present, in almost all countries, the technique of delegated legislation is resorted to and some legislative powers are delegated by the legislature to the executive. It must be

conceded that in the present-day legislative powers can validly be delegated to the executive within permissible limits. At the same time, there is inherent danger of abuse of the said power by executive authorities. The basic problem, therefore, is that of controlling the delegate in exercising his legislative powers.

It has been rightly said that one has to find out a middle course between two conflicting principles; one permitting very wide powers of delegation for practical reasons while the other that no new legislative bodies should be set up by transferring essential legislative functions to administrative authorities. Delegated legislation has become inevitable but the question of control has become crucial.

The control must be introduced at two stages:

- First, at the source, i.e. the safeguards must be provided when the legislature confers the legislative power on the executive.
- Second, some safeguards must be provided in case of misuse or abuse of power by the executive.

**Controls over the delegated legislation may be divided into three categories:**

1. Judicial control;
2. Legislative control, and
3. Other controls.

## **1. JUDICIAL CONTROL**

In India Judicial review of Administrative rule-making is subject to normal rules governing the review of Administrative action. Nevertheless, the principles on which the Constitutionality of a statute is judged and that of subordinate legislation are different. A subordinate legislation could not enjoy the same degree of immunity as a legislative Act would. This judicial review of administrative rule-making cannot be foreclosed in any manner by the enabling Act. It was held in the *State of Kerala v. Unnikrishnan* 2007 SSC, Judicial review of Administrative rule-making cannot be a foreclosed in any manner by the enabling Act.

In the *State of Kerala v. KMC Abdullah and Co.* AIR 1965 SC held that the validity of the rules can still be challenged even in the face of such a phrase as "shall not be called in question in any court" in the enabling Act.

In the same manner in *General Officer Commanding-in- Chief v. Subhash Chandra Yadav*, 1988 SCC, the supreme court held that an Act providing that rules made thereunder on publication in official Gazette would be "as if enacted" In the Act, cannot take away judicial review.



### 1.1. **Constitutionality of the parent Act**

There is always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear so as to be free from doubt; "to doubt the constitutionality of law is to resolve it in favour of its validity. Where the validity of a statute is questioned and there are two interpretations one of its will make the law valid and the other void, the former must be preferred and the validity of the law upheld. In pronouncing on the Constitutional validity of a statute the court is not concerned with the wisdom or unwisdom, the justice or injustice of the law. If that which is passed into law, is within the scope of power conferred on legislature and violates no restrictions on that power, the law must be upheld whatever a court may think of it.

In, the scheme of judicial control of delegated legislation the first question which may arise is whether the parent statute under which legislative powers have been delegated to the administration is itself Constitutional or not, for if the delegating statute itself is unconstitutional, then the delegated legislation a emanating there under will also be invalid.

The parent Act may be unconstitutional on several Grounds example

1. Excessive delegation or
2. Breach of Fundamental Rights or
3. On any other ground such as Distribution of powers between the Centre and States.

### 1.2. **Constitutionality of Delegated Legislation**

There is a presumption in favour of constitutionality of statutes as well as delegated legislation and it is only when there is clear violation of Constitutional provision for of the parent statute in the case of delegated legislation beyond reasonable doubt that the court should declare it to be unconstitutional.

The courts may be asked to consider the question of constitutionality of delegated legislation itself. It is quite possible that the parent Statute may be Constitutional the enabling delegated legislation may be in conflict with some provision of the Constitution. For example, delegated legislation may be in conflict with fundamental right guaranteed by the Constitution.

A few examples may be mentioned herein to illustrate the point:

- i) In *Dwarka Prasad Laxmi Narain v. State of Uttar Pradesh* AIR, 1954 a few provisions of UP Coal Control Order, 1953 made under Section 3(2) of Essential Supplies Act, 1946 were declared ultra-virus as infringing Art. 19 (1)(g), a fundamental right guaranteed by the Constitution.

ii) In *Rashid Ahmed v. Municipal Board*, 1950 certain bye laws made by a municipality were held bad under article 19 (1)(g).

iii) In *Narendra Kumar v. Union of India* 1960 the Supreme Court specifically considered the point whether the question of unconstitutionality of delegated legislation made under a valid Act, could be raised or not. The Non- Ferrous Metal Order, 1958 was made under the Essential Commodities Act, 1955.

In *Hari Shankar Bagla v. State of Madhya Pradesh* AIR, 1954 the validity of Essential Commodities Act, had been upheld. The question in *Narendra* now was whether the constitutional validity of the order made under the Act could be canvassed under Art. 19(1)(g). The court held that though law may not be unconstitutional, an order made there under may yet be challenged under the constitution, because the law could not be presumed to authorise anything unconstitutional.

iv) In *Air India v. Nergesh Meerza* AIR, 1981 is the Supreme Court declared certain regulations pertaining to the conditions of service of air hostess in India, and undertaking of the Central Government as discriminatory under Art. 14 of the Constitution.

v) The Bar Council made a rule under the Advocates Act, barring enrolment of a person as an advocate if he was engaged in any other profession. The rule was declared valid as it did not infringe Art.14 of the Constitution.

### 1.3 Doctrine of Ultra Vires

‘Ultra vires’ means beyond power or authority or lack of power. An act may be said to be ‘ultra vires’ when it has been done by a person or a body of persons which is beyond his, its or their power, authority or jurisdiction. ‘Ultra vires’ relates to capacity, authority or power of a person to do an act. It is not necessary that an act to be ultra vires must be illegal. The act may or may not be illegal. The essence of the doctrine of ultra vires is that an act has been done in excess of power possessed by a person.

Delegated legislation does not fall beyond the scope of judicial review and in almost all democratic countries it is accepted that courts can decide the validity or otherwise of delegated legislation mainly applying two tests:

1. Substantive *ultra vires*; and
2. Procedural *ultra vires*.

## 1. SUBSTANTIVE ULTRA VIRES

When an Act or legislation is enacted in an excess of power, conferred on the Legislature by the Constitution, the legislation is said to be ultra vires the Constitution. On the same principle, when a subordinate legislation goes beyond what the delegate is authorized to enact (and exceeds over conferred on it by the Legislature), it acts ultra vires. This is known as substantive ultra vires.

Substantive ultra vires means that the delegated legislation goes beyond the scope of the authority conferred on it by the parent statute or by the Constitution. It is a fundamental principle of law that a public authority cannot act outside the powers; i.e. ultra vires, and it has been rightly described as the ‘central principle’ and ‘foundation of large part of administrative law.’ An act which, for a reason, is in excess of power is ultra vires.

As Schwartz states, “If an agency acts within the statutory limits (intra vires), the action is valid; if it acts outside it (ultra vires), it is invalid. No statute is needed to establish this; it is inherent in the constitutional position of agencies and courts.”

### **Circumstances**

A delegated legislation may be held invalid on the ground of substantive ultra vires in the following circumstances:

- \*where the parent Act is unconstitutional
- \* Where parent Act delegates essential legislative functions;
- \*Where delegated legislation is inconsistent with general law;
- \*Where delegated legislation is unconstitutional
- \*Where delegated legislation is inconsistent with parent Act;
- \*Unreasonableness;
- \*Mala fide (Bad faith);
- \*Sub-delegation;
- \*Exclusion of judicial review;
- \*Retrospective effect;

### **1. Where Parent Act is Unconstitutional**

For delegation to be valid, the first requirement is that the parent Act or enabling statute by which legislative power is conferred on the executive authority must be valid and constitutional. If the delegating statute itself is ultra vires the Constitution and is bad, delegated legislation is necessarily bad. Under the Defence of India Act, 1939, the Central Government was empowered to make rules for requisition of immovable property. But the subject of requisition of immovable property was not within the field of the Federal Legislature. On that ground, the rule was held invalid (*Tan Bug Taim v Collector of Bombay*, AIR 1946).

In *Chintamanrao v. State of M.P.*, the parent Act authorized the Deputy Commissioner to prohibit manufacturing of bidis in some areas during certain periods. The order passed by the Deputy Commissioner under the Act was held ultra vires inasmuch as the Act under which it was made violated the Fundamental Right to carry on any occupation, trade or business, guaranteed by Article 19(1)(g) of the Constitution.

## **2. Where parent Act delegates essential legislative functions**

It is a well settled principle of Administrative Law that primary and essential legislative functions must be performed by the Legislature itself and they cannot be delegated to any other organ of the State. To put it differently, under the scheme of our Constitution, a legislature cannot create, constitute or establish a parallel Legislature.

## **3. Where delegated legislation is inconsistent with parent Act**

The validity of delegated legislation can be challenged on the ground that it is ultra vires the parent Act or enabling statute. It is an accepted principle that delegated authority must be exercised strictly within the authority of law. Delegated legislation can be held valid only if it conforms exactly to the power granted.

In *Indian Council of Legal Aid & Advice v. Bar Council of India*, a rule was framed by the Bar Council barring enrolment as advocates of persons who had completed 45 years of age. The parent Act enabled the Bar Council to lay down conditions subject to which an advocate 'shall have right to practice.' Declaring the rule ultra vires, the Supreme Court held that the Bar Council can make the rule only after a person is enrolled as an advocate, i.e. at post-enrolment stage. It cannot frame a rule that is barring persons from enrolment. The rule was thus inconsistent with the parent Act.

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exercised strictly within the authority of law. Delegated legislation can be held valid only if it conforms exactly to the power granted.

Under English law delegated legislation may be struck down on the ground that it infringes the parent Act. Thus, where, in exercise of power under the parent Act, the executive framed certain regulations in order to discourage Asylum claims by migrants, it was held that the regulations were ultra vires since they rendered the provisions of the Act nugatory.

This principle is accepted in India also it is well settled that the rule making power conferred by the parent Act does not enable rulemaking authority to make a rule which may travel beyond the scope of the Act or may be inconsistent with or repugnant to the enabling Act. If the rule cannot be reconciled with the parent Act, it must be struck down. This principle was laid down in *Chandra Bali v. R.*, AIR 1952.

In *Mohd. Yasin v. Town Area Committee* AIR 1952 and in *State of Karnataka v. Ganesh kamath*, 1983 SCC, under the parent Act, the municipality was empowered to charge fee only for the use and occupation of some property of the committee, but the town area committee framed bye-laws and imposed levy on wholesalers irrespective of any use or occupation of property by them. Supreme Court held that the bye laws were beyond the powers conferred on the committee and were ultra-vires.

In *Kunj Bihari Bihari Lal vs State of H. P.* 3 2000 SCC., the parent Act H.P. Ceiling on Land Holdings Act, 1972, conferred on the state government power to make rules "for carrying out purpose of the Act". Though the Act excluded from the operation of the Act "Tea Estate", rules (delegated legislation) sought to include tea plantation and prohibited transfer of such land. The rule was held ultra-vires and was struck down.

Even where the power to make delegated legislation is in subjective terms and allows the administrative agency to make rules "as appear to it to be necessary or expedient for giving effect to the provisions of the Act", the discretion is neither unfettered nor beyond judicial scrutiny. The court has power to decide the validity for vires of such provision.

The question when can a bye-law or any other delegated legislation be said to be inconsistent with or repugnant to the parent Act or any general law and therefore, bad. In *White v. Morley* 1899 Q B "A delegate is not entitled to exercise powers in excess or in contravention of the delegated powers. If any order is issued or framed in excess of powers delegated to the authorities, such power would be illegal or void". Channel LJ stated: "A bye-law is not bad because it deals with something that is not dealt with by the general law. But it must not alter the general law by

making that lawful which the general law makes unlawful; or that unlawful which the general law makes lawful”.

Whether a particular piece of delegated legislation is in excess of power of subordinate legislation conferred on the delegate has to be determined with reference to specific provisions contained in the relevant statute conferring the power to make the rule regulation bye laws extra and also the object and purpose of the Act as can be gathered from various provisions of the enactment.

In *State of M.P. v. Bholu* SCC 2003 Supreme Court upheld the validity of rule 3 of the M P Prisoners Release on Probation Rules, 1964 providing that a prisoners convicted under Section 396 of the penal code 1860 (IPC) would not be eligible for release on probation. It was held that classification of offenders on the basis of nature and gravity of offences cannot be said to be arbitrary and unreasonable.

In *Ajay Canu v. Union of India*, SCC 1988, Rule requiring compulsory wearing of helmet by persons driving two-wheeler would not be held arbitrary discriminatory for imposing and reasonable restriction on the fundamental right guaranteed under article 19 (1)(d) of the constitution.

#### **4. Where delegated legislation is inconsistent with General law**

A subordinate legislation, apart from being intra vires the Constitution and consistent with the parent Act, must also be in consonance with general law, i.e. any other law enacted by the Legislature. This is based on the principle that a subordinate or delegated legislation made by the executive cannot be contrary to the law of the land.

#### **5. Where delegated legislation is unconstitutional**

Sometimes a parent Act or delegating statute may be constitutional and valid and delegated legislation may be consistent with the parent Act, yet the delegated legislation may be held invalid on the ground that it contravenes the provisions of the Constitution. It may seem paradoxical that a delegated legislation can be struck down on this ground because if the parent Act is constitutional and delegated legislation is consistent with the parent Act, how can the delegated legislation be ultra vires the Constitution? It was precisely this argument which the Supreme Court was called upon to consider in *Narendra Kumar v. Union of India*. The Supreme Court held that even though a parent Act might not be unconstitutional, an order made thereunder (delegated legislation) can still be unconstitutional and can be challenged as violative of the provisions of the Constitution.

In *Hindustan Times v. State of U.P.*, Parliament, by an Act provided pension to working journalists. The State Government, by executive instructions-imposed levy on government advertisements on newspapers and deducted such levy from pension fund of working journalists. The directive of the State Government was held beyond legislative competence and ultra vires the Constitution.

## 6. Unreasonableness

The test of unreasonableness has been, applied in Britain to the bye laws made by a municipal corporation. The court might well take the position that the legislation never intended to give authority to make unreasonable rules, and they are, therefore, ultra vires.

In *Kruse v. Johnson* 1898 2 Q B, laying down the proposition, Lord Russel, however, gave somewhat Limited meaning to the term unreasonableness, viz., if bye laws were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, or if they involved such oppressive or gratuitous interference with the right of those subject to them as could find no justification in the minds of reasonable man, then these can be regarded as ultra-vires on the presumption that Parliament never intended to give authority to make such bye laws.

In *Air India v. Nergesh Meerza* 1981 SCC, regulations made by Air India providing for termination of service of an air hostess on her first pregnancy has been held to be the most unreasonable and arbitrary provision which is abhorrent to the notions of civilized society. The ruling in *Yadav v. State of Haryana* AIR1987 SC, also appears to come very close to saying that unreasonable rules would be ultra vires.

The courts however adopt a restrictive view of unreasonableness. The test is not whether the impugned rules are reasonable, but whether these are undesirable. A court does not hold a rule unreasonable merely because it does not like or approve the rule. A rule is held unreasonable if it is “manifestly unjust, capricious, inequitable or partial in operation”. *Rajasthan SRTC v. Bal Mukund Bairwa* 2009 SCC rule authorising a public sector undertaking to dismiss a permanent employee just by giving him a 3 months’ notice without any hearing being given to him has been quashed by the Supreme Court as being unreasonable and arbitrary.

It might also be pointed out that delegated legislation may also be adjudged as unreasonable under Article 14 or 19. Art.14 is been given as expansive interpretation by the courts to cover quite a few aspects of Administrative process.

In *Indian Express Newspapers v. Union of India*, 1985 SCC the Apex Court ruled that subordinate legislation does not enjoy the same degree of immunity as substantive legislation enjoys. 'Unreasonableness' is one of the grounds of judicial review available to test validity of delegated legislation. If a delegate intends to impose a condition, which is unreasonable, it cannot be held legal or valid.

## 7. Mala Fide

Indian Administrative Law is based on the principle that every statutory power must be exercised in good faith. Power to make delegated legislation cannot claim immunity from judicial review if the power has been exercised by the rule-making authority mala fide or with dishonest intention. It may, however, be stated that the decisions of the Supreme Court, are not consistent on the point and there is cleavage of opinion.

## 8. Exclusion of Judicial Review

Quite often, statutes make an attempt to exclude judicial control of delegated legislation, by providing that the rules made under an Act shall not be called in question in any court and they may also provide that the rules made under any Act will have effect as if enacted in the Act. The fundamental question here is whether such provision in the statute would prevent judicial review of delegated legislation under the statute.

In England, this question was examined by the House of Lords in *Institute of Patent Agents v. Lockwood*, 1894 A.C. , in this case, Lord Herschell observed that a clause to the effect that "the rules made under the statute shall have the same effect as if they were contained in this Act" would for all purposes mean that the rule would be part of the Act and for all purposes one has to treat the rule exactly as if they were in the Act. This is known as Herschel Doctrine. However, this rule has been modified in *Minister of Health v. King* 1931 A.C., in this case, the House of Lords held that if the rule or the scheme made under the delegated power was inconsistent with the parent Act, the parent Act would prevail unless the rule or the scheme was incorporated in a subsequent Act of the Parliament.

### Herschel Doctrine in India

The position in India is not very clear. In *Ravalu Shubha Rao v. Income Tax Commissioner*, AIR 1956 SC, it appears that the Supreme Court has adopted the Herschel Doctrine but in *Chief Commissioner of Ajmer v. Radheshyam*, AIR 1957 Supreme Court the Doctrine was



not followed. However, in *Orient weaving Mills v. Union of India*, AIR 1963 the Supreme Court again adapted the Herschel Doctrine. The various High Courts have taken conflicting stands.

In *State of Kerala v. Abdulla and Co.* AIR 1965 SC Justice Shah and Justice Sikri made the following observations: "Power to frame rules is conferred by the Act upon the state government and that power may be exercised within the strict limits of the authority conferred. If in making a rule, the state transcends its authority, the rule will be invalid for statutory rules made in exercise of delegated authority are valid and binding only if made within the limits of authority conferred. Validity of a rule whether it is declared to have effect as if enacted in the Act or otherwise is always open to challenge on the ground that it is unauthorised".

The rule of law has always recognized power of judiciary to review legislative and quasi legislative acts. The validity of a delegated legislation can be challenged in a court of law. As early as 1877 in *Empress v. Burah*, the High Court of Calcutta had declared Section 9 of Act XXII of 1869 ultra vires. Though the decision of the Calcutta High Court was reversed by the Privy Council, neither before the High Court nor before the Privy Council it was even contended that the court had no power of judicial review and, therefore, cannot decide the validity of the legislation.

Sometimes, however, attempts are made by the legislature to limit or exclude judicial review of delegated legislation by providing different modes and methods. Thus, in an Act a provision may be made that rules, regulations, bye-laws made under it 'shall have effect as if enacted in the Act', 'shall be final', 'shall be conclusive', 'shall not be called in question in any court', 'shall not be challenged in any legal proceedings whatsoever' and the like.

## 9. Retrospective operation

It is well-settled that delegated legislation cannot have any retrospective effect unless such a power is conferred on the rule-making authority by the parent Act. The legislature can always legislate prospectively as well as retrospectively subject to the provisions of the Constitution. But the said rule will not apply to administrative authorities exercising delegated legislative power. Some statutes specifically confer power to the rule-making authority to frame rules with retrospective effect.

## 2. PROCEDURAL ULTRA VIRES

When a subordinate legislation fails to comply with procedural requirements prescribed by the parent Act or by a general law, it is known as procedural ultra vires. While framing rules, bye-laws, regulations, etc., the parent Act or enabling statute may require the delegate to observe a

prescribed procedure, such as, holding of consultations with particular bodies or interests, publication of draft rules or bye-laws, laying them before Parliament, etc. It is incumbent on the delegate to comply with these procedural requirements and to exercise the power in the manner indicated by the Legislature.

Failure to comply with the requirement may invalidate the rules so framed. At the same time, however, it is also to be noted that failure to observe the procedural requirements do not necessarily and always invalidate the rules. This arises out of a distinction between mandatory requirements and directory requirements. Generally, non-compliance with a directory provision does not invalidate subordinate legislation, but failure to observe a mandatory and imperative requirement does. “It is a well-settled rule that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.”

### **Procedural Requirements:**

1. Publication
2. Consultation

#### **1. Publication:**

#### **Object:**

It is a fundamental principle of law that ‘ignorance of law is no excuse’ (*ignorantia juris non excusat*). But there is also another equally established principle of law that the public must have access to the law and they should be given an opportunity to know the law. The very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public, in the sense, of course, at any rate, its legal advisers have access to it, at any moment, as of right. In case of an Act made by Parliament this poses little difficulty as it receives sufficient publicity during the introduction of a Bill, printing, reference to a Select Committee and its report thereon, reading before the House or Houses, discussion, voting, final approval of the Bill, radio and newspaper reports thereon, etc. But this is not true in the case of delegated legislation.

### **Directory or Mandatory**

In *Harla v. State of Rajasthan*, the legislation in question passed by Council was neither published nor was it made known to the general public through any other means. The Supreme Court, by applying principles of natural justice, held that its publication was necessary. Again, in

*Narendra Kumar v. Union of India*, S. 3 of the Essential Commodities Act, 1955 required all the rules to be made under the Act to be notified in the Official Gazette. The principles applied by the licensing authority for issuing permits for the acquisition of non-ferrous metal were not notified. The Supreme Court held the rules ineffective.

**Mode of publication:**

A question may also arise about the mode, manner and method of publication. As a rule, a distinction must be drawn between publication of delegated legislation and the mode, manner or method of publication. Even if a requirement of publication is held to be mandatory, the mode or manner of publication may be held to be directory and strict compliance thereof may not be insisted upon.

**Effect of publication:** Once the delegated legislation is promulgated or published, it takes effect from the date of such promulgation or publication.

**Defect in publication:** As already noticed, there is difference between publication of delegated legislation and the mode of such publication. If delegated legislation is not published at all, the defect goes to the root and makes the instrument *non est*, ineffective and of no consequence. But, if it is not published in a particular manner, it would not necessarily make the instrument void. Effect to publish in the manner provided by law would be considered by the court.

**2. Consultation:**

One of the techniques adopted by Legislature to control exercise of power by executive against abuse of power is the process of consultation with affected interests before delegated legislation or statutory instrument is prepared. It is indeed a visible safeguard against possible misuse of power by the rule-making authority.

The term ‘consult’ implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct or, at least satisfactory solution of a problem. It is a process which requires meeting of minds between the parties to consultation on material facts to come to a right conclusion.

**Object:**

An important measure to check and control the exercise of legislative powers by the executive is the technique of consultation through which affected interests may participate in the

rule-making process. This modus operandi is regarded as a valuable safeguard against misuse of legislative power by the executive authorities.

As Wade and Philips remark, “One way of avoiding a clash between department exercising legislative powers and the interest most likely to be affected is to provide for some form of consultation.”

This process of exchange of ideas is beneficial to both: to the affected interests itself insofar as they have an opportunity to impress on the authority their point of view; and to the rule-making authority insofar as it can gather necessary information regarding the issues involved and thus be in a better position to appreciate a particular situation. The Administration is not always the repository of ultimate wisdom; it learns from the suggestions made by outsiders and often benefits from that advice. A consultative technique is useful in balancing individual interests and administrative exigencies. The purpose is to allow interested parties to make useful comment and not to allow them to assert their right to insist that the rule to take a particular form. It acts as an important brake on administrative absolutism.

### **Nature and Scope**

Consultation does not mean consent or concurrence. It, however, postulates full and effective deliberation, exchange of mutual viewpoints, meeting of minds and examination of relative merits of the other point of view. Consultation is not complete unless the parties thereto make their respective viewpoints known to others and examine relative merits of their views. Even when consultation is not a legal requirement, such a step generates greater confidence of the persons who may be affected by an action that may be taken by the authority.

### **Mandatory or Directory**

No hard and fast rule of universal application can be laid down as to when a provision relating to consultation should be held as mandatory and when it should be regarded as directory. As held by the Supreme Court, in absence of the legislation making it plain what the consequences of failure to observe the statutory requirement are, the court should decide the question keeping in view the scope and purpose of the enactment, object sought to be secured by such consultation, intention of making such provision, effect of the exercise of power upon the rights of persons to be consulted, etc.

In *New India Industrial Corporation Limited v. Union of India*, AIR1980, consultation interest infuses law-making process with democratic forms, particularly in what is called bureaucratic legislation. Apart from this, it is an administrative necessity for effective and

meaningful administration is impossible without imaginative administrative process. If the citizens are to receive the advantage of any beneficent measures of the administration, the administrative process should be such that the benefit reaches the citizens in full measure and with expedition. A Consultative technique is useful in balancing individual interest and administrative exigencies the consultative process can be a salutary safeguard against improper use of power of delegated legislation as it infuses democratic norms in bureaucratic legislation.

### **LEGISLATIVE CONTROL /PARLIAMENTARY CONTROL**

It is the function of the Legislature to legislate, but if it seeks to give this power to the executive because of some circumstances, it is not only the right of the Legislature, but also its duty, as principal, to see how its agent (executive) carries out the agency entrusted to it. Since it is the legislature which delegates legislative power to the administration, it is primarily for it to supervise and control the actual exercise of this power and ensure against the danger of its objectionable, abusive and unwarranted use by the administration. Based on this theory, a whole system of Legislative supervision over delegated legislation has come into in India.

It is off-course open to Parliament to confer legislative power upon anyone it likes but, if the Parliament delegates legislative power to any authority example to Executive it must also ensure that the powers are properly exercise by the administration and there is no misuse of authority by the executive. *Arvind Singh v. State of Punjab* 1979 SCC, Krishna Iyer J. rightly stated that parliamentary control over delegated legislation should be a living continuity as a constitutional necessity.

**Object of control:** The underlying object of parliamentary control is to keep watch over the rule making authorities and also to provide an opportunity to criticize them if there is abuse of power on their part. This mechanism is described as "legislative Veto"

Since the risk of abuse of power by the executive is inherent in the process of delegated legislation, it is necessary for the legislature to keep 'close watch' on the delegate. This is much more important in view of the fact that judicial control over delegated legislation is not sufficient enough to keep administrative agencies within the bounds of delegation and there is need and necessity 'political' control in terms of policy, which Parliament may be able to exercise efficiently. The fact is that due to broad delegation of Legislative powers and the generalized standard of control also bold, judicial control has shrunk, raising the desirability and the necessity of parliamentary control.

In US the control of the Congress over delegated legislation is highly limited because neither is the technique of “laying” extensively used nor is there any Congressional Committee to scrutinize it. This is due to the Constitutional structure reservation in that country in which it is considered only the duty of courts to review the legality of Administrative rulemaking. There is even authority that is negative resolution technique so widely used in Britain would be unconstitutional in an, American legislature.

In England due to the concept of parliamentary sovereignty, the control exercised by Parliament over administrative rulemaking is very broad and effective. Parliamentary control mechanism operates through laying techniques because under the provision of the English Statutory Instruments Act 1946, all administrative rulemaking is subject to the control of Parliament through the select committee on statutory instruments. Parliamentary control in England is most effective because it is done in a non-political atmosphere and the three-line whip does not come into operation.

In India parliamentary control of Administrative rulemaking is implicit as a normal Constitutional function because the executive is responsible to Parliament.

### **Modes:**

The legislative control can be effectively exercised by

1. Memorandum on Delegation
2. Laying procedure
  - Direct general control
  - Direct special control
3. Indirect Control / Scrutiny Committees

#### **1. Memorandum on Delegation.**

At the centre, the first step in the process of parliamentary control of delegated legislation is taken at the stage of delegation. A rule of procedure of each house of parliament requires that bill involving proposal for delegation of legislative power shall be “accompanied by a memorandum explaining such proposals and drawing attention of their scope, and stating also whether they are of exceptional or normal character”.

The rule is of an informational nature. The rule is celebratory so far as it goes, for the first stage of supervision arises at the stage of delegation. The Lok Sabha committee on subordinate

legislation has emphasized that the rule is mandatory and the memorandum attached to a bill should give full report and effect of the delegation of power to subordinate authorities, the points which may be covered in the rules, the particulars of subordinate authorities who are to exercise the delegated power, and the manner in which such power is to be exercised, the purpose of the memorandum is to focus the attention of the members of the Parliament to the provisions of the bill involving delegation of legislative power.

The speaker may also refer bills containing provisions for delegation of legislative powers to the committee to examine the extent of such power sought to be delegated.

## **2. Laying procedure**

Direct but general control over delegated legislation is exercised

1. Through, debate on Act contains delegation: Members may discuss anything about delegation including necessity, extent, type of delegation and the authority to whom power is delegated.
2. Through questions and notices: Any member may ask questions on any aspect of delegation of legislative powers, and if dissatisfied can give notice for discussion under Rule 59 of the Procedure and Conduct of business in Lok Sabha Rules.
3. Through moving resolutions and notices in the house: Any member may move a resolution on motion if the matter regarding delegation of power is urgent and immediate, and reply of the government is unsatisfactory.
4. Through vote on grant: Whenever the budget demands of ministry are presented, any member may propose a cut and thereby bring the exercise of rule-making power by that Ministry under discussion.
5. Through a private Member's Bill seeking modification in the parent Act, or through a debate at the time of discussion on the address by the President to the joint session of Parliament, members may discuss delegation. However, these methods are rarely used.

### **Direct Special Control**

This control mechanism is exercised through the technique of laying on the table of the house rules and regulations framed by the administrative authority.

In US, the control of the Congress over the exercise of delegated legislation is feeble; however, it does not mean that the technique of laying is no non-existent. The notable use of this technique was made in the Reorganisation Act of 1939 to 1969, which authorise the President to recognise the executive government by administrative rulemaking. The Acts of 1939 and 1945

provided that the presidential organisation plans were not to have any effect for a specified period during which they could be honoured by the Congress through a concurrent resolution of both the houses. Classic annulment through this process has been the rejection by the Senate of President Truman's plan to abrogate the provision of the Taft-Hartley Act, 1947 providing for a separation of functions between the National Labour Relations Board and the independent office of General Council.

In England the technique of laying is very extensively used because all the administrative rule making is subject to the supervision of Parliament under the Statutory Instrument Act, 1946 which prescribes a time table the most common form of provision provides that the delegated legislation comes into immediate effect, but is subject to annulment by an adverse resolution of either House. Other provisions for laying defer the operation of delegated legislation for a specified period require affirmative resolution for the law to be in force before the delegated legislation can operate; allowed the delegated legislation to operate immediately, but require affirmative resolution for subsequent continuance in operation; postpone operation until approved by affirmative resolution.

In India, *Atlas Cycle Industries Ltd v. State of Haryana*, 1979 SCC, the Supreme Court noticed that there are three different link clauses which assume different forms depending on the degree of control which the legislature may like to exercise namely as well as the select committee on delegated legislation summarised the procedure under seven heads:

1. Laying without further procedures.
2. Laying subject to affirmative resolution.
3. Laying subject to negative resolution.
4. Laying in draft subject to negative resolution.
5. Laying in draft subject to an affirmative resolution.
6. Laying with deferred operation.
7. Laying with immediate effect but subject to annulment.

**1. Laying with no further direction:** In this type of laying, the rules and regulations come into effect as soon as they are laid. It is simply to inform the house about the rules and regulation.

**2. Laying subject to negative resolution:** in this process the rule come into effect as soon as they are placed on the table of the house, shall cease to have effect if negated by a resolution of the house.



**3. *laying subject to affirmative resolution:*** this technique may take two shapes:

- a) that the rules shall have no effect or force unless approved by a resolution of each house of the Parliament
- b) that the rules shall cease to have effect unless approved by an affirmative resolution.

In these both processes, it is the duty of the government to move resolution.

**4. *laying in draft subject to negative resolution:*** such a provision provides that when any Act contains provision for this type of Laying the draft rules shall be placed on the table of the house and shall come into force after 40 days from the date of laying unless disapproved before that period.

**5. *Laying in draft subject to an affirmative resolution:*** In this type of laying, the instruments or draft rules shall have no effect unless approved by the house.

**6. *laying with deferred operation:*** the requirement of laying is linked with postponement of operation of the rules and thus parliament gets more control.

**7. *laying with immediate effect but subject to annulment:*** here the rules come into force when laid before parliament, but cease to be in operation if disapproved by it within the specified period. This is the most common form of Parliamentary control and is known as the negative procedure.

The earliest instance of the laying provision found in India is in the Immigration Act, 1922. Between (1929 to 1939) only 3 Act made provision for laying, namely, the Insurance Act 1938, Agriculture Product Act, 1938 and The Motor Vehicles Act, 1939 after a gap of 5 years, The Central Excise Act and Salt Act, 1944 and the Aircraft Act, 1934 made provisions that the rules framed there under must be laid on the table of the house. Only in a few Acts that is Insurance Act, 1938 and Aircraft Act, 1944 provision was made for the laying subject to a negative resolution. The negative resolution procedure differs from its counterpart in England as in India it includes the power of modification also. Three other Act, namely, Representation of The Peoples Act, 1951; All India Services Act, 1951 and Indian Development and Regulation Act, 1951 contain only the right of modification of the rules and not annulment. The period during which the rules could be modified varies from 7 day to 1 month. It may be noted that in England this is a uniform period of 40 days. The Indian Tariff Amendment Act, 1950 provides an illustration where rules are made subject to laying with affirmative resolution.

By the delegated legislation provisions (Amendment) Act, 1983, our Parliament has amended 50 Indian statutes and inserted provisions for laying before State legislature and Parliament where there were no such provisions and in other instances, provided for an annulment or modification within a specified period.

A typical clause read as follows. Every rule prescribed for sanctioned by the central government under this Act shall be laid down as soon as maybe after it is prescribed or sanctioned, before each house of the Parliament, while it is in session, for a total period of 30 days within which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both houses agree in making any modification in the rule or both houses agree that the rule should not have effect, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be: so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

In the State of Uttar Pradesh, an identical provision is made applicable to rule making by the U.P. Government under all the U.P and Central Acts by adopting a convenient method of inserting it in the U.P. General Clauses Act, 1904, thus, making it a rule of uniform application without having to add or amend the individual U.P. or Central Act.

In the absence of any general law in India regulating laying procedure, the scrutiny committee made the following suggestions:

- 1) All Acts of Parliament should uniformly require that rules be laid on the table of the house "as soon as possible".
- 2) The laying period should uniformly be 30 days from the date of final publication of rules.
- 3) The rule will be subject to such modification as the house may like to make.

The highlights of this formula are as follows:

1. This formula requires the rules to be laid down before each house of the Parliament as soon as possible. There is no time-frame within which the rules are to be laid down before the house after their promulgation.
2. The laying procedure envisaged by the above formula is laying with a negative resolution.
3. The rules are to be laid for 30 session days. This period maybe comprised in one session or in two or more successive sessions.
4. Before the expiry of the session immediately following the session or the successive sessions aforesaid, if both Houses agree, they can make any modification in the rules or even annul them.
5. The rules come into force as soon as they are made and the laying procedure takes effect thereafter.
6. If any modification is made in the rules, or they are annulled, by the Houses then the rules operate in the modified form or be of no effect, in the future.
7. If they are annulled then they will cease to exist from the date of annulment.

8. The rules can be annulled or modified only when both houses agree.
9. In this formula, the initiative to move a resolution to annul or modify the rules has to be taken by the members of the House. The government is under no obligation to make any initiative in this regard.
10. In this 'laying' formula, there is a no time frame within which the rules have to be laid before the houses after their promulgation. The phraseology used is "as soon as may be" after the rules are made. In practice, often the rules are laid long after they are made. This reduces the effectiveness of the parliamentary control over delegated legislation. The laying formula as contained in the above provision is regarded as being of directory nature and not mandatory.

### **Failure to lay: Effects**

In England, the position is not clear. In *Bailey v. Williamson*, 1873 8 QB, the condition of laying was held to be directory. However, the position has changed after passing of the Statutory Instruments Act, 1946 and in *R. v. Sheer Metalcraft* 1954, Q B, the court held that delegated legislation became valid only after it was laid before parliament.

In India also, the position is not free from doubt. In *Express Newspaper (P) Limited v. Union of India*, 1958 AIR SC, the supreme court observed by way of obiter dicta that the provision regarding laying was mandatory. But in *Re Kerala Education Bill*, AIR 1958 SC, the supreme court most emphatically and lucidly observed: After the rules are laid before the legislative assembly, they may be altered or amended and it is then rules as amended become effective.

In *Jan Mohammed Noor Mohammad Bagban v. State of Gujarat* AIR 1966 SC, the court held that the rules made under the Parent Act, were valid, and observed that though the rules were not laid before the legislature, they became a valid from the date on which they were made as the Act did not provide that they could in case be invalidated by failure to place them before the Legislature.

In *M. K. Papiiah and Sons v. Excise Commr.* 1975 SCC, the court held that the rules under the parent Act came into force as soon as they were framed. Negating the contention that the power of Legislature to annul or repeal rules subsequently could not be regarded as a sufficient control over delegated legislation. Mathew J. observed "the dilution of parliamentary watchdogging the delegated legislation may be deplored but, in the compulsions and complexities of modern life, cannot be helped".

Whatever are the consequences of failure to lay it is submitted that the correct answer is to this question depends on the terms relating to a particular laying clause. If the provision relating to

laying is a condition precedent, the requirement of laying must be held to be mandatory and the rules do not come into force until they are laid. In case of "negative Clause", however, the rules come into operation immediately and the provision of laying is generally construed as directory.

### **INDIRECT CONTROL/ SCRUTINY COMMITTEES**

Object: As discussed above, laying on the table has not always been held to be mandatory. Even if that requirement is complied with, mere laying of rules before Parliament would not be of much use, unless the rules were properly studied and scrutinized. And, therefore, with a view to strengthening Parliamentary control over delegated legislation, Scrutiny Committees are established. In India, there are two Scrutiny Committees:

- 1) the Lok Sabha Committee on Subordinate Legislation
- 2) the Rajya Sabha Committee on Subordinate Legislation

This control is exercised by Parliament through its committee. In 1950 the law minister made a suggestion for the establishment of committee of the House on the pattern of the select committee on Statutory Instruments, 1944 to examine delegated legislation and bring to the notice of the house whether administrative rulemaking has exceeded the intention of the Parliament or has departed from it or has affected any fundamental norm for principal.

Such committee known as committee on subordinate legislation of Lok Sabha was appointed on 1st December 1953 the committee consisted of 15 members nominated by the speaker for a period of 1 year, the chairman is appointed by the speaker from amongst the members. If the deputy speaker happens to be member then he shall act as chairman.

In England, the healthy tradition is that the leader of the opposition is always appointed as chairman. The committee has the power to appoint subcommittees and refer any matter for its concentration. It also has the power to compel the attendance of any person and to compel the production of documents and records. The powers of the Indian committees are much wider than its counterpart. In England, the committee can only ask government departments to send memos or to depute a person to appear before it as witness.

According to rule 223 of Lok Sabha rules of procedure, the main function of the committee shall be to examine the following:

1. Whether the rules are in accordance with the general object of the act.
2. Whether the rules contain any matter which could more properly be dealt with in the Act.
3. Whether it contains imposition of tax.

4. Whether it directly or indirectly bars the jurisdiction of the court.
5. Whether it is retrospective.
6. Whether it involves expenditure from the consolidated fund.
7. Whether there has been any justifiable delay in the publication for laying.
8. Whether, for any reason, it requires further elucidation.

This committee has between 1953 and 1961 scrutinized about 5300 Orders and rules, and has submitted 19 reports. There is also a similar committee of the Rajya Sabha which was constituted in 1964. It discharges functions similar to the Lok Sabha committee. The committee on subordinate legislation has made the following recommendations in order to streamline the process of delegated legislation in India:

1. Power of Judicial review should not be taken away or curtailed by the rules.
2. A financial Levy or tax should not be imposed by rules.
3. Language of the rules should be simple and clear and not complicated or ambiguous.
4. Rules should not be given retrospective operation, unless such a power has been expressly conferred by the parent Act, as they may prejudicially affect the vested rights of a person.
5. Legislative policy must be formulated by the legislature and laid down in the statute, and power to supply details may be left to the executive, and can be worked out through the rules made by the administration.
6. Sub delegation in very wide language is improper and some safeguards must be provided before a delegate is allowed to sub delegate his authority to another functionary.
7. Discriminatory rules should not be framed by the administration.
8. Rules should not travel beyond the rule making power conferred by the parent Act.
9. They should not be inordinate delay in making rules by the administration.
10. The defects pointed out to the administration should be declared as soon as possible.
11. The rules framed by the administration and required to be laid before the house by the parent Act should be laid before Parliament as soon as possible, and whenever there is inordinate delay, an explanatory note giving the reasons for such delay should be appended to the rules so laid.
12. The final authority for interpretation of rules should not be with the administration.
13. Rules should contain short titles explanatory notes, references to earlier amendments for convenience of location, ready references and proper understanding.
14. Sufficient publicity should be given to the statutory rules and orders.

In India parliamentary control of Administrative rulemaking is to be made a living continuity as a constitutional necessity, it is necessary that the role of the committees of Parliament must be strengthened, and a separate law like the statutory Instruments Act 1946,

providing for uniform Rules of laying and Publication, must be passed. The committee may be supplemented by a specialised official body to make the Vigilance of Administrative rulemaking more effective.

### **OTHER CONTROLS**

Over and above judicial and parliamentary controls, sometimes other controls and safeguards are also provided. One such safeguard against the abuse of delegated power is to properly and precisely limits the power of the delegate. If the extent of power is not properly defined in the parent Act and the language used is very broad, the executive authority may usurp some powers of the Legislature and may be tempted into unjustified interference with the rights of the individual.

The court also should interpret the provisions of the rules and regulations in such a manner as not to give blanket powers to the executive authority. But it has also been said that it is inadvisable to depend on the good sense of the individuals, however High-placed they may be. It is trite to say that individuals are and do become wise because they occupy the seats of power. Good sense, circumspection and fairness does not go with the post. There is only a complacent presumption that those who occupy High seats have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular, in a society pledged to uphold the rule of law, it would be both an advise and impolitic to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law.

It is also argued that the delegation of power should be conferred only on trustworthy authorities, example Central Government, State governments, accept as these authorities will exercise the power conferred on them in a reasonable manner.

In *Maneka Gandhi v. Union of India*, 1978 Supreme Court has observed it is true that when the order impounding a passport is made by the central government, there is no appeal against it, but it must be remembered that in such a case the power is exercised by the central government itself and it can safely be assumed that the central government will exercise the power in a reasonable and responsible manner. When power is vested in a high authority like the central government, abuse of power cannot be lightly assumed.

In *S.R. Bommai v. Union of India*, 1994 SCC, dealing with the power of president to proclaim emergency, it is necessary to retreat that the court must be conscious while examining

the validity of the proclamation that it is a power vested India highest constitutional functionary of the nation. The court will not lightly presume abuse or misuse.

In collective exercise of power also there is no likelihood of abuse of power. *In K. Ashok Reddy v. Government of India*, 1994 SCC an action of transfer of a judge of a High Court was challenged the decision was based on collective exercise of power by the High Constitutional functionaries on objective Criterion. Treating it as inbuilt safeguard on arbitrariness and bias, the supreme court observed "we have no doubt that the Chief Justice of India acting on the institutional advice available to him is the surest and the safest bet for preservation of the independence of judiciary.

Certain Central Acts provide some additional safeguards also. They empower the State Governments to frame rules, but prior approval of the Central Government is necessary, example Section 17 of the Probation of Offenders Act, 1958. Some statutes empower the government to frame rules subject to previous publication in the Official Gazettes example Section 29 of the Minimum Wages Act, 1948. Sometimes, powers are conferred on the government to frame rules for regulation only after consultation with the affected interest, example Section 59 of the Mines Act, 1952.

Plenary powers of law-making are entrusted to elected representatives. But in reality, the political government, instructed by the bureaucracy gets bills passed through either by the aid or whip or by other methods. Thus, law making has remained, more or less, exclusive prerogative of a small cross-section of elites. It affects not only the quality of the law made by reinforces centralised system of power. There must be, therefore be social auditing by public at large. Constitutional legitimation of unlimited power of delegation to the executive by legislature may, on critical occasions, be subversive of responsible Government and erosive of Democratic order. The system of law-making, therefore needs careful and radical restructuring, if participative, pluralistic government by the people is not to be jettisoned. As, Krishna Iyer J stated, "That prompts us to hint at certain portents to our parliamentary system, not because they are likely now but because society may have to pay the price someday".

Power to make subordinate or ancillary legislation may undoubtedly be conferred upon a delegate, but the legislature must be conferring that power disclose the policy of principles are standards which are to govern the delegate in the exercise of that power so as to set out a guideline. Any delegation which transgresses this limit infringes the constitutional scheme.

## **ADVANTAGES AND DISADVANTAGES OF THE DELEGATED LEGISLATION.**

### **I. ADVANTAGES OF THE DELEGATED LEGISLATION:**

Delegated legislation in the modern welfare state has certain advantages which can be broadly summarised as follows

1. Modern legislators are crowded legislative and other activity do not have time to provide for details, therefore, delegated legislation frees the legislature from concern with details and thus enables it to concentrate its attention upon the enactment of the fundamentals of a policy.
2. Since rules are more easily amended than statutes, it becomes easier to correct mistakes and to meet changing conditions if the difficulty concerns details rather than the basic policy. Thus, delegated legislation brings flexibility to legislation.
3. Modern legislation often deals with the matters of highly technical nature. The members of the Legislature may not have the expert knowledge that is necessary for providing the technical details. Delegated legislation can provide such expert knowledge as is necessary.
4. The administrator is the person who has intimate contact with the problems covered under the legislation. Therefore, if details of working out the policy of the legislation are left to be framed by the administrator, he can, by trial and error, work out the specific regulations best calculated to attain the statutory objectives.
5. In the absence of delegated legislation it is possible that the discretion given to the administration will be very wide. Therefore, it is much better to regulate the discretion given by the statutory generalities by framing specific and concrete rules.
6. In certain circumstances the coming into effect of a particular legislation may be made dependent upon the fulfilment of certain conditions. In such circumstances, given power to the administration to bring into effect a particular legislation may be very useful.
7. In emergencies such as war, serious strikes and economic crisis, there would often not be time to pass an Act, of legislation even if the legislature was in session. Quite often, such a legislature may not be in session. In such circumstances, the rule making powers under an Act laying down broad policies may be very useful. For example, the rule making powers given under the Defence of India Act, 1962, were very useful in regulating the various aspects of the life of the nation with a view to promoting defence measures.



## **II. DISADVANTAGES OF THE DELEGATED LEGISLATION**

Disadvantages of delegated legislation are as follows

1. No Parliament deliberation: the essence of a democratic form of government is that the law passed by the legislature is the outcome of the collective wisdom of the representatives. It is in the celebration of the Parliament and the consequent action and reaction of opinion that makes a lot more acceptable to a community. But, in the case of delegated legislation, the rules are framed in the ante-Chambers of the bureaucrat. Therefore, the benefit of parliamentary deliberation is completely denied to the such rule making process.
2. Public opinion cannot influence: in modern legislative procedure, the draft of a bill is published and is open for public examination and criticism. Therefore by, Parliament can benefit by public criticism. In Delegated legislation, such prior publicity may not be always possible, and therefore, the process can benefit by the public criticism.
3. Private knowledge often denied: the modern system of administration of justice according to law is mostly based on the fiction that everyone is presumed to know the law. Everyone is presuming to know the law because law is certain and is a form which can be easily known. But, in the case of delegated legislation, there may not be either adequate publicity or the clear form of legislation. Further, the vast bulk of rules framed under various statutory enactments make it almost impossible for an ordinary citizen to know the rules.

### **Unit III**

- I. Judicial power of Administration**
- II. Tests to determine when an administrative authority required to act judicially**
- III. Doctrine of Bias**
- IV. Doctrine of Audi Alterum Partem**
- V. Reasoned Decision**
- VI. Exception to Natural Justice**
- VII. Effect of Non – Compliance with rules of Natural justice**
- VIII. Grounds on which decision of quasi-judicial authority can be flagged before Supreme Court**

## **JUDICIAL POWER OF ADMINISTRATIVE AUTHORITIES- Quasi Judicial-Decision making or Adjudicatory power of the administration**

Quasi-judicial implies that the act is not wholly judicial and that it describes not only a duty cast on the executive body or authority to conform to the forms of judicial procedure in performing some acts in exercise of executive power.

‘Quasi-Judicial’ is the appellation applied when an administrative body discharges an adjudicatory/judicial function. When there is a contest (*lis*) between two contending parties, and the authority adjudicates upon the rights of the parties, the authority acts in a quasi-judicial manner. But presence of *Lis* is not always necessary for characterizing the function as Quasi-Judicial. Even when there is no *lis*, and there are no two contending parties before the concerned authority, its function may be characterized as quasi-judicial to act judicially.

In *Ridge v. Baldwin*<sup>29</sup> It was held that the duty to act judicially may arise from the very nature of the function performed by the authority. The ratio in this case was approved by the Constitution Bench of the Supreme Court in the celebrated case of *Maneka Gandhi*.<sup>30</sup>

The authority exercising quasi-judicial power is not bound by guidelines issued by a higher authority and has to take an independent view. A departmental proceeding is a quasi-judicial proceeding and the enquiry officer performs a Quasi-judicial function. An enquiry officer is a Quasi-judicial Authority.

There are two important incidents of a quasi-judicial function:

1. The concerned authority has to observe principles of natural justice.
2. Once a decision has been taken by the concerned authority, it cannot review its own decision unless it has statutory authority to do so.

The character of a decision can be determined from the manner in which the decision is arrived at. Whether an act is judicial or quasi-judicial or purely executive depends on the terms of the particular rules and the nature, scope and effect of a particular power in exercise of which the act may be done and would therefore depend upon the facts and circumstances of each particular case," If the statute is silent the nature of 'the decision must be inferred from the general scheme of the act, its provisions or their objectives.

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<sup>29</sup> 1964 AC 40; (1963)2 All ER

<sup>30</sup> AIR 1978 SC 597

Words like 'is of the opinion ' 'if it appears to be', considers likely to be secured' 'reasonable grounds to believe' are indicative of subjective approach. The decision is executive even though there is a provision for appeal, or a provision making the order subject to confirmation by some other authority. But if the decision involves a determination of issues between a proposal and an opposition involving the respective rights of the parties, the decision is quasi-judicial.

Acts of an administrative authority may be purely administrative or may be legislative or judicial in nature. Decisions which are purely administrative stand on a wholly different footing from judicial as well as quasi-judicial decisions and they must be distinguished. This is a very difficult task. "Where does the administrative end and the judicial begin? The problem here is one of demarcation and the courts are still in the process of working it out."

With the increase of power of administrative authorities, it may be necessary to provide guidelines for the just exercise thereof. To prevent abuse of power and to see that it does not become a 'new despotism,' courts have evolved certain principles to be observed by adjudicating authorities.

To appreciate the distinction between administrative and quasi-judicial functions, we have to understand two expressions

- (i) 'lis', and
- (ii) 'quasi-Lis'

One of the major grounds on which a function can be called 'quasi-judicial' as distinguished from pure 'administrative' is when there is a *lis inter parte* and an administrative authority is required to decide the dispute between the parties and to adjudicate upon the *lis*. *Prima facie*, in such cases the authority will be regarded as acting in a quasi-judicial manner.

Certain administrative authorities have been held to be quasi-judicial authorities and their decisions regarded as quasi-judicial decisions, wherein such *lis* was present, e.g. a Rent Tribunal determining 'fair rent' between a landlord and tenant, an Election Tribunal deciding an election dispute between rival candidates, an Industrial Tribunal deciding an industrial dispute, a Licensing Tribunal granting a licence or permit to one of the applicants.

## Quasi-lis

But it is not in all cases that the administrative authority is to decide a *lis inter partes*. There may be cases in which an administrative authority decides a lis not between two or more contesting parties but between itself and another party. But there also, if the authority is empowered to take any decision which will prejudicially affect any person; such decision would be a quasi-judicial decision provided the authority is required to act judicially.

Thus, where an authority makes an order granting legal aid, dismissing an employee, refusing to grant, revoking, suspending or cancelling a licence, cancelling an examination result of a student for using unfair means, rustication of a pupil, etc. such decisions are quasi-judicial in character.

In all these cases there are no two parties before the administrative authority, 'and the other party to the dispute, if any, is the authority' itself. Yet, as the decision given by such authority adversely affects the rights of a person there is a situation resembling a lis. In such cases, the administrative authority has to decide the matter objectively after taking into account the objections of the parties before it, and if such authority exceeds or abuses its powers, a writ of certiorari can be issued against it. Therefore, Lord Greene, M.R. rightly calls it a 'quasi-lis.'

## Duty to act judicially

The real test which distinguishes a quasi-judicial act from an administrative act is the duty to act judicially, and therefore, in considering whether a particular statutory authority is a quasi-judicial body or merely an administrative body, what has to be ascertained is whether the statutory authority has the duty to act judicially.

The question which may arise for our consideration is as to when this duty to act judicially arises. As observed by Parker, J. "the duty to act judicially may arise in widely different circumstances which it would be impossible, and indeed, inadvisable, to attempt to define exhaustively."

Whenever there is an express provision in the statute itself which requires the administrative authority to act judicially, the action of such authority would necessarily be a quasi-judicial function. But this proposition does not say much, for it is to some extent a tautology to say that the function is quasi-judicial (or judicial) if it is to be done judicially.

Generally, statutes do not expressly provide for the duty to act judicially and, therefore, even in the absence of express provisions in the statutes the duty to act judicially should be inferred from ‘the cumulative effect of the nature of the rights affected, the manner of the disposal provided, the objective criterion to be adopted, the phraseology used, the nature of the power conferred, of the duty imposed on the authority and the other indicia afforded by the statute.

### **Duty to Act Fairly**

Since ‘fairness in action’ is required from Government and all its agencies, the recent trend is from ‘duty to act judicially’ to ‘duty to act fairly.’ ‘Duty to act fairly’ is indeed a broader notion and can be applied even in those cases where there is no lis. It is this concept (‘duty to act fairly’), which has given rise to certain new doctrines, e.g. ‘fair play in action’, legitimate expectations, proportionality etc.

### **Cases**

*Province of Bombay v. Khushaldas S. Advani*<sup>31</sup> was the first leading Indian decision on the point. Under Section 3 of the Bombay Land Requisition Ordinance, 1947, the Provincial Government was empowered to requisition any land for any public purpose “if in the opinion of the Government” it was necessary or expedient to do so. It was contended that the Government while deciding whether requisition was for a public purpose, had to act judicially. The High Court of Bombay upheld the said contention. Reversing the decision of the High Court, the Supreme Court held by a majority that the governmental function of requisitioning property was not quasi-judicial, for the decision was based on the subjective satisfaction of the Government and it was not required to act judicially.

Similarly, in *R. v. Metropolitan Police Commr., ex p. Parker*, a cab driver’s licence was revoked on the ground of alleged misconduct without giving reasonable opportunity to him to rebut the allegations made against him. The court upheld the order on the ground that the licence was merely a permission which could be revoked at any time by the grantor, and in doing so he was not required to act judicially.

### **Test**

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<sup>31</sup>*AIR 1950 SC 222*

No 'cut and dried' formula to distinguish quasi-judicial functions from administrative functions can be laid down. The dividing line between the two powers is quite thin and being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power, one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised.

The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of quasi-judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years, the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.

Whether a particular function is administrative or quasi-judicial must be determined in each case on an examination of the relevant statute and the rules framed thereunder and the decision depends upon the facts and circumstances of the case.

At one time prerogative remedies of certiorari and prohibition were confined to 'judicial' functions pure and simple of public bodies. They both are now available in relation to functions which may be regarded as 'administrative' or even 'legislative.' As it is said, it is not the label that determines the exercise of jurisdiction of the court but the quality and attributes of the decision. "On the whole the test of justiciability has replaced that of classification of function as a determinant of the appropriateness of a decision for judicial review."

When authority required to act judicially- few points for consideration as observed by the Supreme Court of India

1. Lis inter parties- dispute b/w 2 parties. - Associated cement companies v. P.N Sharm, Bhopal gas tragedy case
2. Nature of rights affected (fundamental or civil Rights or legal rights). - *R v metropolitan commissioner*
3. Express/ implied provision in the statute- Statute mandates it. - Eg: revocation of the land allotted by the co-operative Society.

4. The statutory authority has power to act which may be prejudicial to subject.- *Keshav mills co ltd v Union of India* When authority required to act judicially?
5. An authority which possesses the powers of a court -Where authority has a power to summon witnesses, documents, examination on oath pass orders by giving reasons.
6. Adverse effect on rights or interests of parties or disadvantageous to the interests of the public - *Manish dixit& others v State of Rajasthan*
7. The very nature of function that was intended to be performed– adjudication of professional misconduct cases by BCI members. Departmental enquiries require a judicial mind– whereas fixation of price, issuing of license, renewal of license, public Policy matters such as issuance of caste certificate cannot be considered Quasi- judicial function and does not require principles of natural Justice. Auction sale by a company during its winding up proceedings (auction Purchaser and creditor)– given by the labor commissioner in an appeal– postponement of examination during emergent situation Acting judicially- PNJ acting fairly-Basic fairness such as consultation.

### **Quasi-judicial Decision**

The English Courts have treated every administrative act as judicial if it adversely affected any person's right, or as Lord Parker puts it 'entailed penalty'. The Courts for the purpose of granting writs of certiorari or prohibition insisted the requirement of 'duty to act judicially' on the part of the body performing the act. Whenever the Court forgot the paradoxical sense which they invented for 'judicial' they found themselves in difficulty. To say that natural justice must be observed when the function is judicial, and the function is called judicial when natural justice ought to be observed is a circular argument. If every power affecting some person's right is called judicial there is virtually no meaning left for administrative power. The term quasi-judicial was brought into vogue as an epithet for powers which, though administrative, were required to be exercised as if they were judicial, i.e., in accordance with natural justice. The Committee on Minister's Powers emphasized that a judicial decision consists of finding facts and applying law, where as a quasi-judicial decision consists of finding facts and applying administrative policy.

A quasi-judicial decision is, a decision by an executive which has some judicial characteristics but not all. The term quasi-judicial is used in the sense that the power of adjudication is entrusted to a person or body outside the system of ordinary courts. In another sense a quasi-judicial decision is one which involves determination of executive policy rather than law.' The Committee on Minister's Powers suggested that the judicial powers should be conferred



on ordinary courts, save only in exceptional cases where it can be conferred on administrative tribunals.

The nature and character of a decision whether it is quasi-judicial or only executive under a statute depends upon the terms of the statute irrespective of the function whether it has duty and jurisdiction to decide controversies as a judicial body. A quasi-judicial decision should be objective, based on evidence, by determinate authority who should not have the right to delegate such a function of a judicial character.

## **PRINCIPLES OF NATURAL JUSTICE**

### **Practice and procedure of Administrative Adjudication: Principles of Natural Justice**

- I. Introduction**
- II. Rule against bias – *nemo iudex non causa sua***
- III. Audi alteram partem –the rule of fair hearing**
- IV. Reasoned decisions- Speaking orders**
- V. Post decisional hearing**
- VI. Exceptions to the Rule of Natural Justice**
- VII. Effect of non-compliance of rules of Natural Justice**

#### **I. Introduction**

Rules of Natural justice have developed with the growth of civilization, and the content thereof is often considered as a proper measure of the level of civilization and rule of law prevailing in the community. Natural justice implies fairness, reasonableness, equity and equality. Natural justice is a concept of common law, and it is the common-law world counterpart of the American “Due Process” and civil law “proportionality”.

The expressions natural justice and illegal justice do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this purpose, natural justice is called in aid of legal justice.<sup>32</sup>

Natural justice contents either to change with exigencies of different situations and therefore do not apply in the same manner to situations which are not alike for this stuff they are neither cast in a rigid mold nor can they be put in a legal state jacket.

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<sup>32</sup>*Canara Bank v. Debasis Das, (2003) 4 SCC 557*

Natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and Adjudication to make Fairness a creed of life. It has many colors and shades, many forms and shapes, and save where valid law excludes it, A place when people are adversely affected by acts of any administrative authority. It is the bane of a healthy government, recognized from earliest times and not a mystic testament of a judge made law. Natural justice represents higher procedural principles developed by Judges which every administrative agency must follow when taking any decision adversely affecting the rights of a private individual.

The Principles of natural justice are not fixed, but are flexible and variable. These principles cannot be put in a straight jacket. Their applicability depends upon the context and the facts and circumstances of each case.<sup>33</sup> To sustain the complaint of the violation of principles of natural justice one must establish that he was prejudiced for non-observance of the principles of natural justice. The principles of natural justice are not rigid, immutable or “embodied” rules, but are flexible.

Natural justice is another name for common sense justice and is based on the natural sense of man of what is right and what is wrong. Natural justice is not an articulation of any Saint or Sage. Natural law has inherent rationality which is in conformity with the natural justice and may lead to all right conclusions. Application of the principles of natural justice can improve the quality of administrative decision, enforce rule of law and accountability in the administration and show respect for human dignity. Thus, the basis of all positive law is natural justice.

Rules of natural justice are not codified cannons. They are principles ingrained in the conscience of man. Justice is based at substantially on natural ideals and values which are universal. Natural justice is not circumscribed by linguistic technicalities and grammatical niceties or logical prevarication.

The purpose of Principles of natural justice is prevention of miscarriage of justice and hence observance thereof is the pragmatic requirement of fair play in action.<sup>34</sup> The aim of rules of natural justice is to secure justice or to put it negatively to prevent the miscarriage of justice.

Principles of natural justice which are judge-made rules and still continue to be a classical example of judicial activism were developed by the courts to prevent accidents in the exercise of outsourced power of adjudication entrusted to the administrative authorities. For some three or

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<sup>33</sup>*Russell v. Duke of Norfolk, (1949) All ER 109.*

<sup>34</sup>*Rajasthan State Road Transport Corporation v. Bal Mukund Bairwa , (2009) 4 SCC 299*

four hundred years, Anglo-American courts have actively applied two principles of natural justice. However, this reduction of the concept of natural justice to only two principles should not be allowed to obscure the fact that natural justice goes to “the very kernel of the problem of administrative justice”. The concept entails two ideas:

- i) *Nemo judex in re sua*, i.e., the authority deciding the matter should be free from bias- Rule against bias -No one should be made judge in his own cause, or the rule against bias- *Nemo in propria causa judex, esse debet*.
- ii) *Audi alteram partem*, i.e., a person affected by a decision has a right to be heard- Hear the other party, or the rule of fair hearing, or the rule that no one should be condemned unheard.

These are the two principles now transparency and good governance may be added as a new dimension which includes the duty to pass a speaking order.

The principles of natural justice have enriched law and Constitutions the world over. Though the Indian Constitution does not use the expression natural justice, the concept of natural justice divested of all its metaphysical and theological trappings pervades the whole scheme of the Constitution. The concept of social and economic justice, in the preamble of the Constitution, conceptually speaking, is the concept of fairness in social and economic activities of society, which is the basis of the principles of natural justice.

The duty to act fairly is part of fair procedure, as envisaged under Articles 14 and 21 of the Constitution. Every activity of a public authority or those under public duty or obligation must be informed by reason and guided by public interest. Exercise of jurisdiction by courts in India, in this behalf is not something extra Constitutional. Now the principals of natural justice are firmly grounded in Articles 14 and 21 of the Constitution.

Article 21 of the Constitution, all that fairness which is included in the principles of natural justice can be read into Article 21 when a person is deprived of his life and personal Liberty. In other areas, it is Article 14 which now incorporates the principles of natural justice. Article 14 now applies not only to discriminatory class legislation but also to arbitrary or discriminatory state action. Because violation of natural justice results in arbitrariness, therefore, violation of natural justice is violation of the equality clause of Article 14. This all suggests that now the principles of natural justice are grounded in the Constitution.

The principles of natural justice cannot be wholly disregarded by law because this would violate the fundamental rights guaranteed by Articles 14 and 21 of the Constitution. It was for this reason that the Supreme Court barely saved a Section 314 of the Bombay Municipal Corporation Act, 1888 which empowered the commissioner to get illegal constructions and structures removed or demolished without notice by holding that Section 314 does not contain a command, and only give discretion to the commissioner which must be reasonably exercised.<sup>35</sup>

In *H.L Trehan v. UOI*,<sup>36</sup> the Supreme Court made it absolutely explicit that even when the authority has statutory power to take action without hearing, it would be arbitrary to take action without hearing and, thus, violated of Article 14 of the Constitution.

In *D.K Yadav v. J.M.A. Industries Ltd.*<sup>37</sup>, The Supreme Court further held that even where statutory standing orders empowered the management to terminate the services of an employee, who is denied of livelihood, without hearing, the termination of services would be violative of Article 21 of the Constitution, as such a procedure established by law which deprives a person of his livelihood cannot be said just, fair and reasonable under Article 21 of the Constitution.

### **Situations in which principles of natural justice are attracted**

Principles of natural justice are attracted whenever a person suffers a severe consequence, or a prejudice is caused to him by any administrative action.

Civil consequences mean in fraction of personal or property rights, violation of civil liberties, material deprivation or sufferance of non-pecuniary damages. Loss of legitimate expectation may also attract to the principles of natural justice. Thus, where a person cannot justify his claim on the basis of any law but suffer a prejudice or adverse consequences, he is entitled to the benefit of the principles of natural justice. Therefore, in comprehensive connotation, every administrative action that causes a rigidized or harm or adverse consequences in his civil life, inflicts civil consequences.

In *Dev Dutta v. UOI*,<sup>38</sup> Supreme Court held that do office rule provides for communication

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<sup>35</sup>*Olga Tellies v. Bombay Municipal Corporation*, (1985) 3 SCC 545

<sup>36</sup>(1989) 1 SCC 764

<sup>37</sup>(1993) 3 SCC 259

<sup>38</sup>(2008) 8 SCC 275

of an adverse entry in the confidential report, yet even good entry is also to be communicated if it eliminates a person from promotion. Natural justice which is a facet of Article 14 of the Constitution overwrites all contrary rules.

It is now settled that mere breach of the principles of natural justice is not sufficient for judicial intervention unless such breach also entails avoidable prejudice caused to the person. Nevertheless, the applicability of the principles of natural justice is not dependent on any statutory provisions. Wherever a prejudice is caused the principles are necessarily attracted.

## **II. *Nemo judex in re sua*, i.e., the authority deciding the matter should be free from bias.**

The first principle of natural justice consists of the rule against bias or interest and is based on three maxims:

- ‘No man shall be the judge in his own case’
- ‘Justice should not only be done, but manifestly and undoubtedly be seen to be done.’
- ‘Judges, like Caesar’s wife, should be above suspicion.’

According to the dictionary meaning ‘anything which tends or may be regarded as tending to cause such a person to decide a case otherwise than on evidence must be held to be biased.’ A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias.

The first requirement of natural justice is that the Judge should be impartial and neutral and must be free from bias. He is supposed to be indifferent to the parties to the controversy. He cannot act as Judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. He must be in a position to act judicially and to decide the matter objectively. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undeflected. He should not allow his personal prejudice to go into the decision-making. ‘The object is not merely that the scales be held even; it is also that they may not appear to be inclined.’

If the Judge is subject to bias in favor of or against either party to the dispute or is in a position that a bias can be assumed, he is disqualified to act as a Judge, and the proceedings will be vitiated. This rule applies to the judicial and administrative authorities required to act judicially or quasi-judicially.

Bias means an operating prejudice, whether conscious or unconscious in relation to a party or issue. Such operating prejudice may be the result of a preconceived opinion or a predisposition or a predetermination to decide a case in a particular manner, so much so that it does not leave the mind open. In other words, bias may be generally defined as partiality or preference which is not founded on reason and is actuated by self-interest whether pecuniary or personal.

Therefore, the rule against bias strikes against those factors which may improperly influence a judge in arriving at a decision in any particular case. The requirement of this principle is that the judge must be impartial and must decide the case objectively on the basis of the evidence on record the dictionary meaning of the word by us also suggests that anything which tends or may be regarded as tending to cause a such person to decide a case otherwise an evidence must be held to be biased. In other words, predisposition to decide for or against one party without regard to the merits of the case is bias. Therefore, if a person for whatever reason cannot take an objective decision on the basis of evidence on record, he shall be said to be biased. A person cannot take an objective decision in a case in which he has an interest, for, as human psychology tells us, very rarely can people take decisions against their own interests.

Therefore, the maxim that a person cannot be made a judge in his own cause. The Supreme Court in *Crawford Bayley & Co. v. UOI*,<sup>39</sup> restated that the doctrine of rule against bias comes into play if it's shown that the officer concerned has a personal connection or personal interest or has personally acted in the matter concerned and or has already taken a decision one way or the other which he may be interested in supporting. This rule of disqualification is applied not only to avoid the possibility of a partial decision but also to ensure public confidence in the impartiality of the administrative adjudicatory process because not only must no man be a judge in his own cause, but also "justice should be not only be done but should manifestly and undoubtedly be seen to be done".

Every kind of preference is not sufficient to vitiate an administrative action. If a preference is rational and accompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision. Therefore, if a senior officer expresses appreciation of the work of a junior in the confidential report, it would not amount to bias nor would it preclude the officer from being a part of the departmental promotion committee to consider such junior officer along with other for promotion. Bias manifests itself variously and may affect a decision in a variety of ways.

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<sup>39</sup> (2006) SCC 25

## Types of Bias

1. Pecuniary bias
2. Personal bias
3. Official bias or bias as to subject-matter, and
4. Judicial obstinacy
5. Departmental or Institutional bias
6. Policy Notion bias
7. Preconceived notion bias
8. Bias on account of obstinacy

### 1. Pecuniary Bias

It is well-settled that as regards pecuniary interest ‘the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a Judge.’ Griffith and Street rightly state that “a pecuniary interest, however slight, will disqualify, even though it is not proved that the decision is in any way affected.” Judicial approach is unanimous and this issue on the point that any financial interest, howsoever small it may be, would vitiate administrative action.

In Halsbury's Laws of England, it is stated, “There is a presumption that any financial interest, however small, in the matter in dispute disqualifies a person from adjudicating.”

*Dimes v. Grant Junction Canal*<sup>40</sup> is considered to be the classic example of the application of the rule against pecuniary interest. In this case, the suits were decreed by the Vice Chancellor and the appeals against those decrees were filed in the Court of Lord Chancellor Cottenham. The appeals were dismissed by him and decrees were confirmed in favor of a canal company in which he was a substantial shareholder. The House of Lords agreed with the Vice-Chancellor and affirmed the decrees on merits. In fact, Lord Cottenham’s decision was not in any way affected by his interest as a shareholder; and yet the House of Lords quashed the decision of Lord Cottenham.

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<sup>40</sup>*HL 26 (1852)*

In *R v. Hendon Rural Distt. Council, ex p choley*<sup>41</sup>, The court in England questioned the decision of the Planning Commission where one of the members was an estate agent who was acting for the applicant to whom the permission was granted.

In *Jeejeebhoy v. Collector*<sup>42</sup> Chief Justice reconstituted the bench when it was found that one of the members of the winch was a member of the cooperative society for which the land had been acquired.

The Madras high court also quashed the decision of the collector who in his capacity as the chairman of the regional transport authority had granted a permit in favor of a cooperative Society of which he was also the chairman.<sup>43</sup>

In *J. Mohapatra*<sup>44</sup> the Supreme Court quashed the decision of the text books selection committee because some of its members were also authors of the books which were considered for selection.

With reference to *R v. Bow street Metropolitan Stipendiary magistrate, ex p Pinochet Ugrate*,<sup>45</sup> laying down the law, the House of lords opined that the rule against bias has two very similar but not identical implications.

1. If a judge has financial or proprietary interest in the case, or any party to the suit, he is automatically disqualified to act as a judge without investigation of a real likelihood of bias or suspicion of bias unless he makes a voluntary disclosure.
2. If a judge has no financial or proprietary interest and is also not a party to case, but his conduct or behavior give rise to a suspicion of bias then there is no automatic disqualification unless a real likelihood is proved.

## 2. Personal Bias

The second type of bias is a personal one. A number of circumstances may give rise to personal bias. Here a Judge may be a relative, friend or business associate of a party. He may have some personal grudge, enmity or grievance or professional rivalry against such party. In view of

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<sup>41</sup> (1933) 2 KB 696 (DC)

<sup>42</sup> AIR 1965 SC 1096

<sup>43</sup> *Vishskapatnam Coop. Motor Transport Ltd. V. Bangaru rajju*, AIR 1953 Mad 709

<sup>44</sup> (1984)4 SCC 103

<sup>45</sup> (2000) 1 AC 119



these factors, there is every likelihood that the Judge may be biased towards one party or prejudiced towards the other.

Personal bias arises from a certain relationship equation between the deciding authority and the parties which incline him unfavorably or otherwise on the side of one of the parties before him. Such equation may develop out varied forms of personal other professional hostility or friendship. However, no exhaustive list is possible.

Real likelihood of bias or reasonable suspicion of bias: However, in order to challenge an administrative action successfully on the ground of personal bias, it is essential to prove that there is a reasonable suspicion of bias or a real likelihood of bias. The reasonable suspicion test looks mainly to outward appearance, and the real likelihood test focuses on the court's own evaluation of possibilities.

However, in practice, the tests have much in common with one another and in the vast majority of cases; they will lead to the same result. In this area of bias, the real question is not whether a person was bias. It is difficult to prove the state of mind of a person. Therefore, what the court sees is whether there are reasonable grounds for believing that the deciding officer was likely to have been biased. In deciding question of bias, judges now to take into consideration the human possibilities and the ordinary course of human conduct. But there must be real likelihood of bias and not mere suspicion of bias before the proceedings can be quashed on the Ground that the person conducting the proceedings is disqualified by bias.

The apprehension must be judged from a healthy, reasonable and average point of view and the not on mere apprehension and vague suspicion of whimsical, capricious and unreasonable people.

Therefore, the real test of real likelihood poses whether reasonable man, in possession of relevant information, would have thought that bias was likely and whether the authority concerned was likely to be disposed to decide the matter in a particular way. Therefore, the test is not what actually happened but the substantial possibility of that which appeared to have happened. The reason is plain enough, writes Lord Denning, justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking the judge was biased.

In *State of U.P. v. Mohd. Nooh*,<sup>46</sup> a departmental inquiry was held against A by B. As one

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<sup>46</sup>AIR 1958 SC 86

of the witnesses against A turned hostile, B left the inquiry, gave evidence against A, resumed to complete the inquiry and passed an order of dismissal. The Supreme Court held that ‘the rules of natural justice were completely discarded and all canons of fair play were grievously violated by B.’

In the leading case of *A.K. Kraipak v. Union of India*,<sup>47</sup> one N was a candidate for selection to the Indian Foreign Service and was also a member of the Selection Board. N did not sit on the Board when his own name was considered. Name of N was recommended by the Board and he was selected by the Public Service Commission. The candidates who were not selected filed a writ petition for quashing the selection of N on the ground that the principles of natural justice were violated. Supreme Court held that there was a real likelihood of bias, for the mere presence of candidate on the selection board may adversely influence the judgment of the other member.

*In Manaklal v. Prem chand*<sup>48</sup> in order to decide a complaint for professional misconduct filed by doctor Premchand against Manaklal, an advocate of the Rajasthan High Court, the High Court appointed tribunal consisting of a senior advocate once Advocate General of Rajasthan as chairman. The decision of the tribunal was challenged on the ground of personal bias arising from the fact that chairman had represented him and in an earlier case. The Supreme Court refused order to quash the action holding that the chairman had no personal contact with his client and did not remember that he appeared on his behalf and that therefore there seemed to be no real likelihood of bias. However, the high professional standards led the court to quash the action in the final analysis on the ground that justice should not only be done but must appear to have been done.

*In Ramanand Prasad Singh v. UOI*,<sup>49</sup> The Supreme Court held that participation in the selection committee as a member where his brother was a candidate but was not selected is inconsequential bias on which the whole select list cannot be quashed.

*In Tata Cellular v. UOI*,<sup>50</sup> the tender for operating the cellular mobile telephone service in 4 Metropolitan cities filed by the son of the members of the tender evaluation committee had been accepted. This was challenged on the basis of personal bias. Applying the principle of necessity, as the involvement of the director general of the telecommunications and telecom authority was a

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<sup>47</sup>(1969) 2 SCC 262

<sup>48</sup>AIR 1957 SC 425

<sup>49</sup>(1996) 4 SCC 64

<sup>50</sup>(1994) 6 SCC 651

necessary in view of Section 3(6) of the Telegraph Act 1885, the court held that the involvement of his father as a member of the tender evaluation committee did not vitiate the selection on the ground of bias. It may be noted in this case that the tender was based on merit through the normal procedure full staff therefore it is necessary to ascertain what role that person played in the decision-making against whom biases alleged.

In *G.N Nayak v. Goa University*,<sup>51</sup> a senior officer expresses appreciation of the work of a junior officer in his confidential report. He was also a member of the Departmental promotion committee to consider such a junior officer along with others for promotion. The committee recommended this junior officer for promotion which was challenged on the ground of personal bias actuated by an element of personal interest. The Supreme Court held that unless preferences unreasonable and is based on self-interest, it will not vitiate an administrative decision.

*Padma v. Hiralal Motilal Desarada*<sup>52</sup> S was a director in a special planning authority, Viz. The city and industrial Development Corporation (CIDCO). The authority alerted plots to three associations comprising family members or relatives of S. The supreme court quashed the allotments on the ground of buyers holding that in such circumstances S ought to have, at least, very specifically informed CIDCO of his relationship with the associations, and while dealing with them should be consciously aware of that fact.

In *Mohd. Yunus Khan v. State of U. P*<sup>53</sup> disciplinary proceedings started against a constable for being late for parade. Authority which initiated proceedings also became a witness, accepted inquiry report and also imposed the punishment of dismissal. It was held that administrative action is flagrant violation of rule against bias.

### **3. Official Bias – Subject matter bias**

The third type of bias is official bias or bias as to the subject-matter. This may arise when the Judge has a general interest in the subject-matter. Those cases fall within this category where the deciding officer is directly, or otherwise, involved in the subject matter of the case. Here again mere involvement would not vitiate the administrative action unless there is a real likelihood of bias.

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<sup>51</sup>(2002) 2 SCC 712

<sup>52</sup>(2002) 7 SCC 764

<sup>53</sup>(2010) 10 SCC 539

According to Griffith and Street, “only rarely will this bias invalidate proceedings.” A mere general interest in the general object to be pursued would not disqualify a Judge from deciding the matter. There must be some direct connection with the litigation. Wade remarks that ministerial or departmental policy cannot be regarded as a disqualifying bias.

In *Gullapalli Nageswara Rao v. A.P.S.R.T.C.*,<sup>54</sup> the petitioners were carrying on a motor transport business. The Andhra State Transport Undertaking published a scheme for nationalization of motor transport in the State and invited objections. The objections filed by the petitioners were received and heard by the Secretary and thereafter the scheme was approved by the Chief Minister. The Supreme Court upheld the contention of the petitioners that the official who heard the objections was ‘in substance’ one of the parties to the dispute and hence the principles of natural justice were violated.

#### **4. Judicial Obstinacy**

There may also be a judicial bias, i.e. bias on account of judicial obstinacy

In *State of West Bengal. v. Shivananda Pathak*<sup>55</sup>, a writ of mandamus was sought by the petitioner directing the Government to promote him. A Single Judge allowed the petition ordering the authorities to promote the petitioner ‘forthwith.’ But the order was set aside by the Division Bench. After two years, a fresh petition was filed for payment of salary and other benefits in the terms of the judgment of the Single Judge (which was reserved in appeal). It was dismissed by the Single Judge. The order was challenged in appeal which was heard by a Division Bench to which one Member was a Judge who had allowed the earlier petition. The appeal was allowed and certain reliefs were granted. The State approached the Supreme Court.

Allowing the appeal and setting aside the order, the Apex Court described the case of a new form of bias judicial obstinacy. It said that if a judgment of a Judge is set aside by a superior court, the Judge must submit to that judgment. He cannot rewrite or overrule judgment in the same or in collateral proceedings. The judgment of the higher court binds not only to the parties to the proceedings but also to the Judge who had rendered it.

#### **5. Departmental bias/Institutional Bias**

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<sup>54</sup> AIR 1959 SC 1376

<sup>55</sup> (1998)

The problem of departmental bias is something which is inherent in the administrative process, and if not effectively checked, it may negate the very concept of fairness in administrative proceedings.

The question of departmental bias was considered by the Supreme Court in *Nagaswara Rao*<sup>56</sup>. In this case, the petitioner challenged the order of the government nationalizing road transport. One of the grounds for challenge was that the secretary of the transport Department who gave the hearing was biased, being the person who initiated the scheme and also being the head of the Department, whose responsibility was to execute it. The court quashed the order on the ground that, under the circumstances, the secretary was biased and, hence no fair hearing could be expected.

Thereafter, the Act was amended and the function of hearing the objection was given over to the minister concerned. The decision of the government was again challenged by Nageswara Rao on the ground of Departmental bias because the minister was the head of the Department concerned which initiated the scheme and was also ultimately responsible for its execution. However, on this occasion the Supreme Court rejected the challenge on the ground that the minister was not a part of the Department in the same manner as a secretary was. The reasoning of the court is not very convincing perhaps because, as observed earlier Departmental bias is something which is inherent in the administrative process.

The Departmental bias also arises in a different context-

When the functions of a Georgian prosecutor are combined in the same Department. It is not uncommon to find that the same Department which initiates a matter also decides it, therefore at the times departmental fraternity and loyalty militates against the concept of Fair hearing.

*Hari K. Gawali v. Dy. Commr. of police*<sup>57</sup> this case an externment order was challenged on the ground that Since the Police Department which initiated the proceedings and the Department which heard under decided the case with the same, the element of Departmental bias vitiated administrative action. The court rejected the challenge on the grounds that so long as the two functions what it discharged about two separate officers though they were affiliated to the same Department there was no bias.

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<sup>56</sup> AIR 1959 SC 1376

<sup>57</sup> AIR 1956 SC 559

The decision of the court may be correct in the ideal perspective but it may not always prove wise in practice it may be suggested that the technique of internal separation which is being followed in the US and England can be profitably user in India if a certain amount of confidence is to be developed in the minds of the people in administrative decision-making.

In *Krishna Bus Service Pvt. Ltd. v. State of Haryana*<sup>58</sup>The Supreme Court however questioned the notification of the tournament which had conferred the powers of a deputy Superintendent of police on the general manager, how do you are not always in matters of inspection of vehicles on the ground of departmental bias. In this case, private bus operators had alleged that the general manager of Haryana roadways who was a rival in business in the state could not be expected to discharge his duties in a fair and reasonable Manner and would be too lenient in inspecting the vehicles belonging to his own Department. The reason for quashing the notification according to the Supreme Court was the conflict between their duty and the interest of the Department and the consequential erosion of public confidence in administrative justice.

However, where there is no such conflict between duty and interest of the Department, concept of institutional buyers cannot be narrowly construed in view of compelling institutional constraints.

## 6. Policy notion bias

Bias arising out of preconceived policy notions is a very delicate problem of administrative law. On one hand no judge as a human being is expected to sit as a blank sheet of paper and on the other preconceived policy notions may vitiate may fair trial.

In *Franklin v. Minister of Town and Country planning*<sup>59</sup> Also known as the Stevenage case, in this case the appellant challenged the Stevenage Newtown designation order 1946, on the ground that no fair hearing was given because the minister had entertained by us in his determination which was clear from his speech at Stevenage when he said are you want to carry out a dating exercise in town planning. Additional function but the problem still remains that the bias arising from strong policy convictions may I put it as a more serious threat to fair action than any other single factor.

*Kondala Rao v. A.P. SRTC*<sup>60</sup>, the court did not crash the order of minister, who had heard the objections of private operators nationalizing road transport on the ground that the same minister had presided over a meeting only a few days earlier in which nationalization was favored.

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<sup>58</sup> (1985) 3 SCC 711

<sup>59</sup> 1948 AC 87 (HL)

<sup>60</sup> AIR 1961 SC 82

The court rejected the contention on the ground that the decision of the committee was not final and irrevocable but merely a policy decision.

Recent trend in almost all jurisdictions is that policy by us is not considered as bias which vitiates an administrative action. In *Bajaj Hindustan Ltd. V. Sir Shahidlal Enterprise Ltd*<sup>61</sup>. Court did not allow a challenge to an administrative action on the ground of policy bias.

### **7. Preconceived notion bias**

This type of bias is also called as Unconscious bias. All persons exercising adjudicatory powers are human with human prejudices no matter some persons are more humans than others. This may include class bias and personality bias.

Every person is a product of your class and inherits some characteristics of that class which may also reflect in his decision-making process. In the same manner every person's personality is a combination of his biological and social heredity which determine his values and attitudes in a way that may condition his decision-making process. The problem of unconscious by us is which is inherent in any adjudication and cannot be eliminated unless detected by some overt action of the authority, and if so, detected can vitiate an administrative hearing if it has a direct relation with the decision. This may include a situation with the deciding officer openly expresses his prejudice.

The problem of bias arising from preconceived notions may have to be disposed of us an inherent limitation of the administrative process. It is useless to accuse a public officer of bias merely because he is predisposed in favor of some policy in the public interest.

### **8. Bias on account of obstinacy**

The Supreme Court has discovered a new category of bias arising from thoroughly unreasonable obstinacy. Obstinacy implies unreasonable and unwavering persistence, and the deciding officer would not take no for an answer. this new category of bias was discovered in a situation where a judge of the Calcutta High Court upheld his own judgment while sitting in appeal against his own judgment. of course, a direct violation of the rule that no George can sit in appeal against his own judgement is not possible, therefore this rule can only be violated indirectly. In this case in a fresh reputation the judge validated his own order in an earlier arithmetician which had been overruled by the division bench. What applies to judicial process can be applied to administrative process as well.

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<sup>61</sup> (2011) 1 SCC 640

## Conclusion:

Direct pecuniary interest, however small or slight it may be, will disqualify a person from acting as a Judge. In case of other interests, however, the test should be of 'reasonable likelihood of bias.' It must be based on reasonable apprehension of a reasonable man fully apprised of all the facts. It is no doubt desirable that all Judges, like Caesar's wife must be above suspicion. But it would be too much to hold that only those people who cannot be suspected of improper motives are qualified to discharge judicial functions, else to quash decisions on the basis of suspicions of fools or other capricious unreasonable people

A ground reality cannot be ignored that Judges are also human, and they have their likes and dislikes, preferences and prejudices and it is too much to expect them to act as a machine uninfluenced by worldly affairs.

## II. *Audi alteram partem*, i.e., a person affected by a decision has a right to be heard- 'Audi alteram partem' is *sine quo non* - right of 'fair hearing'- Rule of fair hearing

There are certain basic values which a man has always cherished. They can be described as natural law or divine law. As a reasonable being, a man must apply this part of law to human affairs. The underlying object of rules of natural justice is to ensure fundamental liberties and rights of subjects. They thus serve public interest. The golden rule which stands firmly established is that the doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice. Its essence is good conscience in a given situation; nothing more – but nothing less.

This is the second long arm of natural justice which protects the little man from arbitrary administrative actions whenever his right to person or property is jeopardized. Thus, one of the objectives of giving a hearing in application of the principles of natural justice is to see that an illegal action or decision does not take place. Any wrong order may adversely affect a person, and it is essentially for this reason that a reasonable opportunity may have to be granted before passing an administrative order.<sup>62</sup>

The rule of Fair hearing is the basic concept of the principles of natural justice. The Omnipotency inherent in the doctrine is that no one should be condemned unheard. In the field of administrative action, this principle has been applied to ensure fair play and justice to affected

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<sup>62</sup>*BALCO Employees' Union v. UOI*, (2002) 2 SCC 333



persons. However, the doctrine is not the cure to all ills and the process. Its application depends upon the factual metrics to improve administrative efficiency, expediency and to mete out justice. The procedure adopted must be just and fair.<sup>63</sup>

Audi alteram partem means ‘hear the other side’, or ‘no man should be condemned unheard’ or ‘both the sides must be heard before passing any order.’

The second fundamental principle of natural justice is Audi alteram partem, i.e. no man should be condemned unheard, or both the sides must be heard before passing any order. This is the basic requirement of rule of law. It has been described as ‘foundational and fundamental’ concept. It lays down a norm which should be implemented by all courts and tribunals at national as also at the international level.

In short, before an order is passed against any person, reasonable opportunity of being heard must be given to him. Generally, this maxim includes two elements:

- Notice
- Fair hearing

### **1. Notice – Right to Notice**

The term notice originated from the Latin word *notitia* which means being known. In its popular sense it is equivalent to information, intelligence or knowledge. In legal sense it embraces a knowledge of circumstances that ought to induce suspicion or belief, as well as direct information of that fact.

Notice embodies rule of fairness and must precede an adverse order. It should be clear and precise so as to give the party adequate information of the case he has to meet. The time given should be adequate for a person so that he could prepare an effective defense. Full denial of notice and an opportunity to respond make an administrative decision completely vitiated.<sup>64</sup>

Before any action is taken, the affected party must be given a notice to show cause against the proposed action and seek his explanation. It is a *sine qua non* of the right of fair hearing. Any order passed without giving notice is against the principles of natural justice and is void ab initio.

<sup>63</sup>*Sarat Kumar Dash v. Biswaji Patnaik, 1995 Supp (1) SCC 434*

<sup>64</sup>*Canara Bank v. Debasis Das, (2003) 4 SCC 557*

If requirement of notice is a statutory requirement then notice must be given in a manner provided by law. Therefore, recently the Supreme Court held that if a check has been dishonored, proper notice as required under the Negotiable Instruments Act, 1881 must be given either by post or Courier, personal information to the drawer will not suffice.

Notice is the starting point of any hearing. Unless a person knows the formulation of subjects and issues involved in the case, he cannot defend himself. It is not enough that the notice in a case be given, but it must be adequate also. The adequacy of notice is a relative term and must be decided with reference to each case. But generally, a notice in order to be adequate must contain the following

- a. Time place and nature of hearing
- b. Legal authority under which hearing is to be held
- c. Statement of specific charges which the person has to meet
- d. Particular penalty or action which is proposed to be awarded or taken

In *R. v. University of Cambridge*,<sup>65</sup> Dr Bentley was deprived of his degrees by the Cambridge University on account of his alleged misconduct without giving any notice or opportunity of hearing. The Court of King's Bench declared the decision as null and void.

The object of a notice is to give an opportunity to the individual concerned to present his case and, therefore, if the party is aware of the charges or allegations, a formal defect would not invalidate the notice, unless prejudice is caused to the individual. If the government servant is placed under suspension and the inquiry is held at a different place from the place of his residence and he is not able to attend the inquiry due to nonpayment of subsistence allowance, the inquiry is vitiated. Whether prejudice is caused or not is a question of fact and it depends upon the facts and circumstances of the case. Moreover, the notice must give a reasonable opportunity to comply with the requirements mentioned therein. Thus, to give 24 hours' time to dismantle a structure alleged to be in a dilapidated condition is not proper and the notice is not valid. If the inquiry is under Article 311 of the Constitution of India, two notices (first for charges or allegations and second for proposed punishment) should be given. Where a notice regarding one charge has been

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<sup>65</sup> (1723) 1 Str 757

given, the person cannot be punished for a different charge for which no notice or opportunity of being heard was given to him.

In *State of U.P. v. Vam Organic Chemicals Ltd.*,<sup>66</sup> The Supreme Court stressed that before any notices issued, there must exist sufficient reasons for your proposal action for which notice is to be issued. Therefore, reasons are a precondition for issuing the notice, and these must be contained in notice. In this case a person was granted recognition certificate for dealing in certain items. Thereafter, government decided to delete certain items from the certificate. Quoted that sufficient reasons are a precondition before notice is issued and they should form part of the notice. The code further emphasized that even if it is a rectification of a mistake, notice must be given very a person would suffer a serious prejudice. Rectification cannot die vest a vested right.

In *Joseph Vilanganandan v. Executive Engineer*<sup>67</sup>, The court held that the notice given was inadequate. The facts of this case where that when the appellant did not start the contract work within time, he received a letter from the executive engineer in which other 11 to sentence was you are, therefore requested to show cause within Seven days from the receipt of this notice why the welcome may not we're injured otherwise at your risk and loss through other agencies after debugging you as a default are. The replay container his statement that the delay was caused by the conduct of the respondent. There after the contract was cancelled and the appeal it was debarred from all future contracts under the PWD. Washing the order, the Supreme Court held that the words debarring you as a default are did not give adequate notice to the appellant of the fact that he would be divided from all future contracts without PWD.

*Keshav Mills Co. Ltd*<sup>68</sup>, the requirement of notice will not be insisted upon as a mere technical formality when the party concerned clearly knows the case against it, and he's not there by plagiarized in any manner in putting up an effective defense. Therefore in this case the court did not crash the order of the government taking over the mill for a period of five years on the technical ground that their parents were not issued notice before this action was taken, as at an earlier stage a full scale hearing had already been given and there was nothing more which the appellants wanted to know.

*State of Karnataka v. Mangalore University Non-teaching Employees, Association*<sup>69</sup>. The

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<sup>66</sup> (2010) 6 SCC 222

<sup>67</sup> (1978) 3 SCC 36

<sup>68</sup> (1973) 1 SCC 380

<sup>69</sup> (2002) 3 SCC 302

court held that where no prejudice is caused to the person on account of non-affording of an opportunity to make representation, violation of the principles of natural justice cannot be insisted upon. In this case house rent and city compensatory allowance were given to the employees at a higher rate. A later date the government wanted to recover excess payment. The VC is positive the cause of the employees although unsuccessfully. In these circumstances the court was of the view that action taken for the recovery of excess payment without notice and affording an opportunity to make representation did not vitiate the action.

*Union of India v. Narendra Singh*<sup>70</sup>, The Supreme Court made it amply clear that even if a mistake in the decision-making process is to be corrected, which has adverse consequences for a person, he must be given notice. In this case an erroneous promotion had been cancelled without following the process of law. An opportunity of hearing may not be given if mistake or error is apparent on the face of the record.

Article 21 of the Constitution requires that a detenu must be furnished with the grounds of detention and if the grounds are vague the detention order may be crushed by the code. In other areas of administrative action, a notice has been held to be vague if it does not specify the action proposal to be taken or the property proposal to be acquired or the grounds on which license is to be cancelled. Requirement of notice, mandated by statute, can be waived if it is solely for the benefit of the individual concern.

### **Consequences of non-issue of notice**

1. Non issuance of notice or mistake in the issue of notice, or defective service of notice does not affect the jurisdiction of the authority if, otherwise a reasonable opportunity of being heard has been given
2. Issuance of notice as prescribed by law constitutes a part of reasonable opportunity of being heard
3. If Richard eyes has been caused by non-issuance or invalid service of notice, the proceedings would be vitiated. But, irregular service of notice would not render the proceedings invalid, more so if the person by his conduct has rendered service impracticable or impossible or is otherwise aware of the proceedings or notice either actually or constructively

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<sup>70</sup> (20008) 2 SCC 750

4. In case of non-issuance of northeast or defective service which violates the principles of natural justice, the administrative authority may decide the case de Novo With proper notice. Violation of the principles of natural justice vitiates Older but not the preceding.

5. He show-cause notice if contains unspecified, vague or unintelligible allegations would imply a denial of proper opportunity of being heard

## **2. Hearing**

The second requirement of Audi alteram partem maxim is that the person concerned must be given an opportunity of being heard before any adverse action is taken against him.

In the historic case of *Cooper v. Wandsworth Board of Works*,<sup>71</sup> the defendant Board had power to demolish any building without giving any opportunity of hearing if it was erected without prior permission. The Board demolished the house of the plaintiff under this provision. The action of the Board was not in violation of the statutory provision. The court held that the Board's power was subject to the qualification that no man can be deprived of his property without having an opportunity of being heard.

The extent of opportunity of hearing to be given is neither dependent upon the quantum of loss to the aggrieved person nor referable to the fatness of the stake but is essentially related to the demands of a given situation. Therefore, if a show cause notice is issued and the explanation is considered before taking action under the statutory provisions, the rules of natural justice cannot be said to have been violated on the ground that more opportunity should have been afforded as a huge amount was at stake.

### **Disclosure of Materials**

An adjudicating authority must disclose all evidence and material placed before it in the course of proceedings and must afford an opportunity to the person against whom it is sought to be utilized.

The object underlying such disclosure is to afford an opportunity to the person to enable him to prepare his defense, rebut the evidence relied upon by the complainant against him and put forward his case before the authority.

### **Right to know the evidence against him**

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<sup>71</sup> (1863) 143 ER 414

Every person before an administrative authority exercising adjudicatory powers has the right to know the evidence to be used against him. This principle was firmly established in *Dhaksheshwari Cotton mills v. CIT*,<sup>72</sup> In this case, appellate income tax tribunal did not disclose the information supplied to it by the Department. The Supreme Court held that the SEC was not given a fair hearing. However, the supply of adverse material unless the law otherwise provides in original form is not necessary. It is sufficient if the contents of the material is applied, provided it is not misleading. A person may be allowed to inspect the file and to take notes whatever more is used to come up the fundamental remains the same that nothing should be used against the person which has not been brought to his notice.

### **Right to present case and evidence/ oral hearing**

The Adjudicatory authority should afford a reasonable opportunity the party to present his case. This can be done through writing or orally at the discretion of the authority, unless the statute under which the authority is functioning directs otherwise.

The requirements of natural justice are met only if an opportunity to justice are not met even if the very person preceded against has been furnished information on which the action is based, if it is furnished in a casual way or for some other purposes. This does not mean that the opportunity needs to be a double opportunity, that is One opportunity on the factual allegations and another on the proposal penalty but both may be rolled into one<sup>73</sup>.

Courts are unanimous on the point that oral hearing is not an integral part of Fair hearing unless the circumstances are so exceptional that without an oral hearing a person cannot put up an effective defense. Therefore, where complex legal and technical questions are involved, or where the stakes are very high, oral hearing shall become a part of Fair hearing<sup>74</sup>.

In *A.K. Roy v. UOI*,<sup>75</sup> Supreme Court held that if the detenu desires to examine any witnesses, he shall have to keep them present at that point at a time and no obligation can be cast on the Advisory Board to someone them. The board can also limit the time within which the detenu must complete his evidence.

### **Right to rebut adverse evidence**

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<sup>72</sup> (1955)SC 154

<sup>73</sup> *S.L Kapoor v. Jagmohan*, (1980) 4 SCC 379

<sup>74</sup> *State of U.P v. Dharmendar Prasad Singh*, (1989) 2 SCC 505

<sup>75</sup> (1982) 1 SCC 271

The right to rebut adverse evidence presupposes that the person has been informed about the evidence against him. In *Dhakeshwari cotton Mills limited*,<sup>76</sup> the court quashed the order of the tax tribunal where the information supplied by the Department against the assessee was not disclosed to him. This does not, however, necessitate the supply of adverse material in original in all cases. It is sufficient if the summary of the contents of the adverse material is made available, provided it is not misleading.

The opportunity to rebut evidence necessarily involves the consideration of two factors:

1. Cross examination and 2. Legal representation.

### **Cross- Examination**

Cross-examination was never considered to be part and parcel of the doctrine of natural justice. It always depends upon the facts and circumstances of each case whether an opportunity of cross-examination should be given to a party against whom proceedings have been initiated.

If a statute permits cross-examination of witnesses examined at the inquiry or adjudication, obviously, the opposite party can claim right to cross-examine them. Normally, in disciplinary proceedings as also in domestic inquiries, right of cross examination is not denied.

In *Khem Chand v. Union of India*,<sup>77</sup> the Supreme Court held that an opportunity to defend a delinquent by cross-examining the witnesses produced against him is an important right.

Regarding the right to the detenu of Cross examination before the Advisory Board, the Supreme Court did not find it an integral and inseparable part of the principles of natural justice. The court reasoned that firstly the question before the board is not whether that detenu is guilty Any charge but whether there is a sufficient cause for his detention and Secondly the witnesses would be most reluctant to testify and often it may harm public interest to disclose their identity. The court did not agree with the contention that there can be no effective hearing without the right of cross examination.<sup>78</sup>

### **Legal Representation**

Normally representation through a lawyer in any administrative proceeding is not considered an indispensable part of the rule of natural justice, as oral hearing is not included in the

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<sup>76</sup> AIR 1955 SC 65

<sup>77</sup> AIR 300 1958 SCR 1080

<sup>78</sup> A.K. Roy v. UOI, (1982) 1 SCC 271

minima of Fair hearing. This detail of legal representation is justified on the ground that lawyers tend to complicate Matters, prolong the proceedings, and destroy the essential informality of the proceedings. It is further justified on the ground that representation through a lawyer of choice would give an edge to that rich over the poor who cannot afford a good lawyer.

The courts in India have held that in situations where the person is illiterate, or the matter is complicated and a technical, or expert evidence is on record, or a question of lawyers involved, or the person is facing it rained prosecutor, some professional assistance must be given to the party to make his right to defend himself meaningful.

In *M.H. Hoskot v. State of Maharashtra*,<sup>79</sup> The Supreme Court held that while importing the concept of Fair procedure in Article 21 of the Constitution, held that the right to personal liberty implies provision by the state of free legal service to a prisoner who is indigent or not, held that the right to personal Liberty implies provision by the state of free legal service to a prisoner who is indigent or otherwise disabled from securing legal assistance where the ends of justice call for such service.

In *Khatri v. State of Bihar*,<sup>80</sup> The Supreme Court further ruled that state is constitutionally bound to provide legal aid to the poor or indigent accused not only at the stage of trail but at the time of remind also. Such right cannot be denied on the ground of financial constraints or administrative inability or that the accused did not ask for it. The Supreme Court emphasized that it is the duty of the presiding officer to inform the accused of such right.

In *Nandini Sathpathy v. P.L. Dani*,<sup>81</sup> The court held that the accused must be allowed legal representation during custodial interrogation, and the police must wait for a reasonable time for the arrival of a lawyer. However, the court which took the right step did not take a long stride in holding that the state must provide a lawyer if the accused is indigent. The observation of the court could well be inducted in the administration. In the area of criminal justice, the Criminal Procedure Code 1973 now provides for legal aid to the accused.

### **Oral or Personal Hearing**

An adjudicating authority must observe the principles of natural justice and must give a reasonable opportunity of being heard to the person against whom the action is sought to be taken.

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<sup>79</sup> (1978)3 SCC 544

<sup>80</sup> (1981) 1 SCC 627

<sup>81</sup> (1978) 2 SCC 424



But in England and in Americas, it is well-settled law that in absence of statutory provision, an administrative authority is not bound to give the person concerned an oral hearing.

In India also, the same principle is accepted and oral hearing is not regard as a sine qua non of natural justice. A person is not entitled to an oral hearing, unless such a right is conferred by the statute.

In *M.P. Industries Ltd v. Union of India*,<sup>82</sup> Subba Rao, observed: “It is no doubt a principle of natural justice that a quasi-judicial tribunal cannot make any decision adverse to a party without giving him an effective opportunity of meeting any relevant allegations against him but the said opportunity need not necessarily be by personal hearing. It can be by written representation. Whether the said opportunity should be by written representation or by personal hearing depends upon the facts of each and ordinarily it is in the discretion of the tribunal”.

Thus, it is well-established that the principles of natural justice do not require personal hearing and if all the relevant circumstances have been taken into account before taking the impugned action, the said action cannot be set aside only on the ground that personal hearing was not given.

The principles of natural justice are flexible and whether they were observed in a given case or not depends upon the facts and circumstances of each case. The test is that the adjudicating authority must be impartial, ‘fair hearing’ must be given to the person concerned, and that he should not be ‘hit below the belt.’

But at the same time, it must be remembered that a ‘hearing’ will normally be an oral hearing. As a general rule, ‘an opportunity to present contentions orally, with whatever advantages the method of presentation has, is one of the rudiments of the fair play required when the property is being taken or destroyed. de Smith also says that “in the absence of clear statutory guidance on the matter, one who is entitled to the protection of the *Audi alteram partem* rule is now prima facie entitled to put his case orally.”

Again, if there are contending parties before the adjudicating authority and one of them is permitted to give oral hearing the same facility must be afforded to the other, or where complex legal and technical questions are involved or where stakes are very high, it is necessary to give oral hearing. Thus, in the absence of statutory requirement about oral hearing, courts will have to decide the matter taking into consideration the facts and circumstances of the case.

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<sup>82</sup> AIR 1966 SC 671

### **No evidence should be taken at the back of other party**

That *ex parte* evidence taken in the absence of the other party violates the principles of fair hearing was discussed by the court in *Errington v. Ministry of Health*<sup>83</sup> – whatever the information is obtained by the administrative authority must be disclosed to the party and an opportunity to rebut it must be provided.

In *Hira Nath Mishra v. Rajendra Medical College*<sup>84</sup>, In this case, 36 Girl students of a Medical College pilot air report which is the principal regarding misbehavior of the boys in the girl's hostel. The inquiry committee appointed by the principle recorded the statements of the girls, but in the absence of the appellants. That appellants were also identified by the girls through photographs. The committee found the appearance guilty and consequently an expulsion order was served on them. The order of explosion was challenged before the Supreme Court and one of the grounds of challenge was that the evidence was taken behind their backs. the court rejected the contention holding that the girls would not have ventured to make the statements in the presence of the appellants except at a greater risk of retaliation and harassment. in this case whatever evidence was collected behind the backs of the appearance was brought to their notice and they were provided with an opportunity to rebut the evidence. Every case has to be decided on its own merit.

### **III. Speaking Order- Reasoned Decisions**

#### **Introduction**

A 'speaking order' means an order speaking for itself. To put it simply, every order must contain reasons in support of it. A reason is an essential requirement of the rule of law. It provides a link between fact and indecision, guard against non-application of mind, arbitrariness and maintain public confidence in judicial and administrative authorities. Reasons also serve a wider principle that justice must not only be done; it must also appear to be done.

#### **Importance**

Giving of reasons in support of an order is considered to be the third principle of natural justice. According to this, a party has a right to know not only the result of the inquiry but also the reasons in support of the decision.

#### **Object**

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<sup>83</sup> (1935) 1 KB 249 (CA)

<sup>84</sup> (1973) 1 SCC 805

There is no general rule of English law that reasons must be given for administrative or even judicial decisions. In India also, till very recently it was not accepted that the requirement to pass speaking orders is one of the principles of natural justice. But as Lord Denning says, “the giving of reasons is one of the fundamentals of good administration.” The condition to record reasons introduces clarity and excludes arbitrariness and satisfies the party concerned against whom the order is passed.

Today, the old ‘police State’ has become a ‘welfare State.’ The governmental functions have increased, administrative tribunals and other executive authorities have come to stay and they are armed with wide discretionary powers and there are all possibilities of abuse of power by them. To provide a safeguard against the arbitrary exercise of powers by these authorities, the condition of recording reasons is imposed on them. It is true that even the ordinary law courts do not always give reasons in support of the orders passed by them when they dismiss appeals and revisions summarily. But regular courts of law and administrative tribunals cannot be put at par.

In India in the absence of any particular statutory requirement, there is no general requirement for administrative agencies to give reasons for their decisions. However, if the statute under which the agency is functioning requires reason to decisions, codes consider it mandatory for the administrative agency to give reasons, which should not be merely rubberstamp reasons but a brief, clear statement, providing the link between the material on which certain conclusions are based on the actual conclusion.

In *M.J. Shivani v. State of Karnataka*<sup>85</sup>, the court reiterated That when the rules direct recording of reasons it is as sine qua non, and a condition precedent for a valid order. Appropriate brief reasons, though not like a judgment are necessary for a valid Order. normally they must be communicated to the affected party so that he may have an opportunity to have them tested in the appropriate forum an administrative order itself may contain reasons, or the file may disclose reasons to arrive at the decision showing application of mind to the facts in issue.

### **General Propositions**

The law relating to ‘speaking orders’ may be summed up thus:

1. Where a statute requires recording of reasons in support of the order, it imposes an obligation on the adjudicating authority and the reasons must be recorded by the authority.

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<sup>85</sup> (1955) 6 SCC 289

2. Even when the statute does not lay down expressly the requirement of recording reasons, the same can be inferred from the facts and circumstances of the case.

3. Mere fact that the proceedings were treated as confidential does not dispense with the requirement of recording reasons.

4. If the order is subject to appeal or revision (including Special Leave Petition under Article 136 of the Constitution), the necessity of recording reasons is greater as without reasons the appellate or revisional authority cannot exercise its power effectively inasmuch as it has no material on which it may determine whether the facts were correctly ascertained, law was properly applied and the decision was just and based on legal, relevant and existent grounds. Failure to disclose reasons amounts to depriving the party of the right of appeal or revision.

5. Even 'fair play in action' requires that an adjudicating authority should record reasons in support of order passed by it.

6. There is no prescribed form and the reasons recorded by the adjudicating authority need not be detailed or elaborate and the requirement of recording reasons will be satisfied if only relevant reasons are recorded.

7. A writ court cannot interfere with an order passed by an adjudicating authority only on the ground that the reasons recorded by such authority are inadequate or insufficient.

8. If, however, the reasons recorded by such authority are factually incorrect, legally untenable or totally foreign or irrelevant to the issue involved in the *lis*, the power of judicial review can be exercised.

9. It is not necessary for the appellate authority to record reasons when it affirms the order passed by the lower authority.

10. Where the lower authority does not record reasons for making an order and the appellate authority merely affirms the order without recording reasons, the order passed by the appellate authority is bad.

11. Where the appellate authority reverses the order passed by the lower authority, reasons must be recorded, as there is a vital difference between an order of reversal and an order of affirmation.

12. The validity of the order passed by the statutory authority must be judged by the reasons recorded therein and cannot be construed in the light of subsequent explanation given by the authority concerned or by filing an affidavit.

13. If the reasons are not recorded in support of the order it does not always vitiate the action. 14. The duty to record reasons is a responsibility and cannot be discharged by the use of vague general words. 15. If the reasons are not recorded, the court cannot probe into reasoning of the order.

16. The doctrine of recording reasons should be restricted to public law only and should not be applied to private law e.g. arbitration proceedings.

17. The rule requiring reasons to be recorded in support of the order is one of the principles of natural justice.

18. Normally, the reasons recorded by the authority should be communicated to the aggrieved party.

19. Even when the reasons are not communicated to the aggrieved party in public interest, they must be in existence.

20. The reasons recorded by the statutory authority are always subject to judicial scrutiny.

#### **IV. Post decisional hearing**

The idea of post decisional hearing has been developed to maintain a balance between administrative efficiency and fairness to the individual. This organizing tool was developed by the Supreme Court in *Maneka Gandhi* case<sup>86</sup>. In this case, the passport dated 1 June 1976 of the petitioner, a journalist, was impounded in the public interest by an order dated 2nd July 1997, And the government having declined to furnish harder reasons for its decision. She filed a petition before the Supreme Court under Article 32 challenging the validity of the impoundment order. The government also did not give her any pre decisional notice and hearing. One of the contentions of the government, relevant for our purposes, was that the rule of *Audi alteram partem* must be held to be excluded because it may have frustrated, purpose of impounding the passport. Rejecting the contention, the court rightly held that though the impoundment of the passport was an administrative action, yet the rule of Fair hearing was attracted by necessary implication, and it would not be fair to exclude the application of this Cardinal rule on the ground of administrative convenience.

However, the court did not outright crash the order and allowed the return of the passport because of the special social political factors attending the case. On the contrary, the technique of

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<sup>86</sup> (1978) 1 SCC 248

post decisional hearing was developed in order to balance these factors against the clear requirements of lock, justice and fairness. The code stressor that a fair opportunity of being heard following immediately the order impounding the passport would satisfy the mandate of natural justice. The concept of post decisional hearing in situation where pre decisional hearing is required either expressly or by necessary implication is itself based on wrong hypothesis that administrative efficiency and fairness to the individual Are discrete values for the stop 1 cannot expect that a post decisional hearing would be anything more than a mere empty formalistic ritual.

The same technique of validating word administrative decision by post decision hearing was adopted in *Swadeshi cotton Mills v. UOI*,<sup>87</sup> The court validated the order of the government for taking over the management of the company, which had been passing in violation of the *Audi alteram partem* rule and which was found to have been attracted by necessary implication, as the government had agreed to do a post decisional hearing.

Justifying the idea of post decisional hearing, professor de Smith writes:

Can the absence of a hearing before a decision is made be adequately compensated for by a hearing ex post facto? A prior hearing may be better than a subsequent hearing, but a subsequent hearing is better than no hearing at all and in some cases the courts have held that statutory provisions for an administrative appeal or even full judicial review on merits is sufficient to negative the existence of any implied duty to hear before the original decision is made. The approach may be acceptable where the original decision does not cause serious detriment to the person affected, or where there is also a paramount need for prompt action, or where it is impracticable to effort and dissident hearings.

In substance, it is the necessity for speed which justifies post decisional hearing at a later stage. In emergent situations, the principles of natural justice are excluded and, therefore, if the code comes to the conclusion that in a given situation these rules are applicable, there seems to be no reason as to why their observance should not be insisted upon at the pre decisional stage.

In the opinion of Supreme Court, the post decisional opportunity of hearing does not sub serve the rules of natural justice. The authority who embarks upon a post decisional hearing will naturally proceed with a closer mind and there is hardly any chance of getting a proper consideration of the representation at such a post decisional opportunity.<sup>88</sup>

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<sup>87</sup> (1981) 1 SCC 664

<sup>88</sup> *H.L. Tehran v. UOI*, (1989) 1 SCC 764

Thus, in every case with a pre decisional hearing is warranted, post decisional hearing will not validate the action except in very exceptional circumstances. Such exceptional circumstances may include deprivation of Liberty, livelihood and property, unless dire public interest demands otherwise. Thus, a balance between the interest of the affected individual and public interest has to be maintained. Fact remains that at the times “To do a great right, it is permissible sometimes to do a little wrong”.<sup>89</sup>

A recent trend of judicial decision appears to restrict its application to exceptional situations, which require immediate action in public interest.

In the US, due process implies fair hearing with Promptitude. Therefore, pre decisional hearing is a rule and opposed to decisional hearing is an exception. Generally, pre decisional hearing is insisted then administrative action impairs Liberty and property interests, and post decision hearing is allowed in case of violation of dire public interest in situations of emergency and impracticability.

The courts have Developed three part- balancing test to determine. When pre-decisional or post-decisional hearing is mandated. These include,

1. Public interest involved
2. Risks in world in allowing pre decisional hearing, and values of the constitution involved
3. Governments financial and administrative implications.

This balancing test has been further refined by including

1. Important government and general public interest
2. Need for prompt action and
3. Quality of control over force of the government.

Called out rightly insisted on adequate compensation if an action is found contrary to law, are status ante cannot be restored.

Post decisional hearing is thus not a violation of the principles of natural justice, but a modification of eating special circumstances.

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<sup>89</sup>*Charan Lal Sahu v. UOI, (1990) 1 SCC 613*

Elaborating the law further, the Supreme Court observed in *Canara Bank v. V. K Awasthy*, further emphasized that in judging the legal validity of post decisional hearing, legal formulations cannot be divorced from the fact situation of the case, as the purpose of natural justice is to prohibit accidents in administrative justice.

## V. Exceptions to Natural Justice

The word exception in the context of natural justice is really a misnomer, because in these exclusionary cases, the rule of *audi alteram partem* is held in applicable not by way of an exception to fair play in action, but because nothing unfair can be inferred by not affording an opportunity to present or meet a case.<sup>90</sup>

Such a situations where nothing unfair can be inferred by not affording a fair hearing must be few and exceptional in a very civilized society. Principles of natural justice or ultimately weighed in the balance of fairness and, hence, the codes have been circumspect extending these principles to situations where it would cause more injustice rather than justice.<sup>91</sup> For example, a party would forfeit its right to hearing if undue advantage obtained is protracting the proceedings somehow and nullifying the objectives . Thus, where a teacher of the now they have Italia was dismissal on gross moral turpitude without giving exhaustive hearing for central civil services (classification, control and Appeal) Rules, the court held termination valid on the ground that fairness cannot be made counterproductive.<sup>92</sup>

Though the rules of natural justice, namely, *nemo judex in causa sua* and *audi alteram partem*, have no definite meaning and connotation in law, and their content and implications are well-understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the

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<sup>90</sup>*Maneka Gandhi v. UOI*

<sup>91</sup>*Karnataka Public Service Commission v. B.M. vijayashankar, (1992) 2 SCC 206*

<sup>92</sup>*AvinashNagra v. Navodaya Vidyalaya Samithi (1997) 2 SCC 534*



same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straight-jacket. They are not immutable but flexible.

These rules can be adopted and modified by statutes and statutory rules and also by the constitution of the tribunal which has to decide a particular matter and the rules by which such tribunal is governed. There are, however, situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on.

Application of the principles of natural justice can be excluded either expressly or by necessary implication, subject to the provisions of Articles 14 and 21 of the Constitution. Therefore, if the statute, expressly or by necessary implication, precludes the rules of natural justice, it will not suffer in validation on the ground of arbitrariness, unless a person suffers adverse civil consequences. In such situation, fair hearing will be read into the law.

In the following cases, the principles of natural justice may be excluded:

1. Where a statute either expressly or by necessary implication excludes application of natural justice- Statutory exception or necessity
2. Exclusion in emergency
3. Exclusion in case of confidentiality
4. In case of purely administrative matters
5. Exclusion based on impracticability
6. In cases of interim preventive action
7. Where the action is legislative in character, plenary or subordinate;
8. Where the doctrine of necessity applies; Where prompt and urgent action is necessary;
9. Where the facts are admitted or undisputed;
10. Where nothing unfair can be inferred by non-observance of natural justice.
11. When no right of the person is infringed
12. In case of contractual agreement
13. In case of government policy decision
14. Useless formality theory

One thing should be noted. Inference of exclusion of natural justice should not be readily made unless it is irresistible, since the courts act on presumption that the legislature intends to observe the principles of natural justice and those principles do not supplant but supplement the law of the land. Therefore, all statutory provisions must be read, interpreted and applied so as to be consistent with the principles of natural justice.

## **VI. Effect of non-compliance rules of natural justice- effect of breach of contravention of the principles of natural justice**

A complicated and somewhat difficult question is: What is the effect of breach or contravention of the principles of natural justice? Does it go to the root of the matter rendering a decision void or merely voidable?

Courts are unanimous that a decision rendered in violation of the rule against bias is merely voidable and not void. The aggrieved party may thus Waive his right to avoid the decision, as where timely objection is not made even though there is full knowledge of the buyers and the right to object to it. However, there is fundamental disagreement amongst courts and jurists As to the effect of a breach of the rule of Fair hearing on any decision. prof. H.W.R Wade Ease of the view that breaches of the rules of natural justice must have the effect of producing void decisions. But D.M.Gordon Argues that procedural breaches can never render a decision void as jurisdictional error. At first prof. De Smith Appears so how agreed with him but later on he changed his stance.

A voidable order is an order which is legal and valid unless it is set aside by a competent court at the instance of an aggrieved party. On the other hand, a void order is not an order in the eye of law. It can be ignored, disregarded, disobeyed or impeached in any proceeding before any court or tribunal. It is a stillborn order, nullity and void ab initio.

So far as India is concerned, it is fairly well settled and courts have consistently taken the view that whenever there is violation of any rule of natural justice, the order is null and void.

Thus, where appointment of a government servant is cancelled without affording an opportunity of hearing, or where an order retiring a civil servant on the ground of reaching

superannuation age was passed without affording an opportunity to the employee, or where a passport of a journalist was impounded without issuing notice; or where a liability was imposed by the Commission without giving an opportunity of being heard to the assessee; the actions were held to be a nullity and orders *void ab initio*.

The same principle applies in respect of bias and interest. A judgment which is the result of bias or want of impartiality is a nullity and the trial 'Coram non iudice'.

### **Test**

It would not be correct to say that for any and every violation of a facet of natural justice, an order passed is always null and void. The validity of the order has to be tested on the touchstone of prejudice. The ultimate test is always the same, viz. the test of prejudice or the test of fair hearing.

One thing, however, must be noted. Even if the order passed by an authority or officer is ultra vires, against the principles of natural justice and, therefore, null and void, it remains operative unless and until it is declared to be so by a competent court. Consequent upon such declaration, it automatically collapses and it need not be quashed and set aside. But in absence of such a declaration, even ex facie invalid or void order remains in operation de facto and it can effectively be resisted in law only by obtaining the decision of the competent court.

In India, the supreme court in *Nawab Khan Abbaskhan v. State of Gujarat*<sup>93</sup> categorically held that an order which infringes a fundamental, passed in violation of the *Audi alteram partem* rule, is a nullity. The appellant in this case had been prosecuted and convicted for disobeying an externment order which was later held invalid for want of hearing. The Supreme Court emphasized that an externment order passed in violation of the rules of natural justice is of no effect, and its violation is no offence because such a determination is a jurisdictional error going to the very roots of a determination.

In *Swadeshi Cotton Mills*<sup>94</sup>, The operational principle laid down by the court is that an order passed in violation of the rules of natural justice is not such a nullity, *non est* which cannot be reviewed by a post decisional hearing it is certainly contrary to the holding of the court in *Nawab Khan*.

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<sup>93</sup> (1974) 2 SCC 121

<sup>94</sup> (1981) 1 SCC 664

In *A. R. Antulay v. R. S. Nayak*,<sup>95</sup> The court favored the proposition that any action in violation of the principles of natural justice is a nullity. The court held that an action in violation of the principles of natural justice is a nullity and the trial “Coram non iudice”.

Similarly, in *Yunus Khan*, the court held that if there is a violation of the principles of natural justice at the initial stage which render proceedings null and void, such proceedings cannot be validated at the appellate stage even if fairness of that appeal its authorities beyond a dispute. In this case in a disciplinary proceeding authority which initiated proceedings was also as a witness accepted inquiry report and imposed punishment. The Supreme Court held the proceedings as void however even when an action is void it is valid until it is declared wild by a quote and cannot be ignored.

Nevertheless, it may be pointed out that whenever an order is struck down as invalid, being violated of the principles of natural justice, there is no final decision on the case and therefore proceedings are left open. All that is done is that the order assailed by virtue of its inherent defect is vacated, but the proceedings are not terminated. The administrative authority may start the proceedings *de novo*.

#### **IX. Grounds on which decision of quasi-judicial authority can be flagged before Supreme Court**

Powers conferred under a statute may be judicial, quasi-judicial or executive. A judicial decision is made according to law. An administrative decision is made according to administrative policy. A judge attempts to find what is the correct solution according to the legal rules and principles. An administrator attempts to find what is the most expedient and desirable solution in the public interest.' In bodies or officials exercising executive powers, judicial or quasi-judicial power may be conferred. Very often the judicial power is unmistakable. But it is very difficult to lay down when a power is regarded as executive and when it is regarded as quasi-judicial. The subject is fraught with complications. The practical consequences flowing from the distinction is that certiorari or prohibition may be issued to quash or restrain an official or body acting in excess of jurisdiction when the power is quasi-judicial.

Judicial and executive functions are basically the same in their character involving some mental process. Both are overlapping. Courts have certain administrative functions and 'the executive has certain judicial functions. The distinction is very subtle.

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<sup>95</sup> (1988) 2 SCC 602

Until the Supreme Court's decision in *State of Orissa v. Dr. Binapani Dei*, it was thought that an executive order is non-reviewable. The question in issue was the determination of the age of an Assistant Surgeon working in a government hospital. The Government contended that it was exercising executive function. The contention was rejected and the Court held that 'if there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of the power'.<sup>93</sup>

Similarly, if an executive order or act contravenes or disregards a statute or statutory rule or made in excess of their authority disregarding principles of natural justice, they are amenable to the jurisdiction of the High Court under Article 226.

In *Jay Engineering Works v. State of West Bengal*,<sup>94</sup> the Government directed that the police officers should not interfere in the disputes between the employers and the employees in industrial undertakings. It has the effect of directing the police not to exercise their powers under the Criminal Procedure Code, involving Commission of cognizable offences. A Bench of five Judges,<sup>95</sup> of the Calcutta High Court unanimously quashed the order of the Government and directed the Police to act according to the statutory powers. Thus, an order purely executive was quashed.

The Supreme Court itself has said in *A. K. Kraipak v. Union of India*, that "the dividing line between an Administrative power and quasi-judicial power is quite thin and it is being gradually obliterated. For determining whether a power is an administrative power or quasi-judicial power one has to look to the nature of the power conferred, the frame-work of the law conferring that powers, the consequences ensuing the exercise of that power and the manner in which that power is expected to be exercised."

The Court further emphasized that "the requirement of acting judicially in essence is nothing but a requirement of acting justly and fairly and not arbitrarily or capriciously". The authorities exercising quasi-judicial functions must record reasons in support of their orders.

## **Judicial Control**

### **Some of the grounds as follows:**

- \*Violation of Natural Justice- Non-Issuance of notice, Sufficient time, rule against bias
- \* Inadequate reasons or no reasons
- \* Ultra vires decision

- \* Decisions violated the Constitutional provisions
- \*When Quasi-Judicial Authorities decision has suffered from non-application of mind
- \* Abuse of discretion
- \* Excessive or non-exercise of discretionary power
- \*Non exercise of jurisdiction or without jurisdiction passing the order

Writ of certiorari or prohibition lies against a quasi-judicial decision if it was given, in excess of jurisdiction or the authority failed to exercise jurisdiction, or in contravention of rules of natural justice and there is a manifest error of law. The Court can order the authority to conform to judicial process. Certiorari would not lie against an executive order.

If an order is purely executive the practice of the courts until recently has been not to interfere with the executive discretion. But the recent trend permits a court to question even an executive order and if necessary, to quash it, if it involves evil consequences.

The distinction sought to be drawn between executive and a quasi-judicial decision is quite unclear. The same decision may be from one point of view be regarded as executive and in another point of view regarded as quasi-judicial.

A quasi-judicial decision involves certain procedural attributes like natural justice. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as administrative power some years back is now being considered as a quasi-judicial power. The recent trend is in the direction of obliterating the distinction. It seems to be the inevitable consequence because the distinction is unreal and does not stand the test of a critical analysis. Allowing the time-worn distinction to remain is only useful for the purpose of obtaining certiorari or prohibition against authorities exercising quasi-judicial powers in arriving at decisions. The distinction serves no other purpose. When the scope of the writ is very much enlarged allowing of a distinction between executive and quasi-judicial decision appears to be unnecessary.

## **Unit IV**

**ADMINISTRATIVE DISCRETION- GRANT AND EXERCISE OF DISCRETION**

**JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION**

## Introduction

With the abandonment of *laissez faire* and advent of the modern philosophy of a “welfare” and “social service” state, the administrative organ, in practically every democratic country, is performing more and more functions. The main tasks of the administrative organ are no longer merely police or political; it performs vast regulatory and managerial functions.

The administrative powers are of varied types. They range from such simple matters as registration of births and deaths, to regulate of a business activity, acquiring property for a public purpose and detaining a person on the subjective satisfaction of the executive. The administrative powers also include such important powers as of investigation, seizing or destroying the property of an individual without hearing in the interest of public health, safety and morality.

A significant phenomenon of the present-day administrative process, is conferment of discretionary powers on administrative personnel to take decisions from case to case. There is a tendency in all democratic countries that legislation, conferring powers on the executive is usually drafted in broad and general terms; it leaves large area of choice to the administrator to apply the law to actual, specific and factual situations, that is, from case to case, and does not specify clearly the conditions and circumstances subject to which, and the norms with reference to which the executive must use the powers conferred on it.

Because of the complexity of socio-economic conditions which the administration in modern times has to contend with, the range of ministerial functions is very small and that of discretionary functions much larger. The modern tendency is to leave a large amount of discretion with various authorities.

Discretion is the all-pervading phenomenon of modern age. Discretion is conferred in the area of rule-making or delegated legislation, e.g. when the statutory formula says that the government may make rules which it thinks expedient to carry out the purposes of the Act, in effect, abroad discretion and choice are being conferred on the government to make rules. The legislature hardly gives any guidance as to what rules are to be made. Similarly, discretion is conferred on adjudicatory, and administrative authorities on, a liberal basis, that is, the power is given to apply a vague statutory standard from case to case.

But providing such vast powers may also be the cause for abuse. The broader the discretion, the greater the chance of its abuse. In the words of Justice Douglas of the U.S.



Supreme Court. “Where discretion is absolute, man has always suffered... Absolute discretion... is more destructive of freedom than any of man’s other inventions”.

It thus becomes necessary to devise ways and means to minimise the danger of absolute discretion, so that injustice is not done to any single individual. It is not possible for this purpose to depend merely on the good sense of administration itself to use its power properly, for broad power always breeds the danger that will wielder will get power drunk. Courts have to play a major role in the process of controlling the functioning of the administration. In this connection the fundamental rights guaranteed by the Indian Constitution play a significant role. The courts control the exercise of discretion by the administration and for this purpose have evolved several norms.

### **Meaning of Administrative Discretion**

“Discretion is a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.”

-Lord Edward Coke, *Rooke's Case* (1598), 5 Rep. 99 b.

Discretion in a lay person’s language can mean choosing from amongst the various available alternatives without reference to any predetermined criterion, no matter how fanciful that choice may be. A person writing his will has such discretion to dispose of his property in any manner, no matter how arbitrary or fanciful it may be. But the term “discretion” when 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 of reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful but legal and regular.

Lords Halsbury in *Sharp v. Wakefield*<sup>96</sup> observed: “Discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion ...according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself”.

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<sup>96</sup> 1891 AC 173

According to Prof. Freund- "When we speak of administrative discretion, we mean that a determination may be reached, in part at least, upon the basis of considerations not entirely susceptible of proof or disproof... [it involves] matter of degree or an appeal to judgment... discretion includes the case in which the ascertainment of fact is legitimately left to administrative determination".

### **Conferring discretion**

Rarely does the legislature enact a comprehensive legislation complete in all details. More often the legislation is sketchy or skeleton, leaving many gaps and conferring powers on the administration to act in a way it deems "necessary" or "reasonable" or if it "is satisfied" or "is of opinion". Rarely does the legislature clearly enunciate a policy or a principle subject to which the executive may have to exercise its discretionary powers. Quite often, the legislature bestows more or less an unqualified or uncontrolled discretion on the executive. Administrative discretion may be denoted by such words or phrases as "public interest", "public purpose", "prejudicial to public safety or security", "satisfaction," "belief, "efficient", "reasonable" etc.

Thus, there is no set pattern of conferring discretion on an administrative officer. According to Freund- "A statute confers discretion when it refers an official for the use of his power to beliefs, expectations or tendencies instead of facts, or to such terms as 'adequate', 'advisable,' 'appropriate', 'beneficial', 'competent', 'conversant', 'detrimental', 'expedient', 'equitable', 'fair', 'fit', 'necessary', 'practicable', 'proper', 'reasonable', 'reputable', 'safe', 'sufficient', 'wholesome', or their opposite. These lack the degree of certainty... They involve matter of degree or an appeal to judgment. The discretion enlarges as the element of -future probability preponderates over that of present conditions; it contracts where in certain types of case quality trends to become standardized, as in matters of safety; on the other hand, certain applications of the concepts of immorality, fraud, restraint of trade, discrimination or monopoly are so controversial as to operate practically like matter of discretion".

### **Reasons for conferring discretion**

Because of the complexity of socio-economic conditions which the administration in modern times has to contend with, it is realised 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 upon what action to take. Thus, the modern tendency is to leave a large amount of discretion with various authorities. Statute book is 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.

There are following 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.

### **Disadvantages in conferring discretion**

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. Also, there is a danger of abuse of discretion by administrative officials.

These can be countered in the following manner:

1. The 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”.
2. 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, thus, 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.
3. 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 time, it may not be possible to prescribe it intelligible standards for the administration to follow. All these considerations 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.

## **No Unfettered discretion**

It is equally true that absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. Therefore, there has been a constant conflict between the claims of the administration to an absolute discretion and the claims of subjects to a reasonable exercise of it.

Discretionary power by itself is not pure evil but gives much room for misuse. Therefore, remedy lies in tightening the procedure and not in abolishing the power itself. Thus, today question is not whether discretionary powers to administrative authorities is desirable or not but what controls and safeguards can be introduced so that unfettered or unqualified discretion could not be conferred and discretionary powers could not be misused by government officials. It thus, becomes necessary to devise ways and means to minimise the danger of absolute discretion. To achieve such an objective, a multi-pronged strategy has to be adopted. Courts have to play a major role in this process.

While the notion of "unfettered discretion" is acceptable to the English Courts due to the operation of the doctrine of sovereignty of Parliament, it would be inconsistent with the constitutional framework of judicial control in India. The Indian Constitution guarantees certain Fundamental Rights to the people which constitute a limitation on the legislative and executive powers of the government and consequently, these rights provide an additional dimension of control over administrative discretion. The courts in India, in addition to controlling the exercise of administrative discretion on the same ground as the courts in England, also use Fundamental Rights to control discretionary powers of administrative authorities in two ways;

- (i) The courts may declare a statute unconstitutional if it seeks to confer too large a discretion on the administration. Fundamental Rights in India thus afford a basis to the courts to control the bestowal of discretion to some extent, by testing the validity of the law in question on the touchstone of Fundamental Rights.
- (ii) The courts may control the actual exercise of discretion under a statute by invoking certain fundamental Rights, especially Article 14.

## **Article 14 of the Constitution and Administrative Discretion**

One of the Constitutional checks against unfettered or uncontrolled discretion in Indian law is article 14 of the Constitution which provides for the principles of 'equality before the law'

and ‘the equal protection of laws’. This constitutional provision condemns discrimination; it forbids class legislation, but permits classification founded on intelligible differential and having a rational relationship with the object sought to be achieved by the Act in question. Article 14 is buttressed by Article 15 expressly prohibiting discrimination on grounds of religion, race, caste, sex or place of birth, Article 16 states positively that there shall be equality of opportunity in matters of public employment. ‘Unfettered discretion’ is liable to be used in a discriminatory manner and this is offensive to Article 14.

The general principle is that conferment of an arbitrary, sweeping, uncontrolled or unfettered discretion on an administrative authority violates Article 14 as it creates the danger of discrimination among those similarly situated which is subversive of the equality doctrine enshrined in Article 14. Mr. Justice Fazl Ali said in *State of West Bengal v. Anwar Ali*<sup>97</sup> “An Act which gives uncontrolled authority to discriminate cannot but be hit by Article 14”. Similarly, in *Satwant Singh v. Assistant Passport officer*,<sup>98</sup> where refusal of passport was held violative of Article 14, the issue of passports being governed entirely by discretion, the Supreme Court observed :

“in the case of unchanneled arbitrary discretion, discrimination is writ large on the face of it. Such a discretion patently violates the doctrine of equality, for the difference in the treatment of persons sets solely on the arbitrary selection of the executive”

In *State of West Bengal v. Anwar Ali*, in order to speed the trial for certain offences, Section 5(1) of the West Bengal Special Courts Act, 1950 conferred discretion on the State Govt, to refer any offence for trial by the special court. Since, the procedure before the special court was stringent in comparison with that for normal trials, the respondents asserted its unconstitutionality on the ground that it violates the equality clause in Article 14. The court held the law invalid on the ground that the use of vague expressions like “speedier trial”, confers a wide discretion on the Government and can be a basis of unreasonable classification. The Act was held violative of Article 14 because it had empowered the government to select any case or a class of cases or offences to be tried by the special courts. This unfettered discretion is likely to be branded discriminatory and therefore, contrary to Article 14.

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<sup>97</sup>AIR 1952 SC 75.

<sup>98</sup>AIR 1967 SC 1836.

In *S. Kandaswamy Chettiar v. State of Tamil Nadu* the Maharashtra vacant Lands (Prohibition of unauthorized occupation and Summary Eviction) Act, 1955, which was passed for prohibiting unauthorised occupation of vacant lands and for providing summary eviction of unauthorised occupants, conferred upon the competent authority the discretion to declare a land as vacant land without laying down any policy as a guidance for the exercise of such discretion. The Act was therefore held to be violative of Article 14. Discretion was conferred on the State Government by the Tamil Nadu Building Lease and Rent Control Act 1960 to exempt buildings from the Act. This provision was upheld in *Kesoram & Co. v. Union of India*.

Similarly, in *State of Kerala v. M/s Travencore Chemicals Manufacturing Co.*,<sup>99</sup> Section 59A of Kerala General sales Tax Act, 1963 conferring wide and unbridled power was held to be violative of Article 14. It is a well established principle of Indian administrative Law that too broad, uncontrolled discretionary power ought not to be conferred on administrative authorities, for uncontrolled or unguided power falls foul of Article 14. This principle finds reiteration in several cases.

In *Sheo Nandan Paswan v. State of Bihar*<sup>100</sup>, Bhagwati C.J. observed :

"It is significant to note that the entire development of administrative law is characterised by a consistent series of decisions controlling and structuring the discretion conferred on the state and its officers. The law always frowns on unanalysed and unfettered discretion conferred on any instrumentality of the state and it is the glory of administrative law that such discretion has been through judicial decisions structured and regulated."

The preceding discussion shows that the court would enquire whether the statute contains the policy or principles for guiding the exercise of discretion by the executive in the matter of classification and if it does not the statute is liable to be invalidated as having conferred "unfettered" discretion to discriminate between persons or things similarly situated.

So long as the policy itself is not discriminatory<sup>36</sup> legislation would be upheld if its purpose or policy to guide the exercise of discretion is manifest. On that basis Preventive Detention Act, Minimum wages Act, Industrial Dispute Act, Suppression of Immoral Traffic in women and Girls Act etc. have been upheld. However, even if the legislation is valid an administrative action purportedly authorised by the legislation could be discriminatory and

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<sup>99</sup>AIR 1999 SC 230.

<sup>100</sup>AIR 1987 SC 877.

invalid. Though, the principle is clear and well established that unguided or arbitrary power cannot be conferred on the administration, yet its application by the courts to various factual situations faces difficulties.

In *Manohar Lal v. State of Maharashtra*,<sup>101</sup> Section 187. A of the Sea Customs Act gave wide discretionary power to the authorities to either refer a case of smuggled goods to a magistrate or to look into the matter themselves. The court upheld the validity of the statute on ground that as this discretion is to be exercised by senior officers that will stand as a guarantee against its misuse.

In *Summan Gupta v. State of J & K* (2000) with a view to encourage national integration certain state governments agreed as a matter of policy to reserve certain seats in medical colleges for outside candidates nominated by the respective state government on a reciprocal basis. The Supreme Court struck down the vesting of power of nomination in the state governments as the nomination was left to their unlimited discretion and uncontrolled choice. In *Monarch Infrastructures v. Commr. Ulhasnagar Municipal Corporation*, the Municipal Corporation had invited tenders for appointment of agents for the collection of Octroi. However, one of the eligibility condition was deleted after the expiry of the time for submission of tenders but before opening thereof.; Thereafter, tender was awarded to one who did not fulfil the deleted condition. The Supreme Court held award of tender arbitrary and discriminatory.

However, if a statute confers wide powers but contains procedural safeguards, then it can be upheld as valid. Thus, in *Tika Ramji v. State of U.P.* (1956) Section 15 of the U.P, sugarcane Act, 1953 gave to the cane commissioner, after consulting the factory and cane grower's co-operative society, power to reserve any area and assign any area for the purpose of supply of cane to a factory. An appeal against such an order lay to the government. The power given to the commissioner was held not bad under Article 14 as it was well defined and contained safeguards against its exercise in a discriminatory manner. *Organo Chemicals Industries v. Union of India*,<sup>102</sup> is an important case on this area. Section 14-B of the employees 'Provident Funds Act', 1952 provides that where an employer makes default in the payment of any contribution to the fund, the Central Provident Fund Commissioner may recover from the employer such damages, not exceeding the amount of arrears, as he may think fit to impose. Before imposing damages, the employer is to be given a reasonable opportunity of being heard. The broad power given to the

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<sup>101</sup>AIR 1971 SC 1511.

<sup>102</sup>AIR 1979 SC 1803.



commissioner was upheld by the Supreme Court mainly because the law in question was social in nature and beneficial to the labour. However, the court adopted the following formal arguments to uphold the commissioner's vast power to impose damages. The power is to be exercised according to natural justice and, as such, he has to make a speaking order; such an order is subject to Art. 226, so that perversity, illiteracy, extraneous influence, mala fides and blatant infirmities straight away get caught and correct". In, awarding damages he usually takes, into consideration, as he has done here, various factors viz. the number of defaults, the period of delay, the frequency of defaults and the amounts involved." Again in *Gopikishan v. Assistant Collector of Customs*,<sup>103</sup> the power of assistant Collector of Customs to order search of the premises of a person if had reason to believe that the person had in his possession goods liable to be confiscated was upheld as he was required to send forthwith a copy of any record made by him to the collector, and he could be prosecuted if he took action without "having reason to believe"

The Supreme Court may read the procedural requirement of hearing into a statute to save it from unconstitutionality under Article 14. Thus, in *State of Mysore v. Bhat*, where a law authorised the competent authority to declare an area a slum area, to declare houses unfit for human habitation and declare a slum area as a clearance area the court read natural justice into the law to uphold it under Article 14. In *Maneka Gandhi v. Union of India*<sup>104</sup>, Section 10(3) of the passport Act, 1967 empowered the Central Government to impound a passport of a person in public interest. There was no appeal against the order of the government and the words "in the interests of the general public" were appeared to be vague and undefined. But the court upheld the provision by reading the requirement of natural justice and because the words in question could not be characterised as vague and undefined as these very words are to be found in Article 19(5). These words provide sufficient guidelines to the government and its power cannot be regarded as unguided and unfettered, the reasons for impounding the passport are to be recorded in writing and copy thereof is to be given to the affected person save in certain exceptional circumstances; the power is vested in a high authority, and according to the court when power is vested in a high authority like the Central Government, abuse of power cannot be legally assumed."

Although Article 14 has established itself as the constitutional basis for demanding judicial review in a way that is familiar to American lawyers i.e. that discretion be structured by rules standards and policies, the degree of judicial review exercised on this basis has swung between two extremes of a pendulum. In some cases the courts have rejected the standards provided by the

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<sup>103</sup>AIR 1967 SC 1298.

<sup>104</sup>AIR 1978 SC 597.

statute as “vague and uncertain” and condemned the enabling Act as having conferred unguided discretion while in other cases they have handed the executive a free hand by saying that a discretion vested in a high ranking officials is presumed to be exercised bona fide. Sometime they have accepted even a vague policy as is sufficient for the purpose when the same has been given in the preamble of the statute concerned or in general objective of the statute.

Thus, in *State of W.B. v. Anwar Ali*, the West Bengal Special Courts Act, 1950 which authorised the state government to direct a special court to try “any offence or cause” under procedure substantially different from the ordinary criminal procedure to determent of the accused declared in its preamble that the object of the Act was” to provide for the speedier trial of certain offences”. It was held that the necessity for a “speedier trial” was too vague and uncertain to form a rational basis of classification. By contrast speedier trial related to the object of the statue such as “public safety” and ‘maintenance of public order in a dangerously disturbed area’ has been accepted a sufficiently certain.

In re *Kerala Education Bill* case,<sup>105</sup> the Kerala Education Bill gave broad powers of control to the Kerala Government over private schools in the state, as for example, power to recognise newly established schools, power to take over any category of schools in any specified area through a notification. These provisions were challenged as being discriminatory on the ground that they were capable of being exercised “with an evil eye and unequal hand”. The Supreme Court held that the clauses of the bill had to be interpreted and read in the light of the general policy laid down in the preamble namely to provide for better development of education in the State. Article 14 has thus proved to be a valuable tool in restraining what has been termed in English law “unfettered discretion”. Thus, the courts have demanded that discretion must not be arbitrary. Absence, of standards, policies and principles to guide the exercise of “absolute discretion” is liable to render the resultant administrative action open to challenge.

### **No Review of the merits of exercise of Discretion**

*A.K Gopalan v. State of Madras* 1950 SCR 88

S.2 Preventive Detention Act was in question– make order if it is necessary to do so in order to prevent him from acting prejudicially to the interest of the nation.

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<sup>105</sup>AIR 1958 SC 956.

Held: no court can sit in place of detaining authority and can decide whether or not it would have come to the same decision as the authority. Authority's satisfaction could not be substituted for court's satisfaction. Court cannot question the grounds of subjective satisfaction.

In *Arora v. State of UP*, Arora's land was acquired u/LAA for construction of a factory for manufacturing textile machinery parts. Arora challenges – he himself wanted to erect a factory and land intended to be used for one public purpose cannot be acquired for another public purpose. It was held: requirement of the 'public purpose' is satisfied and it is for the Govt to decide whether or not to acquire.

*C.P. Sarathy vs State Of Madras And Ors.*<sup>106</sup>-

S. 10(1) Industrial Disputes Act was in question – Govt can refer an ID for adjudication by LC if it is of the opinion that ID existed or apprehended

Held: making reference is administrative but factual existence and expediency of making reference is discretionary u/s.12 if Govt declines to make reference it has to quote reasons but propriety, correctness, adequacy or satisfactory character of reasons cannot be questioned.

## **Grounds for Judicial Review of Administrative Discretion**

The main grounds for reviewing the administrative discretion, may be classified as under:

- (A) Ultra-Vires;
- (B) Abuse of Discretionary Powers:
  - (i) Irrelevant consideration
  - (ii) Improper purpose
  - (iii) Errors of law
  - (iv) Unauthorised delegation
  - (v) Fettering of discretion
- (C) Proportionality

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<sup>106</sup>AIR 1951 Mad 191

(D) Unreasonable exercise of discretionary power

(E) Irrationality

(F) Procedural Impropriety

(G) Jurisdictional error

(H) Acting under dictation

(I) Non-application of mind

(J) Malice

(K) Colourable exercise of powers

### **A. Ultra-Vires**

The doctrine of ultra-vires states that a person or authority acting under statutory power can do only those things which are statutorily authorised. In case of failure to do so, the doctrine permits the courts to strike down the decision made by the bodies exercising the public functions. Doctrine denotes that an authority can only do things permitted by the statute to be done and things which are not expressly conferred by the statute are forbidden to be done.

In the light of the spirit of the ultra-vires, the courts have been empowered to scrutinize and find out whether action taken by the authority was within the jurisdiction or it has travelled beyond the scope of its authority. It is an important feature of administrative law jurisprudence. The essence of this doctrine is that a person or a body acting under a statutory power or authority can be allowed to do things which the statute permits to him to do and anything done beyond the power conferred in this behalf would be without jurisdiction and consequently the decision would be ultra-vires.

The object of the doctrine of ultra-vires is the protection of the people against the administrative authorities whenever they go against the spirit of the statute and exercise the powers conferred on them contrary to the law contained in the statute.

Lord Salbome opines that the doctrine of ultra-vires ought to be reasonably, and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to,

or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra-vires.

It is also important to make a mention here that the notion of implied power has been permitted by the courts to free the administration from the shackles of an overtly strict ultra-vires doctrine.

The doctrine of ultra-vires can be invoked on the ground of non-compliance of the mandatory procedure provided under the Act. However, directory procedure may be considered as an exception to the doctrine of ultra-vires. Wanchoo J., in *Raja Buland Sugar Co. v. The Municipal Board, Rampur*,<sup>107</sup> observed:

“The question whether a particular provision of a statute which on the face of it appears mandatory - in as much as it used the word 'shall' as in the present case - or merely directory cannot be resolved by laying down any general rules and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to person resulting from whether the provision is read one way or the other, the relation of the particular provision to other provision dealing with the same object and other consideration which may arise on the facts of a particular case, including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.”

The principle of ultra-vires can also be invoked if the administrative authorities do not follow the procedure laid down in the Act. If the procedure is violated, rules may be declared invalid. In determining the validity of the rules on this ground, the courts look into the spirit, rather than the letter of the law. The Supreme Court has ruled in *Khoday Distilleries Ltd. v. State of Karnataka*,<sup>108</sup> that the act of the administrative authority can be struck down if it is manifestly unreasonable and arbitrary. The test of reasonableness plays a significant part in the governance of the country. It can always be pointed whether the authority has a reasonable ground exercising judgement.

It may be mentioned here that the principle of ultra-vires requires statutory powers to be exercised in good faith and on correct ground. The presumption is that the legislative authority

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<sup>107</sup>AIR 1965 SC 895

<sup>108</sup>(1996) 10 SCC 304.

cannot have intended to authorise unreasonable action which is therefore, ultra-vires and void. The court is concerned only in the acts of legal powers. Acts, if valid themselves, produce legal consequence. Doctrine of ultra-vires is comprehensive and can cover virtually all situations where statutory power is exercised contrary to some legal principle where a public authority is held to have acted for improper motives or irrelevant considerations, its actions are ultra-vires and void.

## **B. Abuse of Power**

It has been seen that administrative bodies do not exercise their discretionary power for the purpose intended to by the legislature. It may also happen that the statute under which the powers are conferred on the administrative authorities may not be an authorised delegation. It is also generally found that the powers are exercised on irrelevant consideration or sometime there appear some errors of law in the discharge of its function. All these factors amount to the abuse of discretionary powers and become ground for judicial review.

### **(i) Irrelevant Consideration**

There is no denying the fact that administrative decisions involve an element of discretion which is supposed to be exercised on relevant and not on irrelevant or extraneous considerations. It implies that the power conferred on administrative authority by a statute on the consideration relevant to the purpose for which it is conferred. If the statute mentions no such consideration, then the power is to be exercised on consideration relevant to the purpose for which it is conferred on the authority concerned. Therefore, if the authority concerned pays attention to, or takes into account wholly irrelevant or extraneous circumstances, events or matters, then the administrative action is ultra-vires and bound to be quashed.

Undoubtedly the grounds of irrelevant consideration give an additional dimension to judicial review. If the act itself spells out the relevant criteria that has to be taken into consideration in exercising the given power, then the task of the court becomes easy, as what they have to see is whether a consideration is not mentioned in the Act, has affected the exercise of discretion by the authority concerned. However, the courts do not usually perform the task of judicial review mechanically. Even when a statute does not fully spell out the relevant criteria or consideration, or may appear to confer power in almost unlimited terms.

The court may by looking into the purpose and provisions of the Act, assess whether extraneous or irrelevant consideration have been applied by the administration. It is interesting to

note that the ground of irrelevant consideration may be taken up in case of prerogative power. It is now judicially recognised that the prerogative powers are capable of abuse as are the other powers. So, there are cases where prerogatives have many times been restricted by the judicial decision. Lord Green M. R. in a landmark case *Associated Provincial Picture Homes Ltd. v. Wednesbury Corp.*,<sup>109</sup> ruled that an authority exercising discretion must adhere to some principles: which include : (a) take all relevant factors into account; (b) exclude all irrelevant factors from its consideration; (c) reach the decision which is neither perverse nor irrational.

It is also evident from the scrutiny of cases that the judiciary has ruled that discretionary powers must be exercised for proper purposes given in the conferring statute. The courts have a duty to determine the cases within their jurisdiction and properly brought before them and that administrative bodies, in general, have a duty to exercise their statutory discretion one way or the other when circumstances for the exercise of those discretions arise. The statutory body must be guided by relevant considerations.

The judicial trend discloses that every action of the administrative authority becomes invalid if it, in exercise of its discretionary powers, ignore the relevant consideration. The courts have ruled that an authority must take into account the consideration which a statute prescribes expressly or impliedly. In case the statute does not prescribe any considerations but confers powers in a general way, the court may still apply some relevant consideration for the exercise of the power and quash an order because the concerned authority did not take these into account.

Supreme Court of India in a landmark case of *Indian Railway Construction Co. Ltd. v. Ajay Kumar*.<sup>110</sup> has held that the authority in which the discretion is vested can be compelled to exercise that discretion but not exercise it in any particular manner, in general, a discretion must be exercised by the authority to which it is committed. The authority must genuinely address itself to the matter before it. It must not act under the dictate of other body or disable itself from exercising a discretion in each individual cases. It must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant consideration and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of legislation that gives it power to act, and must not act arbitrarily or capriciously. The courts have ruled that discretion may be improperly fettered because irrelevant considerations have been taken into account.

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<sup>109</sup>(1948) 1KB 223

<sup>110</sup>(2003) 4 SCC 579

## (ii) Improper Purpose

If the statutory authority exercises discretion for a different purpose the actions taken may be quashed on the ground to have exercised that power for improper purpose. It may be specifically submitted here that there is a distinction between improper purpose and mala-fide exercise of power. The distinction is that the mala-fide purpose may include ill-will, malice or oblique motive while these may be absent in the former one.

Warrington, L.J., quoted in *Pratap Singh v. State of Punjab*,<sup>111</sup> "It may be also possible to prove that an act of public body, though performed in good faith and without the taint of corruption, was so clearly founded on an alien and irrelevant ground as to be outside the authority conferred upon the body and therefore inoperative.

It is implied that the legislature confers the discretion upon the administrative authority with the intention that it should be used to promote the policy and the objects of the Act, the policy and objects of Act must be determined by taking into consideration, the provisions of the Act as a whole. It is not possible to draw hard and fast line, but if the administrative authority, by reason of its having misconstrued the Act or for any other reason so used its discretion as to thwart or run counter to the policy and objects of the Act, the court would certainly provide protection to the persons aggrieved.

It would be a case of fraud on power, though no corrupt motive or bargain is imputed if it could be shown that authority exercising a power has taken into account, it may even be *bonafide* and with the best of intention as a relevant factor. Something it could not properly take into account, in deciding whether or not exercise the power or the matter or extent to which it should be exercised, the exercise of power would be bad. The Supreme Court has observed:<sup>112</sup> "Misuse of power or misapplication of power are terms correctly employed to describe the use of power in this illegal fashion. It was not necessary for the respondent to go so far as to establish that such misuse took place with the deliberate object of benefiting others at the expense of respondents."

The judiciary has made it abundantly clear in many cases that every discretionary power vested in the executive should be exercised in a just, reasonable and fair manner. In exercising that power the authority must bring to bear an unbiased mind, considering impartially the objections raised by the aggrieved party and decide the matter consistent with principles of natural

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<sup>111</sup>AIR 1964 SC 72.

<sup>112</sup>State of Bombay v. K. P. Krishnan, AIR 1989 SC 1223.



justice. Authority cannot permit its decisions to be influenced by others as this would amount to abdication and surrender of its discretion. It would then not be the authority's discretion that is exercised but some else.

If an authority hands over its discretion to another body, it acts ultra-vires and would plainly be contrary to the nature of the powers conferred upon the authority. The Apex Court in *Suman Gupta v. State of Jammu and Kashmir*, has held that exercise of all administrative powers must be structured within a system of controls informed by both relevance and reason in relation to the object which it seeks to serve and reason in regard to the manner in which it attempts to do so. Court taking serious note of the rights of the individuals has ruled that it is improper and undesirable to expose the precious rights like right to life, liberty and property to the vagaries of the individual's whims and fancies. The presumption that those who occupy high posts have a high sense of responsibility is neither legal nor rational. Absence of guidelines cannot be defended on the ground that discretion is vested in high authority.

### (iii) Errors of Law

The court may review an administrative decision where there has been an error of law on the face of the record or where such errors are obvious. It is imperative to submit here that error must not necessarily be a flagrant one, or relate to a simple or established principle of law, but that the error must be readily ascertainable by the supervising court and not one that can be ascertainable by supervising court and not one that can be ascertained by a detailed examination of all the evidence that was before the deciding agency.

Lord *Denning* in *R. V. Northumberland Compensation Appeal Tribunal*,<sup>113</sup> observed:

“Judiciary has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction but also to seeing that they observe the law. The control is exercised by means of power to quash determination by the tribunal which, on the fact of it, offends against the law. The court does not substitute its own views for those of tribunals as a court of appeal would do. It leaves to the tribunal to hear the case again, and in proper case may command it to do so.”

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<sup>113</sup>(1952) 1 All.ER 122

The error of law must be on the face of record which would mean that all those documents which appear therefrom to be the basis of decision must reveal the error in apparent form. The court will grant review if it was satisfied that there was an error of law on the face of record. Action for declaration can be brought successfully if it is proved to the satisfaction of the court that there was present an error of law. It remains true to say that error of law on the face of record is a ground for review by a supervising court only in respect of decision by an inferior authority acting judicially. Judicial review on the grounds of an "error on the face of record" is not to be likely made available where the administrative authority refused to give or refrains from giving reasons for its decision.

It may be mentioned here that errors of law must take several forms. The authority may wrongly interpret the word to which the legal meaning has been attributed. What is apparent is that judicial review is available for errors of law but not on error of fact as court in such case cannot seek an appeal and decide the correctness of findings or correctness of the facts ascertained by the administrative authority. The court is entitled only to correct the error of law which can be corrected by the writ of certiorari. The error on the face of record means the decision has been made wrongly in law and the decision was acting within the jurisdiction. Error of law takes place when the decision maker acts contrary to the requirement of legality or, he has broken one of the rules for lawful decision-maker.

The courts in India, alike England, have invoked judicial review in cases where the decisions of the administrative authorities were tainted by the errors of law. The sheet-anchor of judicial review of administrative action is the 'error of law'. It has been noticed that at present judicial thinking in India is tending towards expanding the scope of the concept of 'error of law'. A consequence of great importance of this judicial approach is that courts can extend their control over statutory authorities and can vitiate the decisions in case on error of law is found apparent on the face of record. It is seen that the error of law apparent on the face of record has always been the best ground for certiorari being granted.

The error of law in the decision of determination is in itself amenable to a writ of certiorari but it must be a "manifest error apparent on the face of the proceedings" i.e. when it is based on the clear ignorance or disregard of the provisions of law. It may however, be mentioned here that it is a patent or self-evident error of law which can be corrected by certiorari, but not a mere wrong decision. An error of fact, however, grave it may appear, cannot be corrected by a writ of certiorari. What is evident in that error of law must be self-evident.

Gajendragadkar, J. in *Syed Yakoob v. K. S. Radha Krishnan*<sup>114</sup> observed:

“An error of law which is apparent on the face of record can be corrected by a writ but not an error of fact, however, grave it may appear to be. The only case where a finding of fact might be impugned on the ground of error of law apparent on the face of record are: (i) erroneously refusing to admit admissible and material evidence, (ii) erroneously admitting inadmissible evidence which influenced the finding, and (iii) a finding of fact based on no evidence.”

(iv) Unauthorised Delegation

The principle is that when a power entrusted to a person in circumstance indicating that trust is being placed in his individual judgement and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another. The very object of conferring a power on a particular administrative body is that power must be exercised by the authority alone and must not be delegated to other authority or official.

The judicial review of unauthorised delegation may be analysed as under:

- (a) Where an authority vested with discretionary powers affecting private rights, empowers one of its committees or sub-committees, members or office to exercise those power independently without any supervisory control by the authority, the exercise of power is likely to be held invalid.
- (b) A bye-law by which a local authority hands over its own regulatory powers to an official by vesting him with virtually unrestricted discretion, may be called as an authorised delegated legislation and may be held to be void.
- (c) Degree of control maintained by the delegating authority over the acts of the delegates or sub-delegates may be material factors in determining the validity of the delegation.
- (d) It is improper for an authority to delegate wide discretionary power to another authority over which it is incapable of exercising direct control, unless it is expressly empowered so to delegate
- (e) Where the exercise of discretionary power is entrusted to a named officer, another officer cannot exercise his power in his stead unless express statutory provisions have been made to this effect.

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<sup>114</sup>AIR 1964 SC 477.

- (f) Where power to sub-delegate has been conferred by statute, the delegation must be conveyed in an authorised form to the designated authority and must identify sufficiently what are the functions thus delegated instead of leaving the sub-delegate to decide the ambit of his own authority.
- (g) A delegate must exercise its jurisdiction within the four corners of this delegation, failing which the act done by the administrative authority becomes unauthorised hence a ground for judicial review.

(v) Fettering of Discretion

When a statute confers powers on an authority to apply a standard as the case in administrative discretion, it is expected of it to apply it from case to case, and not fetter its discretion by declaration of rules or policy to be followed uniformly in all the cases.

It is submitted here that an authority entrusted with the discretionary power must exercise the same after considering individual cases. Instead if, authority-imposed fetters on its discretion by adopting fixed rules of the policy to be applied in all cases coming before them is failure to exercise discretion on the part of that authority. What is desirable from the authority is that, it must consider the facts of each case, apply its mind and decide the same. Pronouncement of a general rule to be applied to all cases irrespective of different facts will certainly amount to imposing fetters on the discretion by self-imposing rules of policy. It is not advisable to lay down any rigid rule for guiding the discretion. Free discretion given by the statute would, thus be fettered if the discretion is not allowed to be exercised in accordance with the fact of each case.

Any order passed by the administrative authority may be declared bad, if it imposed fetters on its discretion by self-imposed rules of policy. If the government while making the policy decision, shuts its ears to the merits of the individual cases, the action taken cannot be sustained at all. Generally speaking it is in the fitness of things that an authority entrusted with a discretion must not, by adopting a rule or policy disable itself from exercising its discretion in individual cases.

The apex court in *Somabhai v. State*,<sup>115</sup> observed:

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<sup>115</sup>1977 CrLJ 1523

“Generalization on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrates the very purpose of conferring discretion”.

It may, however, be made clear that there are many cases where imposition of fetters on discretion by self-imposed rules or policies can be justified. The only requirement is that when a general policy is adopted, it must be considered on the basis of the facts and the merits of each case. Lord Reid has rightly noted that an administrative authority, having a discretion may formulate a policy or make a limiting rule as to the future exercise of this discretion, if it thinks that good administration requires it, provided the authority is always willing to listen to anyone with something new to say.

Halsbury Laws of England, while elucidating the correct principle of law on the fetters of discretionary powers states that a public body clothed with statutory discretion may formulate general rules or principles of policy to guide itself as to the manner of exercising its own discretion, in individual cases, provided such rules or principles are legally relevant to the exercise of its power, consistent with the purpose of the enabling statute and not arbitrary or capricious. Nevertheless, it must not disable itself from exercising a genuine discretion in a particular case, directly involving individual interest. The authority must be prepared to consider making an exception to the general rule if the circumstances of the case warrant special treatment.

### **C. Proportionality**

The doctrine of proportionality is emerging as a new ground of challenge for judicial review of administrative discretion. It is a recognised general principle of law evolved with a purpose to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose it pursues. The doctrine of proportionality endeavours to confine the exercise of discretionary powers of administrative authority to means which are proportioned to the object to be pursued.

The courts while invoking the doctrine of proportionality may quash the exercise of powers in which there is not a responsible relationship between the objective which is sought to be achieved and the means used to that end.

The Supreme Court, in *Union of India v. Kuldeep Singh*<sup>116</sup> while invoking the principle of

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<sup>116</sup> (2004) 2 SCC 590

proportionately has held that "it is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of misconduct would be violative of Article 14 of the Constitution."

The courts may apply the principle of proportionality as a protection against imposition of cruel and unusual punishment. The state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate. In assessing where the sentence is grossly disproportionate, the court may consider the gravity of the offence, the personal characteristics of the offender and particular circumstances of the case in order to determine what range of evidence would have been appropriate to punish, rehabilitate or deter the particular offender or to protect the public from him.

The Supreme Court of India while expounding the spirit of principle of proportionality, has ruled that a restriction imposed on the fundamental rights can be struck down if it is disproportionate. To sum-up, the courts applies the doctrine of proportionality to evaluate whether there has disproportionate interference with the individuals' rights and interests and declares the action as illegal if the courts finds it contrary to this principle.

#### **D. Unreasonable Exercise of Discretionary Power**

The term unreasonableness embraces a wide variety of defects including misdirection, improper purpose, disregard of relevant considerations and advertence to immaterial factors. The essence of this criteria of reasonableness has been explained very lucidly by Lord Greene in *Associated Provincial Picture Homes Ltd. v. Wednesbury Corporation*.<sup>117</sup> He observes: "There may be something so absurd that no sensible person could ever dream that it lay within the power of authority."

The fact is that all powers exercised by the public authorities are liable to be misused. The courts are, therefore, vigilant to check the misuse of public power which is the subject matter of judicial review. It is the doctrine of ultra-vires that confines the public authorities to the power, granted by the statute. The courts are concerned to see that not only whether power exercised exists but also whether it has been exercised reasonably.

It is for the court to see that the discretionary power conferred on an administrative authority is exercised by that authority reasonably. If the power is exercised unreasonably, there is an abuse

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<sup>117</sup>(1948) 1 KB 223.

of power and the action of the authority will be ultravires. The rule of unreasonableness denotes a general description of the things that must not be done. A person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He cannot exclude from his consideration the matters which are relevant to what he has to consider. If he does not obey these rules, he may be said to have been acting unreasonably.

The rule of reasonableness does not consider extraneous matters as the basis of their decisions. The reasoning faculty of the authority must be exercised objectively and his order must reveal this thinking process in dealing the reasons for his discretion. Exercise of discretion judiciously is clearly opposite to capricious or arbitrary exercise of power. The rule of reason predicates that administrative discretion necessarily be exercised reasonably and objectively. Unreasonableness, such as considering extraneous factors, disregarding relevant factors, ignoring statutory objective, vitiate the order.

Gajendra Gadkar, J. has opined in the landmark case of *Pukhraj v. Kohi*,<sup>118</sup> “that the courts cannot sit in appeal over the decision of administrative office. All that the court can consider is whether there is a ground which prima-facie justifies the said reasonable belief.” If a decision of administrative authority on a competent matter is so unreasonable, that no authority could even have come to it, then the court can interfere, but to prove a case of that kind would require something overwhelming. Thus, the reasonableness could, therefore, mean not what the court considers unreasonable, but a decision which the court thinks that no reasonable body would have come to this conclusion. There must be some material on the basis of which reasonable belief can be founded for giving decision.

Similarly, Grover J. has rightly stated in that there can be no manner of doubt that words 'reason to believe' suggest that the belief must be that of honest and reasonable person, based upon reasonable ground and the administrative authority may act on circumstantial evidence but not on mere suspicion, gossips or rumour. The administrative authority would be acting without jurisdiction if the reason for its belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the law. The court can always examine this aspect, though the declaration or the sufficiency of the reasons for the belief cannot be investigated by the court.

### Wednesbury Principles

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<sup>118</sup>AIR 1962 SC 1559

- These are the principles laid down by Court of Appeal in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*
- The plaintiffs were the owners and licensees of a cinema house. defendants were the licensing authority for that area, the Wednesbury Corporation.
- The Wednesbury Corporation had the power under The Cinematograph Act to grant licenses in any area for cinematograph performances.
- Under the Sunday Entertainments Act, had the power to allow a licensed place to be open and used on Sundays, “subject to such conditions as the authority thinks fit to impose”.
- The Wednesbury Corporation granted the license to the plaintiffs on the condition that no children under 15 years, whether accompanied by an adult or not, should be admitted to Sunday performances.
- Court held, in order to overturn the order of corporation court must be satisfied that
  - The corporation, in making that decision, took into account factors that ought not to have been taken into account, or
  - The corporation failed to take account factors that ought to have been taken into account, or
  - The decision was so unreasonable that no reasonable authority would ever consider imposing it. (Wednesbury unreasonableness)
- Court ruled in the favour of Corporation.

### **E. Irrationality**

The term 'irrationality' and 'unreasonableness' are often used interchangeably. However, irrationality may be said to be only one facet of unreasonableness. A decision is said to be irrational if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. The term irrationality has reference to those decisions which are made in arbitrary fashion. 'Absurd' or perverse decisions may be presumed to have been decided in a fashion that the reasons are simply unintelligible. Mostly there is an absence of logical connection between the evidence and ostensible reasons for the decision or there is absence of evidence in support of the decision.



Irrationality may be inferred from the reasons. When reasons are required by statute or law, those reasons must be both adequate and intelligible. The failure to non-consideration of reasons may vitiate the decision if the aggrieved can show the substantial prejudice resulting from a failure on the part of the decision maker to demonstrate how an issue of law had been resolved or a disputed issue of fact decided or by demonstrating some other lack of reasoning which raised substantial doubt over the decision making process.

Judicial review may lie on the ground of irrationality where the existence of a set of facts is a condition precedent to the exercise of power or when the decision maker has taken into account something which is wrong or where he has misunderstood the facts on which the decision depends or where there is no evidence for a finding upon which a decision depends or where the evidence, taken as whole, is not reasonably capable of supporting finding of facts.

The Supreme Court of India in a landmark case of *Indian Railway Construction Company Ltd. v. Ajay Kumar*,<sup>119</sup> has held that judicial review is open in cases of irrationality. While quoting Lord Diplock, the Apex Court has endeavoured to explain the meaning of irrationality as a decision which is so outrageous in its defiance to logic or accepted moral standards that no sensible person who had applied to the question to be decided could have arrived at. The court ruled that a decision can be said to be irrational if it is not based on the material of the case and is so outrageous as to be in total defiance of logic and moral norms.

#### **F. Procedural Impropriety**

The administrative authorities are required to adhere to some procedure for arriving at the administrative decision. Procedure 'deals with the structure' of decision making and not the quality or impact of the decision themselves. The significant aspect of the procedural justice is to provide the opportunity for individual to participate in the decision that affects them.

Another important concern of the procedural justice is to promote the quality, accuracy and rationality of decision-making process. Both aspects of procedural justice aim at enhancing the legality of that process.

Both aspects of justice i.e. substantive justice and procedural justice - are important in the field of administrative law. Substantive justice ensues that the decisions of administrative authority are kept within the bounds of the conferred powers whereas procedural justice affords individual a

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<sup>119</sup>(2003) 4 SCC 579

fair opportunity to influence the outcome of a decision and deals with issues such as requirement to consult, to hear representation and to hold hearing. According to John Rawls, "The rule of law requires some form of due process designed to ascertain the truth. The precepts of natural justice are to ensure that the legal order will be impartially and regularly maintained."

It may be submitted here that entire concept of procedural fairness has flown out of the expression of natural justice. It is an established fact that the procedure which deals with the entire scenario of decision-making by administrative authority derives its authority from the ultimate source called as 'Nature'. It was with the passage of time that the term natural justice became identified with the two constituents of a fair hearing:

- (a) That parties should be given proper opportunity to be heard and to this end should be given due notice of the hearing (*audi altarem partem*).
- (b) That a person adjudicating should be disinterested and unbiased (*nemo iudex in causa sua*)

The first principle of natural justice aims at to govern the conduct of administrative authority in the exercise of their disciplinary functions invested with the authority to adjudicate upon the matters involving civil consequences to individuals. It implies that the public authorities must either give the person notice that they intend to take the matter into their consideration with a view to coming to a decision, or if they have come to a decision, they propose to act upon it, and to give him an opportunity of showing cause why such step should not be taken.

Significance of the principle of natural justice read with the doctrine of *audi altarem partem* is that is *prima facie* imposes on administrators, an obligation to act fairly. When the mandatory procedure is set out in a statute, the administrative authorities are required to follow it, failing which the decision taken will be vitiated.

It is evident from the analysis of the cases that there is an implied presumption that procedural fairness is required whenever the exercise of a power adversely affects an individual's rights created by statute. The latest trend discloses that the duty to afford procedural fairness is not to be limited to the protection of legal rights in the strict sense but also to more general interests of which the interest in pursuing a livelihood and in personal reputation.

Another aspect of procedural impropriety is that the decision maker should not be biased or prejudiced in a way that precludes fair and genuine consideration being given to the argument

advanced by the parties. Bias can be defined as an operative prejudice whether conscious or unconscious and aims at preventing hearing from being a shame or a ritual or a mere exercise in symbolic reassurance. It not only concern to prevent the distorting influence of actual bias but also to protect the integrity of decision-making process by ensuring the circumstances should not give rise to appearance or risk of bias.

### **G. Jurisdictional Error**

The administrative discretion is founded on one of the basic principles to prevent administrative authorities from exceeding their powers or neglecting their duties imposed under the law. When jurisdiction had been conferred upon an authority, the authority may make errors of law within its jurisdiction. It is clear that judicial review, as traditionally held not with correctness of findings as such, but with their legality.

The term jurisdiction means authority to decide. Where an authority is empowered or required to inquire into question of law or fact for the purpose of giving a decision its findings cannot be impeded collaterally or on an application of judicial review but are binding until reversed on appeal. It may be submitted here that where a court has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it was wrong in law or fact. it does not lose its jurisdiction even if its conclusion on any aspect of its proper field of inquiry is entirely without evidential support. The question whether administrative authority has jurisdiction, depends not on the truth or falsehood of act into which it has to inquire or upon the correctness of its findings on these facts, but upon their nature, and its determinable at the commencement, not at the conclusion of inquiry. The administrative authority empowered to determine the issue has jurisdiction to determine all questions of law and fact relating to that question, and it does not exceed its jurisdiction by determining any of those questions incorrectly.

The jurisdiction impliedly denotes that the administrative authorities are required to discharge their functions under the statute. The administrative body can decide only such question as it is authorised to decide under the statute concerned and that it has no power to dub any provision of the statute as ultra-vires. The court have held that the administrative authority cannot go into the question of validity of substantive law or procedure laid down in the statute or the rules framed thereunder since it itself is creature of statute. Prof. K. C. Davis has said that it is difficult to prescribe straitjackets looped with chained as uniform for the administrator, however, he suggests that jurisdiction should be structured, confined and checked through judicial review. In essence,

the doctrine of ultra-vires permits the courts to strike down decision made by administrative bodies exercising public functions, if they exceed the jurisdiction provided in the statute under which they exercise their powers.

where an Act confers a jurisdiction, it impliedly also grants jurisdiction of doing such acts or employing such means as are essentially necessary to its execution. The express grant of statutory powers carries with it, by necessary implications, the authority to use all reasonable means to make such grant effective- Chief Executive Officer and Vice-Chairman, *Gujarat Marketing Board v. Haji Dand Haji*, (1996) 11 SCC 223.

#### Acting Without Jurisdiction

- *News papers Ltd. v. State Industrial Tribunal (1957)*
- *State of Gujarat v. Patil Raghav Nath (1969)*
- *Ahmadabad St. Xavier's College Society v. State of Gujarat (1974)*

#### Exceeding Jurisdiction

- *London County Council v AG (1902)*
- *Calcutta Electric Supply Corp. v. Workers' Union (1959)*

#### **H. Acting under Dictation**

The cardinal principle of administrative law is that an authority entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body. All authorities entrusted with statutory discretion must be guided by consideration of public policy, and in some context, the policy of existing government will be a relevant factor in weighing those considerations, but this will not absolve them from their duty to exercise their individual judgement.

The decision of the administrative authority vested with discretionary powers has to be quashed where it surrenders its discretion to another person. *P. F. Cooperative Society v. Collector Thanjavour*, AIR 1975 Mad 81: "This, in law, would amount to non-exercise of its power by the authority and will be bad in the eyes of law."

Gajendragadkar, C. J., in *Rajagopala Naidu v. State Transport Appellate Tribunal*<sup>120</sup> "It is of the essence of fair and objective administration of law that the decision of the judge or tribunal must be absolutely unfettered by the extraneous guide by the executive or administrative wing of the state. If the exercise of discretion conferred on a quasi-judicial tribunal is controlled by any such direction that forges fetters on the exercise of quasi-judicial authority and the presence of such fetters would make the exercise of such authority completely inconsistent with the well-accepted notion of judicial process. . . . The scope of jurisdiction of the tribunal, constituted by the statute, can well be regulated by the statute and principle for the guidance of the said tribunal may also be prescribed subject of course, to the inevitable requirement that these provisions do not contravene the fundamental rights granted by the Constitution."

Venkatachaliah J. observed: "The authority cannot permit its discretion to be influenced by the dictation of others as this would amount to abdication and surrender of its discretion. It would then not be the authority's discretion that is exercised, but of somebody else. If an authority hands over its discretion to another body it acts ultra-vires. Such an interference by a person or body extraneous to the power would be, plainly contrary to the nature of power conferred upon the authority.

There is, however, a difference between seeking advice or assistance and being dictated to. Advice or assistance may be taken so long as the authority concerned does not mechanically act on it, and itself take the final decision in the matter before it. The discretion may be exercised by the authority concerned genuinely without blindly and mechanically acting on the advice.

In *Commissioner of Police v. Gordhandas*,<sup>121</sup> while distinguishing between seeking an advice and acting under dictation, held that the administrative authority was entitled to take into consideration the advice tendered to it by public body set up for this express purpose and it was entitled in the bonafide exercise of its discretion to accept that advice and act upon it even though, the authority would have acted differently if this important factor had not been present in its mind when it reached a decision.

Similarly, in *Indian Railway Construction Company v. Ajay Kumar*,<sup>122</sup> the Supreme Court of India struck down the order passed by the administrative authority on the ground that it had acted under

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<sup>120</sup>AIR 1964 SC 1573

<sup>121</sup>AIR 1952 SC 16

<sup>122</sup>(2003) 4 SCC 579.

the dictation of a superior authority and had therefore, surrendered its discretionary power to the dictation of other authority and had not acted independently.

In *Muni Survarat Swami Jain S. M. P. Singh v. Arjun Mathuran Gaikwad*,<sup>123</sup> the Apex Court while expounding the scope of the term 'acting under dictation' has held that if the authority in whom the discretion is vested does not act independently and passes an order under the instruction and dictation of other authority, the court would intervene in the matter, quash the orders and issue a mandamus to that authority to act on its own in accordance with a spirit of powers vested in it by the statute.

### **I. Non-application of Mind**

It is an established rule that the authority vested with the discretionary power ought to exercise that power after applying its mind to the fact and circumstances of the case in hand. If this condition is not complied with, its action or decision will be bad and the authority will be deemed to have failed to exercise its discretion in accordance with the intention of the legislature contained in the statute.

The discretion must be exercised after applying mind to facts and circumstances and not in a mechanical manner. This may happen because the authority has only taken one view of its powers, or has been lazy or casual, or because of over reliance on subordinates.

Non-application of mind may be manifest and gathered from several situations:

- (a) When the authority fails to apply its mind to vital facts. When the authority might have acted mechanically
- (b) without due care and caution and without a sense of responsibility in the exercise of its discretion.
- (c) When the authority may not have complied with condition precedent laid down in the statute itself for the exercise of that power.
- (d) When the authority might have abdicated its powers to someone else or it may have acted under the dictation of its superior.
- (e) The authority may have imposed fetters on the exercise of its discretionary power.

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<sup>123</sup>(2006) 8 SCC 590.

The Supreme Court has rightly ruled in *Abdul Razak Abdul Wahab v. Commissioner of Police*,<sup>124</sup> that the fact of non-awareness of the administrative authority is a strong ground to establish that the subjective satisfaction could not be arrived by the authority on the consideration of relevant material. The Apex Court has laid emphasis on the fact that care should always be taken to avoid mere copying of the words from the statute while making an order.

The court has reminded the fact that ordinarily and generally in a large number of cases, the authority merely apprehends the dispute and do not go into the details of the material facts of the case and arrive at a decision without the application of mind.

The analysis of the judgements of the Apex Court disclose that the judiciary has always laid emphasis on the aspect that the authority vested with the discretionary power must exercise that power with due care and caution after applying its mind to the facts and circumstances of the case. Failure to exercise discretion in the absence of application of mind is illegal and liable to vitiate it in the eyes of law. Justice Hidayatullah also took the same viewpoint in *Barium Chemical Ltd. V. Company Law Board*,<sup>125</sup> and observed: "No doubt the formation of opinion is subjective but existence of circumstances relevant to the inference as the sine quo non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the Section exists, the action might be exposed to inference unless the existence of the circumstance is made out."

## **J. Malice or Malafide**

It is, undoubtedly, a settled principle that every power must be exercised in good faith. There is a condition implied in the statute which creates power, namely that the power shall be used bonafide for the purpose which it is conferred. Every action of the public authority is expected to be supported by reason and good faith, objectivity, genuine satisfaction, reason and rationales. It is not only the power but the duty of the court to ensure that all authorities exercise their powers properly, lawfully and in good faith. If the powers are exercised with oblique motive, in bad faith or for extraneous or irrelevant considerations, there is no exercise of power known to the law and action cannot be termed as, action in accordance with law.

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<sup>124</sup>AIR 1989 SC 2265

<sup>125</sup>AIR 1967 SC 295; See Emperor v. Sibnath Banerjee (1945)Nandlal v. Bar Council of Gujarat (1981), Jagannath v. State of Orissa (1966)

It is imperative to submit here that there is always a condition implied in the instruments which create power that they shall exercise these powers for the purposes, for which they are conferred in bonafide belief. Fundamental to the legitimacy of public decision making is the principle that official decision must not be infected with motives such as fraud, dishonesty, malice, personal self-interest, motive, etc.

Two types of malice:

1. Malice in Fact
2. Malice in Law

High degree of proof is required for review due to malice and mere allegations do not suffice. in the absence of sufficient material, the court will not interfere, however, mala-fide exercise of statutory power conferred on an authority is liable to be struck down if it is established by the party who has alleged it so. (*Somesh Tiwari v. Union of India*, (2009) 2 SCC 592.)

The factors which are important in proof of mala fides:

- i. Direct evidence (e.g. documents, tape recordings etc.),
- ii. Course of events,
- iii. Public utterance of the authority,
- iv. Deliberate ignoring of facts by the authority and
- v. Failure to file affidavits denying the allegations of mala fides

A decision based on malice is always expected to be directed '*ad hominem*' i.e. where a bye law or order is made specially to thwart an individual for his cause. Malice may arise out of personal or political animosity towards those who are directed by its exercise.<sup>269</sup> The personal animosity towards a party disqualify an adjudicator. To be true, *malafide* denotes ill will, corrupt motive, dishonest intention in relation to the exercise of the statutory power. Strictly speaking, a power is said to have been exercised maliciously if its repository is motivated by personal enmity towards those who are affected by its executions achieve an object other than that for which authority believes the power to have been conferred. [See *Pratap Singh v. State of Punjab* (1964)]



It is added here that the principle of mala fide cannot be alleged against the government policies and the action taken by the administrative authorities in pursuance of the government policies cannot be declared illegal, arbitrary or ultra-vires.

### **K. Colourable Exercise of Powers**

The decision given by the administrative authority is always open to challenge at the instance of the aggrieved party if the power is exercised by it ostensibly for the purpose for which it was conferred. The doctrine of colourable exercise of powers denotes an idea that the power exercised by the administrative authority ostensibly for the authorised and but really to achieve some other purpose. The courts have used this idiom to denounce an abuse of discretion which speaks that under the 'colour' or 'guise' or power conferred for one purpose, the authorities seek to achieve something else which is not authorised to do so under the law in question. The transgression made by the authority in the guise of the colourable exercise of power vested in it may be patent, manifest, or direct, but it may also be disguised, covert and indirect and if be this latter class of the cases that the expression 'colourable legislation' has been applied in many judicial pronouncements. The idea conveyed by the expression is that although, a legislature in passing a statute purports to act within the limit of its power, yet in substance and in reality, it transgresses those powers, the transgression being veiled by what appears on proper examination to be a mere pretence or disguise. (See *Ashok Kumar v. Union of India* AIR 1991 SC 1792)

It may be pointed out here that if a lawful object is chosen as a colour or guise for doing something other than genuinely achieving that object, the action would be termed as colourable exercise of power and it cannot be sustained in the eyes of law as it is mala-fide exercise of the power. [See *State of Bihar v. Shree Baidyanath Ayurved Bhawan Pvt. Ltd.*, (2005) 2 SCC 762].

## **Unit V**

**Control of Administrative Action- Judicial Control**

**Public law and Private Law Remedies- Distinction**

**Writs- Theory, Practice and procedure- Ouster Clause**

**Liabilities of the State in the Province of Contract and Tort- constitutional  
Tort**

**Doctrine of Promissory estoppels- Doctrine of Legitamate Expectation-  
Doctrine of Proportionality**

## Introduction

It is an eternal principle of modern democratic Govt. that “the governing power wherever located must be subject to the fundamental constitutional limitations.” Parliament’s inability to exercise control over administrative powers essentially calls for control by judiciary. Parliament could theoretically exercise this control, but in practice it could not, since it did not have the time. Hence it became the duty of the Judges, though unelected, to become representatives of the people and ensure that executive authorities do not abuse their powers, but instead use it in the public interest.

But Judges too are not supposed to act arbitrarily. Hence a body of legal principles was created (largely by Judges themselves in their judgments and not by Parliament) on the basis of which Judges had to exercise their powers of judicial review of administrative action on settled principles but not arbitrarily.

The objectives of judicial control over administrative actions are twofold: Control Mechanism to curb administrative abuse of power, and remedies and relief to the person affected by administrative action.

In *Tata Cellular v. Union of India*<sup>126</sup> the Supreme Court laid down the following basic principles relating to administrative law:

- (1) The modern trend points to judicial restraint in administrative action;
- (2) the Court does not sit as a court of appeal over administrative decisions, but merely reviews the manner in which the decisions were made;
- (3) the Court does not have the expertise to correct administrative decisions. If a review of the administrative decisions is permitted it will be substituting its own decision without the necessary expertise, which itself may be fallible;
- (4) a fair play in the joints is a necessary concomitant for the administrative functioning.
- (5) however, the administrative decision can be tested by application of the Wednesbury principle of reasonableness, and must be free from arbitrariness, bias or mala fides.

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<sup>126</sup>(1994) 6 SCC 651

## **Kinds of Controls over administrative power**

### **Statutory controls**

Statutory controls are given in the statute (or rules or regulations made under the statute). Any executive action in violation of the same will be declared illegal by the courts, by applying the ultra vires doctrine.

Thus, where the London County Council had statutory powers to purchase and operate tramways, it was held by the House of Lords that it had no power to run omnibuses, which was not incidental to the running of tramways<sup>4</sup> Similarly a local authority with the power to acquire land other than "park, garden or pleasure house" acts in excess of jurisdiction in acquiring land which is part of a park (*White and Collins v. Minister of Health*).<sup>127</sup>

An executive authority may also act unlawfully if it fails to perform a duty imposed upon it by statute such as maintenance of civic services (e.g. sewerage, drainage, water supply, etc.) by the Municipalities or other local bodies whose duty under the statute is to maintain such services. Here also a mandamus will issue from the courts to compel such authority to perform its statutory duty.

Where the statute delegates a power to a particular authority, that authority cannot sub-delegate that power to another authority or person unless the statute permits such sub-delegation.

Similarly, discretion exercised by the prescribed authority on the direction of a higher authority would be illegal. When the statute prescribes the manner of doing an act, the authority must do it in that manner alone.

Difficulty, however, arises in the matter of what is called "subjective discretion" conferred by the statute. An instance of such subjective discretion is where the statute says that an executive authority can take such decision "as it deems fit". Another example is where the statute says that action can be taken or order passed where the authority has "reasonable grounds to believe" to take that action or pass such order e.g. Section 132 of the Income Tax Act which confers power on the Commissioner of Income Tax to order search and seizure where he has "reason to believe" that some person is concealing his income.

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<sup>127</sup>(1939) 2 KB 838

In *Liversidge v. Anderson*<sup>128</sup> the Defence (General) Regulations, 1939 provided:

"If the Secretary of State has reasonable cause to believe any person to be of hostile origin or association, he may make an order against that person directing that he be detained."

The detenu Liversidge challenged the detention order passed against him by the Secretary of State. The majority of the House of Lords, except Lord Atkin, held that the Court could not interfere because the Secretary of State had mentioned in his order that he had reasonable cause to believe that Liversidge was a person of hostile origin or association. Liversidge<sup>8</sup> was delivered during the Second World War when the executive authority had unbridled powers to detain a person without even disclosing to the Court on what basis the Secretary had reached to his belief. However, subsequently, the British courts accepted Lord Atkin's dissenting view that there must be some relevant material on the basis of which the satisfaction of the Secretary of State could be formed. Also, the discretion must be exercised keeping in view the purpose for which it was conferred and the object sought to be achieved, and must be exercised within the four corners of the statute.

Sometimes a power is coupled with a duty. Thus, a limited judicial review against administrative action is always available to the courts.

### **Non-statutory controls**

Some of the non-statutory controls are:

- (a) The Wednesbury principle
- (b) Rules of natural justice
- (c) Proportionality
- (d) Promissory estoppel
- (e) Legitimate expectation

### **Promissory estoppel**

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<sup>128</sup>1942 AC 206

The doctrine of promissory estoppel is a doctrine of equity. It makes a promise irrevocable when the acceptor acts on the promise and irreversibly changes his position. The rationale behind this doctrine is that it is unfair if one party, acting on the promise of the other, does something to his detriment and receives no consideration because the promise is revoked.

The government can enter into a contract just like any other individual or entity. Today, state officials make promises to individual parties who enter into commitments on the basis of these promises, only to find that the government's discretion cannot be relied upon. The defence of statutory provisions provide sufficient umbrage for the government to go back on promises. Therefore, in this time of escalating administrative and executive facets of the State, the doctrine of promissory estoppel has gained considerable importance in the field of administrative law.

The foundation of the doctrine of promissory estoppel in India, as such, was laid down in the ratio of *Collector of Bombay v. Municipal Corporation of the City of Bombay*.<sup>129</sup> Chandrashekar Aiyer J., in this case, expressed the following view:

“But even otherwise, that is if there was merely the holding out of a promise that no rent will be charged in the future, the Government must be deemed in the circumstances of this case to have bound themselves to fulfil it. Courts must do justice by the promotion of honesty and good faith, as far as it lies in their power”.

Nevertheless, it was in the case of *Union of India vs. Anglo Afghan Agencies*<sup>130</sup> that there was a manifest depiction of the newfound stress on the principles of equity under the doctrine. The Government of India announced certain concessions with regard to the import of certain raw materials in order to encourage export of woollen garments to Afghanistan. Subsequently, only partial concessions and not full concessions were extended as announced. The Supreme Court applied the rule of estoppel based on equity and maintained that such promises may bind the Government even in the absence of constitutional formalities prescribed for government contracts.

The *Anglo Afghan* case depicted a judicial trend. The key to this trend was to be found in the following statement of the Supreme Court:

“If our nascent democracy is to thrive different standards of conduct for the people and public bodies cannot ordinarily be permitted”

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<sup>129</sup> 1952 SCR 43

<sup>130</sup> 1968 SCR (2) 366

However, the judicial attitude in the matter of applying promissory estoppel in the post Anglo Afghan period with respect to applying promissory estoppel against administrative remained ambivalent. The doctrine was applied in some cases, and not in others.

It was in *Motilal Padampat Sugar Mills v Uttar Pradesh*<sup>131</sup> that the doctrine of promissory estoppel was expounded afresh and given its most liberal interpretation by the Supreme Court. In this case, the Government of U. P. notified a sales tax exemption for three years to all new industrial units with a view to increase industrial progress. The appellant company wanted to avail of the exemption by setting up a hydrogen plant for Vanaspati manufacturing. In answer to the appellant company's enquiry, the Director of Industries confirmed the tax concession as announced by the government. The appellant company thereupon took steps towards getting finances for the project and the necessary machinery. The Chief Secretary and advisor to the government made a further oral assurance about the exemption from sales tax as well as gave a written confirmation. Later, the government announced only partial sales tax concessions. The appellant agreed to these concessions. At an even later date, however, the government rescinded the concessional rates and the appellant company challenged it. The facts necessary for invoking the doctrine of promissory estoppel were, therefore, clearly present and the Government was bound to carry out the representation and exempt the appellant from sales tax in respect of sales of Vanaspati effected by it in Uttar Pradesh for a period of three years from the date of commencement of the production. The Government was held bound to the principle of promissory estoppel to make good the prosecution made by it.

The importance of equity was emphasised as it was held that the doctrine of promissory estoppel was not really based on the principle of estoppel and instead was evolved by equity in order to prevent injustice.

It was pronounced that there was no reason why the doctrine should be given only a limited application by way of defence and that it could be the basis of cause of action. In addition, Justice Bhagwati stated :

“The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promise and, in fact, the promise, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promise, notwithstanding that there is no consideration for the promise and the

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<sup>131</sup>1979 AIR 621

promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution.”

Another important aspect of the doctrine of promissory estoppel that was argued in this case was the complexity that arose with the conflicting doctrine of executive necessity. The doctrine of executive necessity prevents the government from contracting with another party to refrain from exercising its statutory functions. Since the term ‘statutory functions’ is a very broad one, this is a major constraint to the application of the doctrine of promissory estoppel to government contracts.

It was held that the doctrine could not be defeated on the plea of executive necessity or freedom of future executive action. There is, however, much controversy regarding this particular decision as there is a conflicting decision in the case of *Shri Bakul Oil Industries v State of Gujarat*.<sup>132</sup> In that case, the Government of Gujarat issued a notification under Section 49 (2) of the Gujarat Sales Tax Act, 1969 exempting wholly or partly from payment of sales tax or purchase tax, as the case may be, certain specified classes of sales and purchases in order to stimulate wider distribution of industrial units in rural areas. The appellant company set up a plant for decorticating and crushing cotton and groundnut seeds for manufacture of oil. The plant and the appellant company satisfied all the requirements laid out in the notification. When the appellant company applied for the exemption, the government rejected the offer and amended the notification saying that this particular category of plants is sufficiently well distributed in rural areas. The appellant company challenged the rejection in Court. The doctrine of promissory estoppel was not applied and it was held that the government was not estopped from amending the notification.

Though the facts are almost similar, the decisions in these two cases are in conflict with each other. This presents a divergence of opinion. In recent times, there has been a leaning towards the decision in *Shri Bakul Oil Industries v State of Gujarat* because there has been an increasing tendency of the Courts to apply the doctrine of executive necessity in cases involving changes in public policy. This virtually makes the doctrine of executive necessity an effective defence against the doctrine of promissory estoppel.

### **Doctrine of Legitimate Expectation**

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<sup>132</sup>1987 AIR 142



The doctrine of legitimate expectation belongs to the domain of public law. It is proposed to give relief to the people when they are not able to justify their claims on the basis of law. As they had suffered a civil consequence because their legitimate expectation had been violated.

Lord Denning first used the term 'legitimate expectation' in 1969 and from that time it has assumed the position of a significant doctrine of public law in almost all jurisdiction. In India, this doctrine had been developed by the court in order to check the arbitrary exercise of power by the administrative authorities. According to private law a person can approach the court only when his right based on statute or contract is violated, but this rule of locus standi is relaxed in public law to allow standing even when a legitimate expectation from a public authority is not fulfilled. This doctrine grants a central space between 'no claim' and a 'legal claim' wherein a public authority can be made accountable on the ground of an expectation, which is legitimate. For example, if the Government has made a scheme for providing drinking water in villages in certain area but later on changed it so as to exclude certain village from the purview of the scheme then in such a case what is violated is the legitimate expectation of the people in the excluded villages for tap water and the government can be held responsible if exclusion is not fair and reasonable. Thus, this doctrine becomes a part of the principles of natural justice and no one can be deprived of this legitimate expectation without following the principles of natural justice.

In the bulk of the administrative law the doctrine of legitimate expectation is also a fine example of judicial creativity. Nevertheless, it is not extra-legal and extra-constitutional. A natural habitat for this doctrine can be found in Article 14 of the Constitution which abhors arbitrariness and insists on fairness in all administrative dealings. It is now firmly established that the protection of Article 14 is available not only in case of arbitrary 'class legislation, but also in case of arbitrary 'State action'. Thus, the doctrine is being hailed as a fine principle of administrative jurisprudence for reconciling power with liberty. (*Food Corporation of India V. Kamdhenu Cattle Feed Industries*, AIR 1993 SC 1601).

In India the first reference to the doctrine is made in *State of Kerala v. K.G. Madhavan Pillai*<sup>133</sup> In this case, the government had issued a sanction to the respondents to open a new unaided school and to upgrade the existing ones. However, after 15 days a direction was issued to keep the sanction in abeyance. This order was challenged on the ground of violation of the principles of natural justice. The court held that the sanction order created legitimate expectation

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<sup>133</sup>AIR 1989 SC 49

in the respondents which was violated by the second order without following the principles of natural justice which is sufficient to vitiate an administrative order.

The doctrine was also applied in SC and WS *Welfare Association v. State of Karnataka*,<sup>134</sup> in this case the government had had issued a notification notifying areas where slum clearance scheme will be introduced. However, the notification was subsequently amended and certain areas notified earlier were left out. The court held that the earlier notification had raised legitimate expectation in the people living in an area, which had been left out in a subsequent notification, and hence legitimate expectations cannot be denied without a fair hearing.

Thus, where a person has legitimate expectation to be treated in a particular way, which falls short of an enforceable right, the administrative authority cannot deny his legitimate expectations without a fair hearing. Legitimate expectation of fair hearing may arise by a promise or by an established practice.

The Supreme Court in *Union of India v. Hindustan Development Corp.*<sup>135</sup> got the opportunity of laying down the meaning and scope of this doctrine. Explaining the meaning of the doctrine and the legitimacy of the doctrine when it arises, the court held that, “time is a threefold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purpose, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to fulfilled, they by themselves cannot amount to an assertible expectation and a mere disappointment does not attract legal consequences. A pious hope cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in a natural and regular sequence. Again, it is distinguishable from a mere expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and, therefore, it does not amount to a right in a conventional sense.”

In this case in the absence of any fixed procedure for fixing price and quantity for the supply of food grains, the Government adopted a dual pricing system i.e., lower price for big suppliers and higher price for small suppliers in the public interest in order to break the cartel.

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<sup>134</sup>(1991) 2 SCC 604

<sup>135</sup>(1993) 3 SCC 499

The Court held that there is no denial of legitimate expectation, as it is not based on any law, custom or past practice. The court said that it is not possible to give an exhaustive list wherein legitimate expectations arise but by and large they arise in promotion cases, though not guaranteed as a statutory right, in cases of contracts, distribution of charges by the government and in somewhat similar situations.

The court also held that legitimate expectation gives sufficient locus standi to the applicant for judicial review. The doctrine is to be confined mostly to a right of fair hearing before a decision, which results in negating a promise, or withdrawing an undertaking is taken.

Though the denial of legitimate expectation is a ground for challenging an administrative action, but the court will not interfere unless the denial is arbitrary, unreasonable, not in the public interest, and inconsistent with principles of natural justice or where denial is in violation to a right. However, it does not mean that an administrative body cannot change its policy, so, denial of legitimate expectation can be justified only by showing some overriding public interest. The court further held that unless the fair hearing is not a pre-condition for the exercise of power the doctrine has no role to play and the court should not interfere with the exercise of discretion by the administrative authority. Thus, the extent of judicial review of administrative action is very limited. The doctrine of legitimate expectation is 'not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits. The court should exercise self-restraint and restrict the claim of denial of legitimate expectation to the legal limitations.

## **Remedies Against Unlawful Administrative Action**

### **Public Law Remedies**

#### Writ Jurisdiction of Supreme Court and High Court

Under articles 32 and 226, the Supreme Court and high courts have the power to issue directions, orders or writs including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*. The rights to be enforced through such writs must be against the State, except in the case of the writ of habeas corpus, which may be issued even against a private person who might have detained another person illegally.

Article 32, which itself is fundamental right, is invoked for the enforcement of fundamental rights guaranteed in Part III of the Constitution. Whereas the high courts have the power to issue writs not only for the enforcement of the fundamental rights but also 'for any other purposes'. The jurisdiction of the high courts under Article 226 is wider in scope than the Supreme Court under Article 32.

Traditionally, the phrase 'for any other purpose' has been interpreted to mean, enforcement of any statutory or Common Law rights. The proposition that purely contractual matters cannot be enforced through writ jurisdiction is no more accepted as a general proposition. Over the years, the judicial interference with respect to the contractual matters of the government has been on increase to ensure fairness in actions. For instance, claim under an insurance policy or arbitrariness in distribution of largess by the State through contract can be enforced in the high courts through writ petitions.

The jurisdictions under Articles 32 and 226 are concurrent and independent of each other so far as fundamental rights are concerned. There is choice of forum. One may move either the Supreme Court under article 32 or an appropriate high court under article 226. The position, hitherto, has been that a petitioner seeking to enforce fundamental right can come straight to the Supreme Court without going to the high court first. The Supreme Court's power to provide appropriate remedy is not discretionary but a matter of right. In *Fertilizer Corporation Kamgar Union v. Union of India*<sup>136</sup> Chandrachud, C.J., said:

“The jurisdiction conferred on the Supreme Court by Article 32 is an important part of the basic structure of the Constitution because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated.”

The jurisdiction of high courts to entertain writ petition is discretionary. It is far more discretionary in respect of 'any other purposes'. The legal position in this respect has been summarized in *T. P. Mahajan v. Union of India*<sup>137</sup> in the following words:

“The power of the High Court to act under Article 226 of the Constitution is discretionary. It is a supervisory power, which is to be contrasted with an appellate power. While appeal is a matter of right, the collateral attack on administrative action under Article 226 is not so.”

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<sup>136</sup>1981 AIR 344

<sup>137</sup> (1973) 1 S.L.R. 436

The courts in India have developed rules and norms to regulate writ jurisdiction. There are various grounds on which the high court may refuse to entertain a writ petition. For instance, the high court would have to scrutinize the conduct of the petitioner. If he comes to court with unclean hands, the High Court may refuse to entertain his petition. For, the high court is acting in the exercise of its extraordinary original jurisdiction only with a view to granting expeditious relief in the interest of justice. It cannot be compelled to entertain writ petitions when it is of the view that the interests of justice do not favour such a course.

Other grounds on which writ petition may be refused are as follows: (i) Res judicata (ii) Inordinate delay (iii) Exhaustion of alternative remedies (iv) If involved a question of disputed facts or interpretation of law within jurisdiction.

### ***Kinds of Writs***

#### ***Habeas Corpus***

Habeas Corpus is a Latin term which may be translated into English in some such form as “you must. have the body”. Writ of habeas corpus is used primarily to secure the release of a person who has been detained unlawfully or without any legal justification. By means of this writ an individual, who has been deprived of his personal liberty by any executive act, may have the validity of such act tested, before a superior court. The object of the writ is to ascertain whether there is any legal justification for the detention of the person in custody.

A detention becomes unlawful not only where there is no law to justify it but also where procedure prescribed by the law which authorities the detention has not been followed, and, in determining whether such procedure has been complied with, the court applies a strict standard not only in interpreting the terms of the statute but also in exacting a strict compliance with the requirements, so interpreted, in fact.

Shastri C.J., in *Ram Narayan v. State of Delhi*<sup>138</sup> observed “Those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the form and rules of the law. That has not been done in this case. The petitioners now before us are, therefore, entitled to be released, and they are set at liberty forthwith.”

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<sup>138</sup> (1953) SCR 652

The efficacy of the writ of habeas corpus, depends to a large extent, on the operative part of the law under which the freedom of an individual has been curtailed. As for example, the preventive detention law gives power to the executive to detain a person in preventive detention in its discretion and thus the scope left for the courts to review the validity of such a detention is very restricted. Habeas corpus cannot be granted where a person has been committed to custody under an order from a competent' court when prima facie the order does not appear to be without jurisdiction or wholly illegal.

The purpose for which the writ of habeas corpus may be issued may include;

(i) testing the regularity of detention under preventive detention laws and any other law; (ii) securing the custody of a minor; (iii) securing the custody of a person alleged to be a lunatic; (iv) securing the custody of a marriage partner; (v) testing the regularity of detention for a breach of privilege by the House; (vi) testing the regularity of detention under court martial; (vii) testing the regularity of detention by the executive during emergency, etc.

Besides, these traditional grounds for which the writ of habeas corpus may be issued, Krishna Iyer J. in *Sunil Batra II v. Delhi Administration*,<sup>139</sup> opened new vistas for the issuance of this writ. Batra II case arose out of a letter written by a convict to one of the judges of the Supreme Court alleging inhuman torture to a fellow convict. Krishna Iyer J. treated this letter as a petition of habeas corpus filed on behalf of Prem Chand though the letter had not demanded his release from the jail. The learned judge followed a series of American cases,<sup>304</sup> employing the writ of habeas corpus for the neglect of state penal facilities like overcrowding, understaffing, in sanitary facilities, brutality, constant fear of violence, lack of adequate medical and mental health, censorship of mail, inhuman isolation, segregation, inadequate or non-existent rehabilitative or educational opportunities. The writ was also issued when a ban was imposed on law students to conduct interviews with prisoners for affording them legal relief.

The writ is issued to the authority which has the aggrieved 'r person in its custody. A prayer for the writ may be made by the prisoner himself or in case he is unable to do so, by someone else on his behalf.

### ***Quo-Warranto***

*Quo Warranto* means, "by warrant or authority". it is a judicial order issued by the Supreme Court or a High Court by which any person who occupies or usurps an independent

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<sup>139</sup> AIR 1980 SC 1579

public office or franchise or liberty, is asked to show by what right he claims it, so that the title to the office, franchise or liberty may be settled and any unauthorised person ousted. The writ of quo warrant is used to judicially control executive action in the matter of making appointments to public offices under relevant statutory provisions. The writ is also used to protect a citizen from the holder of a public office to which he has no right. Furthermore, it tunes the administration by removing inefficient and unqualified personal and imposters from public offices. Thus, the writ of *quo warranto* gives personal and imposters from public officers Thus, the writ of *quo warranto* gives the judiciary a weapon to control the executive, the legislature statutory and non-statutory bodies in matters of appointments to public officers. Conversely, it protects a citizen from being deprived of a public office to which he had a right. The writ calls upon the holder of a public office to show to the court under what authority he is holding the office, the court may restrain him from acting in the office and may also declare the office to be vacant.

### Conditions:

- a) Office must be a public office- The Madras High Court in *Anand Bihari v. Ram Sahai*,<sup>140</sup> held that a public office is one which is created by the Constitution or a statute and the duties of which must be such in which the public is interested.
- b) Public office must be substantive in nature- A substantive office is one which is permanent in character and is not terminable at will. In *R. v. Speyer*,<sup>141</sup> the word 'substantive' was interpreted to mean an "office independent of title".
- c) The Person must be in actual possession of the office- Mere declaration that a person is elected to an office or mere appointment to a particular office is not sufficient for the issue of *quo warranto* unless such person actually accepts such office.

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<sup>140</sup> AIR 1952 Mad. 31

<sup>141</sup> (1916)1 K B 595.

- d) The office must be held in contravention of Law- There must be a clear violation of law in the appointment of a person to the public office. If there is a mere irregularity, *quo warranto* will not lie.

### ***Mandamus***

*Mandamus* literally means a command. “It commands the person to whom it is addressed to perform some public or quasi-public legal duty which he has refused to perform and the performance of which cannot be enforced by any other adequate legal remedy...” where any tribunal inferior court or body of persons charged with the performance of a public duty do not discharge that duty, mandamus lies to compel him to do it.”

It is considered as a residuary remedy of public law. It is a general remedy whenever justice has been denied to any person. It is a judicial remedy issued in the form of an order from the Supreme Court or a High Court to any constitutional statutory or a non-statutory agency to do or to forbear from doing some specific act which that agency is obliged to do or refrain from doing under the law and which is in the nature of a public duty or a statutory duty. It can be issued to undo what has already been done in contravention of a statute, or to enforce a duty to abstain from acting unlawfully. For example, mandamus can be issued to restrain the government from superseding, a reference made by it earlier of an industrial dispute for adjudication to a labour tribunal because under the law the government has no authority to do so.

Thus, the function of the mandamus is to keep the public authorities within the limits of their jurisdiction while exercising public functions. However, a writ of mandamus cannot be issued to direct the government to refrain from enforcing the provisions of law or to do something which is contrary to law.

*Mandamus* can be issued to any kind of authority in respect of any kind of function administrative, legislative, quasi-judicial, judicial. The Supreme Court in *Mansukhla Withaldas v. State of Gujarat*,<sup>142</sup> has observed that mandamus which is a discretionary relief under Article 226 is requested to be issued inter alia, to compel performance of public duties which may be administrative, ministerial or statutory in nature. In *Birender Kumar v. Union of India*,<sup>143</sup> when the Telephone of the applicant was wrongly disconnected in spite of his paying his dues regularly, the Calcutta High Court directed the telephone authorities to restore the connection within a week.

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<sup>142</sup> AIR 1997 SC 3400.

<sup>143</sup> AIR 1983 Cal, 273



**Conditions:**

- a) There must be public law duty- Mandamus is used to enforce the performance of public duties by public authorities. Mandamus is not issued when the government is under no duty under the law. Mandamus cannot be issued to enforce administrative direction which do not have the force of law, hence it is discretionary that the authority accept it or reject it. But where the administrative instructions are binding mandamus would lie to enforce them.
- b) Petitioner must have a right to enforce the duty- To maintain a petition for mandamus, the petitioner must show that he has a right to compel the government to act in a particular manner. In the absence of any such right, mandamus cannot be issued.
- c) There had been a demand and refusal- For the issue of mandamus against an administrative authority the affected individual must demand justice and only on refusal he has a right to approach the court. Thus, a writ of mandamus does not lie in the absence of demand and justice. (*State of Haryana v. Channan Mal* AIR 1976 SC 1654).
- d) The Writ petition is filed *bonafide* and is good faith- the courts have held that the law is well settled that they will not interfere at the instance of a person who does not approach the court with clean hands an abuse the process of the court.

***Certiorari and Prohibition***

'*Certiorari*' is a late Latin word, being the passive form of the word '*certiorari*' meaning to 'inform'.

It may be defined as a judicial order operating by the Supreme Court or High Court to any Constitutional, statutory, or non-statutory body or person, requiring the records of any action to be certified by the court and dealt with according to law.

Similarly, writ of prohibition is a judicial order issued by the Supreme Court or a High Court to any constitutional, statutory or non-statutory agency to prevent these agencies from continuing their proceedings in excess or abuse of their jurisdiction or in violation of the principle's of natural justice or in contravention of the law of the land.

These writs are designed to prevent the excess of powers by public authorities. Therefore, these writs are corrective in nature. *Certiorari* and *Prohibition* are much in common, both in scope and the rules by which they are governed. Both are issued on similar grounds. But there is no fundamental difference between the two. *Certiorari* is issued to quash a decision already made and

so it is issued at a stage when the proceedings have terminated and the authority has given a final decision to quash the decision. Prohibition is issued when the matter has not been disposed of but is being considered by the body concerned. The function of prohibition is to prohibit the body concerned from proceeding with the matter further. Thus, prohibition is issued at a stage when the proceedings are in progress to forbid the authority from continuing the proceedings.

**Grounds:**

- a) when the authority is acting or has acted under an invalid law;
- b) jurisdictional error;
- c) error apparent on the face of the record;
- d) findings of fact not supported by evidence;
- e) failure of natural justice.

**Supervisory Jurisdiction of High Courts**

Article 227(1) gives to high courts the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. A high court may call for returns or make and issue general rules and prescribe forms for regulating the practice and proceedings of these courts and tribunals. The court may also prescribe the forms in which officers of such courts and tribunals shall keep books, entries and accounts. Thus high courts have power of superintendence not only with respect to judicial but also administrative matters. The court under article 227 does not sit in appeal and is not concerned with decision but with the decision-making process.

The scope of Article 227, in some respects, is wider than Article 226. A High Court may exercise jurisdiction *suo moto* under article 227 but not so under Article 226. Also, under Article 226, High court merely quashes the decision of a tribunal but under Article 227, it can issue directions as to manner in which it would proceed or it can pass such a decision or direction as the inferior court or tribunal should have passed. But this distinction between writ jurisdiction and power of superintendence is narrowing down.

In the landmark case, *Bhagat Ram v. State of Himachal Pradesh*<sup>144</sup> the Supreme Court not only sent the matter of dismissal of employee back to the tribunal but also imposed punishment on

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<sup>144</sup> AIR 1983 SC 454

the delinquent employee in proportion to the gravity of misconduct. However, jurisdiction under Article 226 can be exercised against administrative and quasi-judicial actions whereas under Article 227, it can be exercised against judicial and quasi-judicial functions. The wider interpretation of quasi-judicial bodies would bring into it various administrative bodies as well.

### **Special Leave Petition**

Under Article 136, the Supreme Court, in its discretion, can grant special leave to appeal to it from any judgment, decree, determination sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. The court's jurisdiction under Article 136 is of an exceptional nature. It is to be used only in an extraordinary and exceptional situation whenever there is a miscarriage of justice. Some of the circumstances in which the court interferes under article 136 are excess of jurisdiction, failure to exercise jurisdiction, error of law, violation of principles of natural justice or accepted principles of jurisprudence, etc. Again, in the matter of findings of fact the court interferes only in special circumstances, e.g., complete lack of evidence.

### **Private Law Remedies**

#### **Injunction**

An injunction is a prohibitive order issued by a court, at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action fit law.

The law of injunction has been provided for by the Specific Relief Act, 1963 (hereinafter, the Act), and is also regulated by the Code of Civil Procedure, 1908 in India.

There are two types of injunctions:

Temporary Injunction and Perpetual/Permanent Injunction.

Injunction will not be granted:

- a) To restrain a person from instituting or prosecuting any judicial proceedings.
- b) To restrain a person from petitioning to any legislative body
- c) To prevent breach of a contract which cannot be specifically enforced.

## **Declaration**

It may be defined as a judicial remedy which conclusively determines the rights and obligations of public and private persons and authorities without the addition of any coercive or directory decree. It is a discretionary remedy and may be refused if it would be infructuous, or if an adequate alternative exists or on other equitable consideration.

### **Conditions:**

- a) The person must be entitled to legal character or to a right to any property.
- b) There must be some danger or detriment to such right or character.
- c) Plaintiff must seek further relief if he is entitled to it.

### **Suit for damages**

Whenever any person has been wronged by the action of an administrator, he can file a suit for damages against such authority. Such a suit is filed in the civil court in the first instance and its procedure is regulated by Civil Procedure Code, 1908. The requirement of two months' notice is mandatory under Section 80 of CPC, unless waived by court under special circumstances. The principles governing the calculation of quantum of damages are the same as that of private individuals.

## **Liability of Government**

### **Introduction**

In England, the Government was never considered as an 'honest man.' It is fundamental to the rule of law that the Crown, like other public authorities, should bear its fair share of legal liability and be answerable for wrongs done to its subjects. The immense expansion of governmental activity from the latter part of the nineteenth century onwards made it intolerable for the Government, in the name of the Crown, to enjoy exemption from the ordinary law. English law has always clung to the theory that the King is subject to law and, accordingly, can commit breach thereof. As far as 700 years ago, Bracton had observed: "The King is not under man, but under God and under the law, because it is the law that makes the King." Though theoretically there was no difficulty in holding the King liable for any illegal act, there were practical problems. Rights depend upon remedies and there was no human agency to enforce law against the King. All

the courts in the country were his courts and he could not be sued in his own courts without his consent. He could be plaintiff but never be made defendant. No writ could be issued nor could any order be enforced against him. As ‘the King can do no wrong’, whenever the administration was badly conducted, it was not the King who was at fault but his Ministers, who must have given him faulty advice. But after the Crown Proceedings Act, 1947, the Crown can now be placed in the position of an ordinary litigant.

In India, history has traced different path. The maxim ‘the King can do no wrong’ has never been accepted in India. The Union and the States are legal persons and they can be held liable for breach of contract and in tort. They can file suits and suits can be filed against them.

## **CONTRACTUAL LIABILITY**

### **Constitutional Provisions**

Contractual liability of the Union of India and States is recognized by the Constitution itself. Article 298 expressly provides that the executive power of the Union and of each State shall extend to the carrying on of any trade or business and the acquisition, holding and disposal of property and the making of contracts for any purpose. Article 299(1) prescribes the mode or manner of execution of such contracts. It reads:

‘All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.’

### **Requirements**

Reading the aforesaid provision, it becomes clear that Article 299 lays down the following conditions and requirements which must be fulfilled in contracts made by or with the Union or a State:

1. Every contract must be expressed to be made by the President or the Governor (as the case may be);
2. Every contract must be executed by a person authorized by the President or the Governor (as the case may be); and
3. Every contract must be expressed in the name of President or the Governor (as the case may be).

### **Written Contract**

A contract to be valid under Article 299(1), must be in writing. The words 'expressed to be made' and 'executed' in this article clearly go to show that there must be a formal written contract executed by a duly authorized person. Consequently, if there is an oral contract, the same is not binding on the Government. This is not a mere formality but a substantial requirement of law and must be fulfilled. It, however, does not mean that there must be a formal agreement properly signed by a duly authorized officer of the Government and the second party. The words 'expressed' and 'executed' have not been literally and technically construed.

### **Execution by authorized person**

The second requirement is that such a contract can be entered into on behalf of the Government by a person authorized for that purpose by the President or the Governor as the case may be. If it is signed by an officer who is not authorized by the President or Governor, the said contract is not binding on the Government and cannot be enforced against it.

In *Union of India v. N.K. (P) Ltd.*, the Director was authorized to enter into a contract on behalf of the President. The contract was entered into by the Secretary, Railway Board. The Supreme Court held that the contract was entered into by an officer not authorized for the said purpose and it was not a valid and binding contract. Expression in the name of President (Governor)

The last requirement is that such a contract must be expressed in the name of the President or the Governor, as the case may be. Thus, even though such a contract is made by an officer authorized by the Government in this behalf, it is still not enforceable against the Government if it is not expressed to be made on behalf of the President or the Governor.

In *Bhikraj Jaipuria*, the contracts entered into by the Divisional Superintendent were not expressed to be made on behalf of the Governor-General. Hence, the Court held that they were not enforceable even though they were entered into by an authorized person.

### **Non-compliance: Effect**

The provisions of Article 299(1) are mandatory and not directory and they must be complied with. They are not inserted merely for the sake of form, but to protect the Government

against unauthorized contracts. If, a contract is unauthorized or in excess of authority, the Government must be protected from being saddled with liability to avoid public funds being wasted. Therefore, if any of the aforesaid conditions is not complied with, the contract is not in accordance with law and the same is not enforceable by or against the Government.

Formerly, the view taken by the Supreme Court was that in case of non-compliance with the provisions of Article 299(1), a suit could not be filed against the Government as the contract was not enforceable, but the Government could accept the liability by ratifying it. But in *Mulamchand v. State of M.P.*, the Supreme Court held that if the contract was not in accordance with the constitutional provisions, in the eye of the law, there was no contract at all and the question of ratification did not arise. Therefore, even the provisions of S. 230(3) of the Indian Contract Act, 1872 would not apply to such a contract and it could not be enforced against the government officer in his personal capacity.

#### **Valid contract: Effect**

If the provisions of Article 299(1) are complied with, the contract is valid and it can be enforced by or against the Government and the same is binding on the parties thereto. Once a legal and valid contract is entered into between the parties, i.e. Government each a private party, the relations between the contracting parties are no longer governed by the provisions of the Constitution but by the terms and conditions of the contract. Article 299(2) provides that neither the President nor the Governor shall be personally liable in respect of any contract executed for the purpose of the Constitution or for the purpose of any enactment relating to the Government of India. It also grants immunity in favour of a person making or executing any such contract on behalf of the President or the Governor from personal liability.

#### **Quasi-contractual Liability**

The provisions of Article 299(1) of the Constitution [Section 175(3) of the Government of India Act, 1935] are mandatory and if they are not complied with, the contract is not enforceable in a court of law at the instance of any of the contracting parties. In these circumstances, with a view to protecting innocent persons, courts have applied the provisions of Section 70 of the Indian Contract Act, 1872 and held the Government liable to compensate the other contracting party on the basis of quasi-contractual liability. What Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed, then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for

compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties, but on the basis of the fact that something was done by one party for the other and the said work so done has been voluntarily accepted by the other party. Thus, Section 70 of the Contract Act prevents 'unjust enrichment.' Before Section 70 of the Contract Act is invoked, the following conditions must be fulfilled:

- A person must have lawfully done something for another person or deliver something to him;
- He must not have intended to do such act gratuitously; and
- The other person must have accepted the act or enjoyed the benefit.

If these three conditions are fulfilled the section enjoins on the person receiving benefit to pay compensation to the other party.

### **Doctrine of Unjust Enrichment**

The Doctrine of 'unjust enrichment' is an equitable principle and prevents a person from enriching at the cost of another. The expression 'unjust enrichment' is not defined either in the Constitution or in any other statute. Stated simply, 'unjust enrichment' means retention of a benefit by a person that is unjust or inequitable. 'Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else.

The doctrine of unjust enrichment is 'just and salutary' in nature. It is based on the principle that no person can get benefit when he has not suffered a loss. The juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely quasi-contract or the doctrine of restitution.

#### **In Quasi-contractual Liability:**

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In *Orient Paper Mills Ltd. v. State of Orissa*, the Supreme Court did not grant refund to a dealer since he had already passed on the burden to the purchaser. It was observed that it was open to the Legislature to make a provision that an amount of illegal tax paid by the persons could be claimed only by them and not by the dealer and such restriction on the right of the dealer to obtain refund could lawfully be imposed in the interests of general public.

### **Grant of State largess**

The modern State is no more a 'Police State.' It has become 'Welfare State' and in that role, it has undertaken several commercial activities. A private individual, no doubt, has an absolute right whether to enter into contract with the State. The State has equally a right to enter or not to enter an agreement with any person. The said right, however, is not absolute, unlimited or unqualified particularly in granting State largess.

### **Contract of Service**

A contract of service between State and a private person is not governed by Article 299 of the Constitution. At the initial stage of appointment in Government service, no doubt, there is a contract between the parties. There is an offer and acceptance of employment. But once a person is appointed, he/she acquires a status and the relationship no more governs by a contract, but by an appropriate Legislation or Rules under proviso to Article 309 of the Constitution.

In the leading case of *Roshan Lal Tandon v. Union of India*, the Constitution Bench of the Supreme Court stated: “It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Article 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties’ society has an interest.

In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned.”

### **Unconscionable Contracts**

If a contract between an individual and a Government contains a clause which is arbitrary, unreasonable, unconscionable or opposed to public policy. It cannot be enforced by a court of law.

Thus, a condition in a service contract that service of a permanent employee can be terminated by paying three months’ salary cannot be enforced. Similarly, a provision in a contract of service empowering the employer to terminate services of an Air Hostess on her first pregnancy must be held to be extremely arbitrary, unreasonable and abhorrent to all notions of civilized society. Again, *en masse* termination of all Government Counsel without assigning any reason is violative of Article 14 of the Constitution even if the action is in accordance with a term of the contract. On the same principle, all allotments made in favour of several persons granting licence to run petrol pumps cannot be cancelled. Even in contractual matters, the Government cannot act unreasonably.

### **Statutory Contracts**

Article 299 of the Constitution applies to a contract made by the Government in exercise of executive powers and not in exercise of statutory powers. Thus, there is a distinction between

contracts entered into between Government and a private party in exercise of 'executive powers' and in exercise of 'statutory powers' of the State. The rights and liabilities of the parties in a contract entered into between Government and an individual in exercise of the executive powers of the State are governed by Article 299 of the Constitution but the rights and liabilities of the parties in a contract government by a statutory provisions are governed by the relevant statute under which such contract is entered into. Article 299 of the Constitution has no application to such contracts.

### **Liability of State in Tort**

#### **Introduction**

In England, the Government was never considered as an 'honest man.' It is fundamental to the rule of law that the Crown, like other public authorities, should bear its fair share of legal liability and be answerable for wrongs done to its subjects. The immense expansion of governmental activity from the latter part of the nineteenth century onwards made it intolerable for the Government, in the name of the Crown, to enjoy exemption from the ordinary law. English law has always clung to the theory that the King is subject to law and, accordingly, can commit breach thereof. As far as 700 years ago, Bracton had observed: "The King is not under man, but under God and under the law, because it is the law that makes the King."

Though theoretically there was no difficulty in holding the King liable for any illegal act, there were practical problems. Rights depend upon remedies and there was no human agency to enforce law against the King. All the courts in the country were his courts and he could not be sued in his own courts without his consent. He could be plaintiff but never be made defendant. No writ could be issued nor could any order be enforced against him. As 'the King can do no wrong', whenever the administration was badly conducted, it was not the King who was at fault but his Ministers, who must have given him faulty advice. But after the Crown Proceedings Act, 1947, the Crown can now be placed in the position of an ordinary litigant.

In India, history has traced different path. The maxim 'the King can do no wrong' has never been accepted in India. The Union and the States are legal persons and they can be held liable for breach of contract and in tort. They can file suits and suits can be filed against them.

#### **Doctrine of vicarious Liability**

Since the State is a legal entity and not a living personality, it has to act through human agency, i.e. through its servants. When we discuss the tortious liability of the State, it is really the

liability of the State for the tortious acts of its servants that has to be considered. In other words, it refers to when the State can be held vicariously liable for the wrongs committed by its servants or employees. Vicarious liability refers to a situation where one person is held liable for act or omission of another person. Thus, the master may be held liable for the torts committed by his servant in the course of employment.

The doctrine of vicarious liability is based on three principles

- *Respondeat superior* (Let the principal be liable); and
- *Qui facit per alium facit per se* (He who does an act through another does it himself)
- Socialisation of Compensation

There is no reason why this doctrine should not be applied to the Crown in respect of torts committed by its servants. In fact, if the Crown is not held vicariously liable for such torts, the aggrieved party, even though it had sustained a legal injury, would be without any effective remedy, inasmuch as the government servant may not have sufficient means to satisfy the judgment and decree passed against him.

### **Constitutional Provisions**

Under Article 294(b) of the Constitution, the liability of the Union Government or a State Government may arise 'out of any contract or otherwise.' The word 'otherwise' suggests that the said liability may arise in respect of tortuous acts also. Under Article 300(1), the extent of such liability is fixed. It provides that the liability of the Union of India or of a State Government will be the same as that of the Dominion of India and the Provinces before the commencement of the Constitution (if this Constitution had not been enacted).

In *State of Rajasthan v. Vidhyawati*, a jeep was owned and maintained by the State of Rajasthan for the official use of the Collector of a district. Once the driver of the jeep was bringing it back from the workshop, after repairs. By his rash and negligent driving of the jeep a pedestrian was knocked down. He died and his widow sued the driver and the State for damages. A Constitution Bench of the Supreme Court held the State vicariously liable for the rash and negligent act of the driver.

The court after referring to the P & O Steam Navigation Co. did not go into the wider question as to whether the act was a sovereign act or not. But it held that the rule of immunity based on the English law had no validity in India.

The Court, in subsequent cases, decided to look into the matter of whether the act was sovereign or not. The principle which emerges is that if the function involved is a 'sovereign function', the State cannot be held liable in tort, but if it is a 'non-sovereign function', the State will be held liable. But the difficulty lies in formulating a definite test or criterion to decide to which category the act belongs. In fact, it is very difficult to draw a distinction between the two. 'The watertight compartmentalization of the State's functions into sovereign and non-sovereign or governmental and non-governmental is unsound and highly reminiscent of the *laissez faire* era.'

The test whether the act in question could have been performed only by the government or also by a private individual is also not helpful in deciding the issue. In a welfare State, the governmental functions have increased and today, not all the functions performed by the Government are sovereign functions; e.g. commercial activities like the running of the Railways.

It is also said that if the act in question is statutory, it may be regarded as a sovereign function, but it is a non-sovereign function if it is non-statutory. But this test is equally defective. An activity may be regarded as sovereign even though it has no statutory basis (power to enter into a treaty with a foreign country) and conversely, it may be regarded as non-sovereign even though it has a statutory basis (running of Railways).

Moreover, sometimes a particular act may be held to be a sovereign function by one court but non-sovereign by another. For example, running of the Railways was held to be a sovereign function by the High Court of Bombay, but non-sovereign by the High Court of Calcutta and this may lead to further uncertainty in law.

Further, the traditional doctrine of sovereign immunity has no relevance in the modern age when the concept of sovereignty itself has undergone drastic change. The old and archaic concept of sovereignty no longer survives. Sovereignty now vests in the people. Hence, even such actions of the Government which are solely concerned with relations between two independent States are now amenable to scrutiny by courts. Sometimes the distinction between sovereign and non-sovereign functions is categorized as regal and non-regal functions. The former is confined to legislative, executive and judicial power whereas the latter can be characterized as analogous to private company. In the former, the Government is not liable but, in the latter, it is liable.

Again, the concept of public interest has also undergone change. No legal or political system today can place the State above law and can deprive its citizens of life, liberty or property by negligent acts of its officers without providing any remedy. Even if the governmental functions can be classified into one or the other category, the principle is unsatisfactory from yet another viewpoint. Generally, in a civil action in tort, the principal idea is to compensate the aggrieved person and not to penalize the wrongdoer or his master. And if in compensating the aggrieved party, the wrongdoer or his master has to pay damages, the resultant burden on the latter is merely incidental and not by way of penalty or punishment. It is, therefore, absurd and inhumane to hold that the Government would not be liable if a military truck supplying meal to military personnel struck a citizen, but it would be liable if such an accident occurred when the truck carried coal to an army headquarters.

In *Challah Ramakonda Reddy v. State of A.P.*, It was held that plea of sovereignty was not applicable, where there was a violation of Fundamental Rights of the Citizens.

In *Neela bhathi Behra v. State of orissa*, the court held that a claim in public law for compensation for violation of Human rights and Fundamental freedoms, the protection remedy for enforcement and protection of such a right, is distinct from and in addition to the remedy in private law damages for torts. The court expressly held that Principle of sovereign immunity does not apply to the public law remedies under Article 32 and 226 for the enforcement of Fundamental Rights.

The distinction between public and private law and the remedies under the two has been emphasised in *Common Cause, A registered society v. UOI*, It was held that “where public functionaries are involved and the matter relates to the violation of Fundamental rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law.”

## **Conclusion**

Recent judicial trend is, undoubtedly, in favour of holding the State liable in respect of tortious acts committed by its servants. In cases of police brutalities, wrongful arrest and detention, keeping the under-trial prisoners in jail for long periods, committing assault or beating up prisoners, etc. the courts have awarded compensation to the victims or to the heirs and legal representatives of the deceased. As a matter of fact, the courts have severely criticized the inhuman attitude adopted by the State officials.

The Law Commission also stated: “The old distinction between sovereign and non-sovereign functions should no longer be invoked to determine liability of the State.”

## **UNIT VI**

**CORPORATES AND PUBLIC UNDERTAKINGS**

**CONTROL OF STATUTORY CORPORATIONS AND PUBLIC UNDERTAKINGS**

**CORRUPTION AND MAL-ADMINISTRATION- CONTROL MECHANISM**

**OMBUDSMAN IN INDIA (LOK PAL AND LOKAYUKTA)**

**CVC-CENTRAL VIGILANCE COMMISSION**

**PARLIAMENTARY COMMITTEES**

**COMMISSION OF ENQUIRY**

## Introduction

No statute or court has ever attempted or been asked to define the expression 'public corporation.' It has no regular form and no specialized function. It is employed wherever it is convenient to confer corporate personality. In *Dartmouth College v. Woodward*, John Marshall stated: "A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of the law. Being the mere creature of the law, it possesses only those properties which the Charter of its creation confers on it, either expressly, or as incidental to its very existence. Those are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression be allowed, individuality; properties by which a perpetual succession of many persons are considered the same, and may act as a single individual."

The main purpose of establishing public corporations is to promote economic activity through autonomous bodies. With that object, these corporations have been granted very wide powers and there is no interference by any authority in exercise of these powers by the corporations. But it is also necessary that some control over these corporations should be there so that the powers conferred on such corporations may not be arbitrarily exercised or abused, and it may not become the 'headless fourth organ' of the Government.

## JUDICIAL CONTROL

Since a public corporation is a legal entity it can sue and be sued. It is a body corporate having perpetual succession and a common seal. Legal proceedings may be taken by or against a corporation in its corporate name. It is a distinct and separate entity from the Crown or the Government. Jurisdiction of courts over a public corporation is the same as it is over any private or public company except that the powers of the former depend on the provisions of a special statute while the powers of a company are derived from the terms of its Memorandum of Association. In some statutes an express provision is made enabling a corporation to be sued. But even in the absence of such a provision, a corporation can be sued like any other person. In fact, when any statute refers to a 'person', it includes a corporation also.

Accordingly, a public corporation is liable for a breach of contract and also in tort for tortious acts of its servants like any other person. It is liable to pay tax unless expressly exempted and cannot invoke the exemption granted to the State under Article 289 of the Constitution of India. It is bound by a statute. It cannot claim 'Crown privilege.'



### Illustrative Cases

So far as Indian courts are concerned, they have always adopted a liberal view and have interfered wherever justice required such interference.

Thus, if an action of a public corporation is illegal, arbitrary or unreasonable, the court would quash and set it aside. Even in case of grant of largess, jobs, government contracts, issue of quotas and licences, etc. such corporations and companies have to act in accordance with law. In cases of acceptance of tenders, enhancement of rates of taxes and fees, irrational or discriminatory actions cannot be allowed. In cases of employees of such corporations and government companies, though they are not 'civil servants' under Part XIV of the Constitution and, therefore, not entitled to protection under Article 311 thereof, the general principles of service jurisprudence are applied to those employees. Nevertheless, in 'unequal fights between giant public sector undertakings and petty employees' the courts have safeguarded the interests of employees. Again, the courts have also criticized the attitude of such corporations whenever they had adopted an attitude of typical private employer's unconcealed dislike and detestation.

Apart from enforcing statutory regulations and granting relief of declaration and reinstatement in service to employees of corporations, by invoking the provisions of equality clause enshrined under Articles 14 and 16 of the Constitution of India, the regulations framed by such corporations were also declared illegal, arbitrary and unconstitutional by the courts. In *LIC of India v. CERC* the Supreme Court held that in prescribing terms, conditions and rates of premium while issuing policy, the corporation must act reasonably and fairly. The eligibility conditions must be just and reasonable.

### **Powers and duties of courts**

It is true that public corporations must have liberty in framing their policies. If the decisions have been taken bona fide although not strictly in accordance with the norms laid down by courts, they have been upheld on the principle laid down by Justice Holmes that they must be allowed some freedom of 'play in the joints.' It cannot, however, be overlooked that such power is not absolute or blanket. If it is shown that exercise of power is arbitrary, unjust or unfair, an instrumentality of State cannot contend that its action is in accordance with the "letter of the law". Whatever may be the activity of a corporation, it must be subject to rule of law and should meet the test of Article 14 of the Constitution. It is not only the power but the duty of a court of law to see that every action of an instrumentality of the State is informed by reason, guided by public interest and conforms to the Preamble, Fundamental Rights and Directive Principles of the Constitution.

### **Governmental Control**

As the judicial control over public corporations is not effective, it needs to be supplemented by other controls. Government also exercises some control and supervision over such corporations as the custodian of public interest in different ways.

### **Appointment and removal of members**

Generally, the power of appointment and removal of the Chairman and the members of a public corporation is vested in the Government. This is the key provision and the most effective means of control over a public corporation. In some cases, the term of office of a member is also left to be determined by the Government. In some statutes, a provision is made for removal of a member on the ground that the member is absent from meetings for a specified period, he is adjudged a bankrupt or is 'otherwise unsuitable' to continue as a member.

### **Finance**

The Government exercises effective control over a public corporation when such Corporation is dependent on the Government for finance. A statute may require previous approval of the Government for undertaking any capital expenditure exceeding a particular amount. It may also provide to submit to the Government its programme and budget for the next year and to submit the same in advance. It may also impose a condition on the corporation to take consent of the Government before borrowing money or may insist for issuance of bonds and debentures to secure payment made by the Government to the corporation. The Comptroller and Auditor General exercises control in the matter of audit or accounts submitted by public corporations.

### **Dissolution or supersession of Corporation**

A constituent statute may also empower the Government to abolish, dissolve or supersede a corporation if the corporation exceeds its authority or abuses its powers. Even if such 'drastic' power is not exercised, it works as a cheque on the functioning of the corporation.

### **Cancellation, suspension or modification of Acts**

An Act creating a corporation may as well provide that all acts and proceedings of the corporation may be subject to the control of the Government which may cancel, suspend or modify as it may think fit any action taken by the Corporation. Institution of an Act creating a corporation may as well provide that all acts and proceedings of the corporation may be subject to

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### **Institution of enquiries**

A statute may also enable the Government to order enquiries into the working of the corporation in certain circumstances. Such power may work as a check against any deviation from the norms of functioning of the corporation.

### **Directives**

An important technique involved to reconcile governmental control with the autonomy of the undertaking is to authorize the Government to issue directives to public undertakings on matters of 'policy' without interfering with the matters of day-to-day administration. A statute may empower the Government to issue such directives as it may think necessary on questions of policy affecting the manner in which a corporation may perform its functions. The corporation will give effect to such directives issued by the Government. A statute may also provide that in case 'any question arises whether a direction relates to matter of policy involving public interest, the decision of the (Central) Government thereon shall be final.'

It is no doubt true that such directions should relate to questions of policy and should not be routine administrative instructions in the day-to-day working of the corporation. But it is very difficult to draw a dividing line between matters of 'policy' and 'day-to-day' working of a public corporation and by this method, the Government can exercise effective control over public corporations. But unfortunately, in practice, the Government hardly exercises its power to issue policy directives.

### **Rules and Regulations**

Usually a constituent statute creating a corporation contains provisions to make rules and regulations. The provision empowers the Central Government to make rules 'to give effect to the provisions of the Act.' The other provisions authorize the corporation 'with the prior approval of the Central Government' to make regulations 'not inconsistent with the Act and the Rules made thereunder' for enabling it to discharge its functions under the Act. Thus, even in case of 'filming rules and regulations, the Government is having the upper hand. Regulations promulgated without previous approval of the Government cannot be said to be valid. Again, in case of inconsistency

between the rules and the regulations, the rules would prevail and the regulations will have to give way to the extent of inconsistency with the rules made by the Central Government.

### **PARLIAMENTARY CONTROL**

Public corporations are created and owned by the State, financed from public funds and many a time they enjoy full or partial monopoly in the industry, trade or business concerned. They are expected to exercise their powers in the public interest. It is, therefore, necessary for Parliament to exercise some degree and mode of control and supervision over these corporations. The methods adopted to exercise such control are numerically four.

#### **Statutory provisions**

All public corporations are established by or under statutes enacted by Parliament or State Legislatures. The powers to be exercised by such corporations can be defined by them. If any corporation exceeds or abuses its powers, Parliament or the State Legislature can dissolve, supersede or even abolish the said corporation. Even though this type of control is not frequently employed, it is a salutary check on the arbitrary exercise of power by the corporation. Parliament also exercises effective control through technique of 'laying.'

Through this traditional method, the members of Parliament put questions relating to the functions performed by public corporations to the Minister concerned. But this method has not proved to be very effective because of the authority of public corporations in their fields.

Accordingly, broad principles subject to which questions relating to these undertakings can be asked, have been laid down, namely, questions relating to policy, an act or omission on the part of a Minister, or a matter of public interest (even though seemingly pertaining to a matter of day-to-day administration or an individual case), are ordinarily admissible. Questions which clearly relate to day-to-day administration of the undertakings are normally not admissible. A more significant and effective method of parliamentary control is debate on the affairs of a public corporation. Usually, this method is followed when annual accounts and reports regarding the corporation are placed before Parliament for discussion in accordance with the provisions of the statute concerned. There is no general obligation on the part of all corporations to present their budget estimates to Parliament. Estimates Committee, therefore, recommended that corporations should prepare a performance and programme statement for the budget year together with the

previous year's statement and it should be made available to Parliament at the time of the annual budget.

### **Parliamentary Committees**

This is the most effective form of parliamentary control and supervision over the affairs conducted by public corporations. Parliament is a busy body and it is not possible for it to go into details about the working of these corporations. Parliament has, therefore, constituted the Committee on Public Undertakings in 1964. The functions of the Committee are to examine the reports and accounts of the public undertakings, to examine the reports, if any, of the Comptroller and Auditor-General on the public corporations, to examine in the context of the autonomy and efficiency of the public corporations, whether their affairs are being managed in accordance with sound business principles and prudent commercial practices.

The recommendations of the Committee are advisory and, therefore, not binding on the Government. Yet, by convention, they are regarded as the recommendations by Parliament itself, and the Government accepts those recommendations; and in case of non-acceptance of the recommendations of the Committee, the ministry concerned has to give reasons therefor.

### **Conclusion**

No doubt, parliamentary control over the public corporations is "diffuse and haphazard", yet it is the duty of Parliament to ensure that if a corporation is exercising too great a measure of freedom, it should be brought to heel. The whole purpose of establishing an autonomous undertaking is to make it free, in its daily working from detailed scrutiny by members of Parliament. But since the functions carried on by these undertakings are of public concern and to be performed in public interest, Parliament cannot completely absolve itself of its controlling function. It is, therefore, necessary that leaving the matters relating to day-to-day administration to the corporations, there must be overall supervision in important policy matters by Parliament.

### **CONTROL BY PUBLIC**

In the ultimate analysis, public corporations are established for the public and they are required to conduct their affairs in the public interest. In the ultimate analysis, public enterprises are owned by the people and those who run them are accountable to the people. It is, therefore, necessary that in addition to judicial, parliamentary and governmental control, these corporations

must take into account public opinion. There are different means of representation of the 'consumer' or public interest.

### **Consumer Councils**

These are bodies established under the authority of the statute constituting the corporations concerned with the object of enabling "consumers" to ventilate their grievances, or make their views known to the corporations. The outstanding examples of consumer councils are to be found in the electricity and gas industries. The difficulty about these councils is that the members of the general public have neither the technical knowledge nor a keen interest in the affair of certain consumer councils; e.g. Gas or Electricity Consumer Councils. These councils may make recommendations to their area boards, but there have been very few occasions when alterations of policy decisions have resulted.

In some cases, Parliament has arranged for members of certain public corporations to be nominated by local authorities and other bodies interested in the functions of the particular corporation. Thus, members of Hospital Management Committees are appointed by the Regional Hospital Board after consultation with local health authorities, executive councils and other officials, as required by the statute. Sometimes, such consultation is made mandatory. Some statutes also provide that certain members of a council must possess particular qualifications.

### **Consumers and Courts**

Due to rapid development of Administrative Law and consciousness of rights by vigilant citizens, there is a clear tendency on the part of the Consumers to approach courts for the purpose of ventilating their grievances. More and more cases are coming before the courts by consumers in their individual capacity or through some organization by way of Public Interest Litigation (PIL).

### **Consumer Protection Act**

With a view to provide for better protection of the interests of consumers and for that purpose to make a provision for the establishment of Consumer Councils and other authorities for the settlement of consumers disputes and for matters connected therewith, Parliament enacted the Consumer Protection Act, 1986. The Act provides for establishment of consumer protection councils, and also sets up machinery for settlement of consumer disputes.

## **(CVC) CENTRAL VIGILANCE COMMISSION**

A serious problem affecting the Indian Polity is that of corruption in the administration this is the decision-making process by the administration and gives rise to all kinds of vices. Incorruptibility is an essential requirement of public confidence in the administration of government departments. A word made therefore decide on the subject of law and the machinery to fight administrative corruption in the case of *S. A. Kiri v. Union of India* AIR 1985. The supreme court said that "no employee of a nationalised bank or any other public sector cooperation should engage himself in collecting donations for any trust or other organisations from persons with whom he comes into contact in the course of is employment. Such a practice is likely to lead to harmful results because "in the world of Commerce quid pro quo and not charity is the rule".

Any system of government, improvements of the grievance redressal machinery have always increased the attention of the people. Even in Parliamentary form of Government, where the rules rule with the consent of the people the need for a viable grievance redressal machinery cannot be overemphasized actualities of our times have proved false the assumption that the system of responsible government provides for a built-in continuous review of the activities of the administration to stop the growth of party discipline and the millions of partition attitudes in asserting partition attitudes in asserting in asserting grievances and defending the performance of the government by ministers tend to create an unfavourable atmosphere for the proper consideration of individuals Complaints against the administration this system no matter how so ever ineffective completely says when inter alia and corruption filter and corruption filter from the top it was against this factor of that the establishment of the that the establishment of the CVC was recommended by the committee on prevention of corruption. The Santhanam committee first of the committee known after the name of its chairman was appointed in 1962. It recommended establishment of a CVC has the highest authority at the head of the existing anti-corruption organisation consisting of the Directorate of gender complaints and redress, the Directorate of vigilance and Central police organisation. The recommendations of the Santhanam committee were accepted by the government and dash, the CVC was established on a non-statutory basis under the resolution dated 11th February 1964.

The committee has recommended that the commission should be concerned with two major problems facing the administrations, namely

a) prevention of corruption and maintenance of integrity amongst government servants.

b) ensuring just and fair exercise of Administrative powers vested in various authorities by statutory rules are by non-statutory executive orders.

The CVC was attached to the ministry of home affairs of the Government of India. Nevertheless, it is independent in its functioning in the same sense the Union Public Service Commission UPSC. Is and no order, direction or instruction can be issued by the Ministry so as to interfere with its independent operation. The central Vigilance commissioner was appointed by the president for a term of 6 years for till he attains the age of 65 years whichever is earlier. Therefore the central Vigilance commissioner, like other civil servants, do not hold of face at the pleasure of the president he can be removed or suspended from the office by the president on the ground of miss behaviour, but only after the Supreme Court has held an enquiry into his case and recommended action against him. His responsibilities include the operation of the Vigilance machinery and coordination of the work of vigilance officers subordinate to him.

The committee has recommended to measure matters to come within the purview of the commission, that is, cases of corruption and cases involving maladministration to stop payment accepted the recommendations of the committee as regards corruption but not maladministration, because the latter problem was big enough to require a separate machinery by itself, and if the commission was bird and with the additional responsibility former administration along with corruption, it would dilute its effectiveness in dealing with cases of corruption. The Central Government increases the status and functions of central Vigilance Commission as follows:

### **The powers and functions of the Commission**

1. The powers and functions were set out in the resolution under which it is established. Exercise to general control and supervision over the vigilance and anti-corruption work carried down in various Ministries, departments and public undertakings. It has been given jurisdiction and power to conduct an enquiry into transactions in which public servants are suspected of impropriety and corruption including misconduct, misdemeanour, lack of integrity and malpractices against civil servants.

2. The commission was assisted by the CBI in its operations. CBI in its operations. The CVC has taken a serious note of the growing occupation of the CBI with work other than vigilance. Thus, when the CBI is extensively used for non-corruption investigation work such as drug trafficking, smuggling and murders it hampers the work of the CVC.



3. The CVC also advises the Home Ministry on the necessity of departmental disciplinary action against public servants where prima facie charges of corruption and misconduct are established.

But how effective this institution has proved in uprooting corruption depends on various factors, the most important being the earnestness on the part of the government, citizens and Institutions to clean public life.

4. Whenever complaints are received by the commission's it refers them either to the CBI or the concerned Ministry department for investigation. These bodies after investigation have to send their report to the commission for advice. The commission may drop a complaint at the initial stage itself if it considered as it to be the vague or if the allegations contained there in a not verifiable. Just during the year 1976, out of 665 complaints, 492 were dropped by the commission itself and the remaining 173 were forwarded to the CBI and the concerned Ministries or departments for investigation.

The commission does not does investigate the complaint successful. It has to depend on other organisations for the purpose. However, there is one exception. The chief technical examinations organisation attached to the commission conducts technical examination of public works during checking of bills of contractors, contracts and throws.

5. The commission advises as to the action to be taken in the following cases:

a) Report of Investigation by the CBI involving departmental action or prosecution in cases either referred to it referred to it by the commissions or otherwise.

b) Reports of Investigation by the Ministry of department involving disciplinary action in cases either referred by the commission or otherwise.

c) cases received direct from public sector undertakings and statutory corporations, etc.

6. The commission has power to required that oral enquiry in any departmental proceedings should be entrusted to one of the Commissioner for departmental enquiries. It Overseas the enquiry is conducted by the Commissioner and here the commission has two major functions:

1. To ensure that enquiries are completed expeditiously, and
2. To tender advised to the disciplinary authorities for taking action on the reports of the Commissioners.

7. All chief Vigilance commissioner are required to furnish to the commission for its assessment a resume of the Vigilance work done in their organisation with special emphasis on preventive vigilance.

8. The commission suggest changes in the procedure for practice where it appears that the existing procedure or practice a force scope for corruption or misconduct. Decommision me also initiate review of Administrative procedure and practice in so relates to the maintenance of integrity in the administration.

9. The commission discharges miscellaneous functions such as conducting orientation courses for Vigilance officers and courses in the conduct of departmental proceedings review of vigilance arrangements in ministries and departments public undertakings, advise in matters relating to interpretation of law and procedures governing departmental proceedings, etc.

Over the years, the independence of the CVC has also been seriously compromised originally the CVC seriously compromised originally the CVC had been equated with the UPSC and its chairman had a six years term. However, later on it was reduced to 5 years which was further reduced to 3 years in 1977 with a provision for 2 years extension at the pleasure of the government. UC Agarwal who deleted office on 7th July 1987, after a period of 3 years, was not only refused extension of 2 years but the office remained vacancy for about one year when C G Somaiah, former home secretary was appointed in 1988 Foster it is discouraging to note that the CVC has mentioned in its 1982 annual report 41 cases where the government did not accept its advice of imposing major penalty on erring officials in various units of the central sector. The commission has suggested premature retirement has the legitimate handle to be used for weeding out the corrupt among the public servants in higher positions. The commission in its 1982 report also suggested that in cases where prosecution cannot be launched due to lack of evidence and other reasons, corrective and deterrent action should be taken at the stage of confirmation or the crossing of efficiency. In its 1986 report, the commission has reacted sharply to the government decision to Limit its roll over public sector undertakings where the problem of corruption is by no means negligible.

In its efforts to check corruption in public life and to provide good governance, the supreme court commended measures for far-reaching consequences valid disposing a PIL petition on the *CBI v Shukla Jain Hawala*. The three judges bench separated for measure investigating agencies from the control over the executive. This Agencies are CBI, enforcement Directorate of revenue intelligence department and the CVC. The Court has shifted CBI under the administrative control

of the CVC. The CVC, until now, was under the home ministry interested with the task of bringing to book cases of corruption and sunrise wrong doings and suggesting departmental action. Now the CVC is to be the umbrella agency and would co-ordinate the work of three other investigating arms. The code for the directed that the CVC should be made a statutory body and its head is to be selected by a three men high powered panel consisting of the Prime minister, the Home minister and the Leader of the opposition.

In order to give effect to the views of the Supreme Court the government issued an Ordinance on 25th August 1998. However, this measure had diluted the views of the Supreme Court by putting one view against the other. Therefore, what ought to have been visualised as a reformative step had begun to be seen as a clever bureaucratic register.

**Main objections against the ordinance related to:**

1. Restricting the membership of the CVC to bureaucrats.
2. Making prior permission of the competent authority mandatorily before starting investigation against government officers above the rank of joint secretary and high-ranking officers of Nationalised banks and public sector undertakings.
3. Making the secretary personal *ex-officio* member. Objections were also raised against Article 21 of the ordinance which had authorised the commission to make rules but in consultation with the government.

It was when the Supreme Court expressed concern over these aspects of the ordinance in the hearing relating to its validity that the government decided to Amend the Ordinance and does on 27th October 1988 the Central Vigilance Commission Amendment Ordinance was issued. The commission was made a four-member body and its membership was open to others besides bureaucrats. In the same manner, the single directive of prior permission was deleted and the membership of secretary personnel, Government of India was given a statutory status. It is too early to comment on the functioning of the reconstituted statutory CVC but one thing is certain that no Commission can uproot corruption which has trunk so deep in the body politic. It can only act as a facilitator and proper length in the absence of a strong political will.

*Union of India v. Alok Kumar* 2010 SCC, the supreme court held that unless the rules so require, advice of the CVC, is not binding. The CVC to enable the disciplinary authority to proceed in accordance with. The system in the absence of any specific rule, that seeking advice and implementing thereof is mandatory, it will not be just and proper to presume that there is prejudice

to the officer concerned. even in the cases where action is taken without consulting the vigilance commission, necessary will not vitiate the order of the removal passed after enquiry by the departmental authorities.

The Disciplinary proceedings against government servant taken under the Services Rules, framed by the Government under Art. 309 of the Constitution. Besides, public servant can also be prosecuted for bribery and corruption in criminal court. with a view to expedite such trials, The Prevention of Corruption Act, 1947 (replaced by Prevention of Corruption Act, 1988) (PCA) make certain provisions. As it is in the interest of public that corruption be eradicated, so also it is in the public interest that honest public service should be able to discharge the duties free from false frivolous and malicious accusations.

In *Mohammad Iqbal Ahmed v. State of Andhra Pradesh*, AIR 1979 SC, the supreme court has emphasized two significant aspects of sanction for prosecution. First, any case instituted without a proper sanction must fail as the entire proceeding are rendered *void ab initio*. Therefore, the prosecution must prove that valid sanction has been granted by the sanctioning authority. secondly, the sanctioning authority must be satisfied that a case for sanction has been made without constituting the offence. The constituting authority at time of giving sanction must be aware of the fact constituting the offense and must apply its mind. The grant of sanction is not an ideal formality. It is a sacrosanct act which affords protection of the government servants against frivolous prosecution.

All the facts constituting the offence constituting the offence must be placed before the sanctioning authority and it should then arrive at the satisfaction. However, the accused facing prosecution for offences under the Prevention of Corruption Act, 1947 for Prevention of Corruption Act, 1988 cannot claim any immunity on the ground of want of sanction, if he is ceases to be a public servant on the date on which the court took cognizance of the said offence. But the position is different wear Sec. 197 of Code of Criminal Procedure, 1973 has application.

In the case of *Centre for Public Interest Litigation v. Union of India*, 2005 SCC, it has been held that protection under Section 197 is available only when the alleged act done by public servant is reasonably connected with the discharge of his official duty.

In *State of Maharashtra v. R. S. Nayak*, AIR 1982, Nayak filed a complaint a complaint against chief minister and Antually charging him with offence under Sections 161 and 185 of Penal Code and Section 5 of the PCA. The Supreme Court ruled that the complaint was not maintainable without the requisite sanction of the government under Section 6 of the PCA the court also stated

that the sanction must be given by the Governor in his Individual discretion and not on the advice of the Ministers. for the interest of democratic government and its functioning, the Governor must act in such as a case on his own. The court said when there is to be a prosecution of the Chief Minister, the Governor would, while determining whether sanction for such prosecution should be granted or not under Section 6 of the Prevention of Corruption Act, as a matter of propriety necessary act in his own discretion and not on the advice of the Council of Ministers. This will advance the cause of justice.

In another case on the same facts as mentioned above the Supreme Court answer on another important question is a private complaint in respect of offences committed by a public servant cognizable by the court? The court answered the question in the affirmative arguing as follows:

In the absence of a statutory provision to the contrary, A *locus standi* of a complainant is concept foreign to criminal jurisprudence first of penal statutes are enacted for the larger good of the society an object of the such statutes is to punish the offenders in the interest of the society. Therefore, the right to initiate proceedings cannot be whittled down, circumscribed or method by putting it into a straight-jacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception.

Under PCA, the state government has power to appoint special judges to try specified offences against public servants. the special judge has exclusive jurisdiction to try these offences against public servant. The judge follows the procedure set out in the Cr.P.C for trial of warrant cases. The underlying idea of having special judges is to expediate such trials. It was felt that to fight corruption it was necessary to take corruption cases out of the maze of ordinary criminal cases handled by Magistrate. a special judge has the status of the sessions judge. such as Court is one of the original criminal jurisdictions subject to the control of the High Court. The special judge can take cognizance of the specified offences upon a complaint or upon a police report or upon his coming to known in some manner of the offence have been committed.

Antulay's case is important because it is the first formal criminal trial on private complaint of a public man on charges of corruption, for acts done during his tenure of his office. There have been in the past many occasions when such charges were levelled against state ministers. Such cases were treated mostly on an *ad hoc* basis without involving any set pattern to deal with such matters. some ministers resigned their office after adverse remarks were made against them in the court decisions. In such cases, enquiry officers were appointed under administrative decisions to assess whether there was any *prima facie* evidence against the concerned minister in some cases,

formal enquiry Commission under the Commission of Enquiry Act, were appointed to probe into the charges of corruption and misuse of power. Even when such a Commission reported that there was prima facie evidence against the Minister, hardly any follow-up action by way of prosecution in a criminal court was undertaken. The difficulty in the situation is that such enquiries are undertaken under the auspices either of the centre of the government taking office in the concerned state after the old government quits office into whose action the enquiry is instituted, and soon the matter of enquiry gets embroiled into political controversy.

The above case is of the great public importance because an Ex Chief Minister is being prosecuted for the first time on a private complaint. But this cannot serve as a model for the future. It needs great effort, tenacity and resource on the part of the individual to launch a prosecution of this type, and not many can mobilize search resources. Nor can the matter of containing corruption and abuse of power be left solely in the hands of the government for political considerations come into the picture. No ruling party likes to take action against its own members for corruption and misuse of power. In addition to these two channels, a third channel is also necessary to contain the malady, namely a strong and independent ombudsman system having Constitutional sanction so that its autonomy is not compromised in practice. But even such an institution may fail to deliver the goods unless it gets a strong political backing and support in its efforts. It needs to be emphasized that corruption and misuse of power by holders of higher offices constitute serious malady affecting public interest as such factors distort the whole process of policy and decision-making and a strong mechanism is needed to fight the same.

### **OMBUDSMEN IN INDIA**

Ombudsman means a delegate, agent, officer or commissioner. Gender defines ombudsman as “an officer of parliament, having as his primary function, the duty of acting as an agent for parliament, for the purpose of safeguarding the citizen against abuse or misuse of administrative power by the executive.” Administrative law provides for control over the administration by an outside agency, strong enough to prevent injustice to the individual, at the same time leaving the administration adequate freedom to enable it to carry on effective government. In every progressive system of administration, there is need of a mechanism for handling grievances against administrative fault. Ombudsman is one of such machinery.

The parliamentary and judicial control on the administrative action is very weak, except there is a statutory provision for an administrative tribunal. There is no means for handling grievance against misconduct, inefficiency, delay, negligence, etc. against the officials. The natural remedy

open to the aggrieved person, in such cases, is for him to persuade the minister if he is accessible to the aggrieved person, or to draw his attention by raising question in parliament to which he is responsible, but in practice it is difficult. Even the parliamentary remedy is also not adequate. It was felt necessary to have alternative or additional institution to control wrong decision, maladministration or corruption of public officials. The ombudsman is one of such principle alternatives provided for.

### **Origin of Ombudsman**

Ombudsman first introduced in Sweden by King Charles XII on 18th century. It is also practiced by Finland in 1919, Denmark in 1953, Norway in 1963, New Zealand in 1962, US 1960 and UK 1967.

### **Meaning of Ombudsman**

Ombudsman is an appointed official whose duty is to investigate complaints, generally on behalf of individuals such as consumers or taxpayers, against Institutions such as companies and government departments. Ombudsman means the “grievance man” or a “commissioner of administration”.

According to Garner, he is an officer of parliament having as his primary function, the duty of acting as an agent for the parliament for the purpose of safeguarding the citizen against abuse or misuse of administrative power by the executive.

### **Characteristics of ombudsman:**

1. Independence - It is a body that assists with fair and expeditious resolution of complaints in an impartial confidential and independent manner.
2. Impartiality and fairness - It works impartially
3. Credibility - It maintains its Credibility
4. Confidentiality

According to Professor S.K Agrawal, the term ombudsman refers only to institute, which have three basic and unique characteristic which are as follows –

- i) Ombudsman refers to an independent and non-partisan officer of the legislature who supervise the administration.
- ii) He deals with specific complaints from the public against administrative injustice and maladministration.

iii) He has the power to investigate, criticize and report back to the legislature, but not to reserve administrative action.

### **Powers and Duties of Ombudsman -**

Ombudsman is a watchdog of the administration or the protector of the little man, ombudsman inquires and investigates all complaints made by the citizen against the abuse of discretionary power, mal-administration inefficiency and take appropriate actions. For that purpose, very wide power has been given to him, he has access to departmental files. The complainant is not required to lead any evidence before the ombudsman to prove his case he is empowered to grant relief to the aggrieved person. His function is to satisfy himself whether the complaint is justified or unjustified. He can act even *suo-moto*. These powers are not limited like the powers of civil court, he is responsible and responsive to people.

**Nature/Status** of an ombudsman is judge or lawyer or a high officer and his character, reputation and integrity are above board. He is appointed by the parliament and sets out the reaction of the citizen against the administration. He makes his own recommendation to eliminate the cause of complaints. Ombudsman is thus a strong position to redress individual grievances arising out of bad administration. Status Generally, the Ombudsman is a judge or a lawyer or a high officer and his character, reputation and integrity are above board. He is appointed by Parliament and thus, he is not an officer in the administrative hierarchy. He is above party politics and is in a position to think and decide objectively. There is no interference even by Parliament in the discharge of his duties. He makes a report to Parliament and sets out reactions of citizens against the administration. He also makes his own recommendations to eliminate the causes of complaints. Very wide publicity is given to those reports, all his reports are also published in the national newspapers. Thus, in short, he is the 'watchdog' or 'public safety valve' against maladministration, and the "protector of the little man".

### **Defects**

1. It is argued that this institution may prove successful in those countries which have a comparatively small population, but it may not prove very useful in populous countries, like U.S.A. or India, as the number of complaints may be too large for a single man to dispose of.
2. It is also said that the success of the institution of Ombudsman in Denmark owes a great deal to the personality of its first Ombudsman Professor Hurwitz. He took a keen interest



in the complaints made to him and investigated them personally. Prestige and personal contact would be lost if there are a number of such officers, or if there is a single officer who has always to depend upon a large staff and subordinate officers.

3. According to Mukherjea, J., in India this institution is not suitable. He describes it as "an accusatorial and inquisitorial institution a combination unprecedented in democracy with traditions of independent judiciary". It is an 'impracticable and disastrous experiment' which will not fit into the Indian Constitution.

### **Conclusion**

In a democratic Government, it is expected that the subjects have adequate means for the redress of their grievances. Since the present judicial system is not sufficient to deal with all cases of injustices, an institution like Ombudsman may help in doing full and complete justice to aggrieved persons. But Ombudsman is not a "panacea for all the evils of bureaucracy." His success depends upon the existence of a reasonably well-administered State. He cannot cope with the situation where administration is riddled with patronage and Corruption. Indian Parliament so far has not enacted any Act though a proposal to constitute an institution of Ombudsman (Lokpal) was made by the Administrative Reforms Commission as early as in 1967. Some States, however, have enacted Statutes and appointed Lokayukta.

## **LOKPAL AND LOKAYUKTA IN INDIA**

The word "Lokpal" is derived from the sanskrit word "loka" meaning people and "pala" meaning protector or caretaker. Together it means "protector of people". The aim of passing such a law is it to eradicate corruption at all levels of the Indian polity. For a nation to develop it needs to have an extremely well organized and meticulously planned organization. A failure of the administrative set up reflects on the holistic growth of the state, the biggest reason for the failure of the administration can be attributed to the ill effects of corruption. The growth of the country has been plagued by corruption and it has extended its wings through-out the entire administrative set up. To root out the menace of corruption the institution of "ombudsman" came up and has played a great role in fighting administrative malpractices.

### **Historical Background**

The institution of ombudsman originated in Scandinavian countries. The institution of ombudsman first came into being in Sweden in 1713 when a "chancellor of justice" was appointed

by the king to act as an invigilator to look into the functioning of a war time government. From 1713 the duty of this ombudsman was to mainly ensure the correct conduct of royal officials. The institution of the ombudsman was firmly incorporated into the Swedish Constitution from 1809.

It was defined as the parliamentary body supervising judges, government and other officials, and ensuring their compliance with laws and other legal regulations. The embedding of the ombudsman in the constitution was completed by a further law specifying in greater detail the scope of his activities and his legal authority. The institution of the ombudsman developed and grew most significantly in the 20th century. Ombudsman institutions were on the increase especially in the period after the Second World War when almost a hundred of them were established. The institutions took varied forms and modifications depending on the historical, political and social background of the given country.

In India the ombudsman is known as Lok pal or Lokayukata. The concept of Constitutional ombudsman was first proposed by the then Law minister Ashok Kumar Sen in parliament in the early 1960s. The term Lok pal and Lokayukta were coined by Dr. L. M. Singhvi as the Indian model of ombudsman for the redressal of public grievances, it was passed in Lok Sabha in the year 1968 but it was lapsed with dissolution of Lok Sabha and since then has lapsed in the Lok Sabha many times.

### **Need for Lok pal**

There are several deficiencies in our anti-corruption systems because of which despite overwhelming evidence against the corrupt, no honest investigation and prosecution takes place and the corrupt are hardly punished. The whole anti-corruption set up ends up protecting the corrupt.

1) Lack of Independence - most of our agencies like CBI, state vigilance departments, internal vigilance wings of various departments, Anti-corruption Branch of state police etc are not independent. In many cases, they have to report to the same people who are either themselves accused or are likely to be influenced by the accused.

2) Powerlessness- Some bodies like CVC or Lokayuktas are independent, but they do not have any powers. They have been made advisory bodies. They give two kinds of advice to the governments “to either impose departmental penalties on any officer or to prosecute him in court. Experience shows that whenever any minister or a senior officer is involved, their advice is rarely followed.

3) Lack of Transparency and internal accountability - In addition, there is the problem of internal transparency and accountability of these anti-corruption agencies. Presently, is there any separate and effective mechanism to check if the staff of these anti-corruption agencies turns corrupt. That is why, despite so many agencies, corrupt people rarely go to jail. Corruption has become a high profit zero risk business. There is absolutely no deterrence against corruption.

### **Lok pal and Lokayukta Act, 2013**

The Lok pal and Lokayukta Act, 2013 seeks to provide for the establishment of Lok pal for the Union and Lokayukta for States to inquire into allegations of corruption against certain public functionaries and for related matters. The act extends to whole of India, including Jammu & Kashmir and is applicable to "public servants" within and outside India. The Act mandates for creation of Lok pal for Union and Lokayukta for states. The Bill was tabled in the Lok Sabha on 22 December 2011 and was passed by the House on 27 December as The Lok pal and Lokayuktas Bill, 2011. It was subsequently tabled in the Rajya Sabha on 29 December. After a marathon debate that stretched until midnight of the following day, the vote failed to take place for lack of time. On 21 May 2012, it was referred to a select Committee of the Rajya Sabha for consideration. It was passed in the Rajya Sabha on 17 December 2013 after making certain amendments to the earlier Bill and in the Lok Sabha the next day. It received assent from President Pranab Mukherjee on 1 January 2014 and came into force from 16 January.

### **Structure of Lok pal**

The institution of Lok pal is a statutory body without any constitutional backing. Lok pal is a multimember body, made up of one chairperson and maximum of 8 members. The person who is to be appointed as the chairperson of the Lok pal should be either the former Chief Justice of India or the former Judge of Supreme Court or an eminent person with impeccable integrity and outstanding ability, having special knowledge and expertise of minimum 25 years in the matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law and management.

Out of the maximum eight members, half will be judicial members. Minimum fifty per cent of the Members will be from SC / ST / OBC / Minorities and women. The judicial member of the Lok pal should be either a former Judge of the Supreme Court or a former Chief Justice of a High Court. The non-judicial member should be an eminent person with impeccable integrity and outstanding ability, having special knowledge and expertise of minimum 25 years in the matters

relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law and management.

The members are appointed by the president on the recommendation of a selection committee. The selection committee is composed of the Prime Minister who is the Chairperson; Speaker of Lok Sabha, Leader of Opposition in Lok Sabha, Chief Justice of India or a Judge nominated by him / her, and One eminent jurist.

### **Jurisdiction of Lok pal**

The jurisdiction of the Lok pal will include the Prime Minister except on allegations of corruption relating to international relations, security, the public order, atomic energy and space and unless a Full Bench of the Lok pal and at least two-thirds of members approve an inquiry. It will be held in-camera and if the Lok pal so desires, the records of the inquiry will not be published or made available to anyone. The Lok pal will also have jurisdiction over Ministers and MPs but not in the matter of anything said in Parliament or a vote given there. Lok pals jurisdiction will cover all categories of public servants. Group A, B, C or D officers defined as such under the Prevention of Corruption Act, 1988 will be covered under the Lok pal but any corruption complaint against Group A and B officers, after inquiry, will come to the Lok pal.

However, in the case of Group C and D officers, the Chief Vigilance Commissioner will investigate and report to the Lok pal. However, it provides adequate protection for honest and upright Public Servants. Also any person who is or has been in charge (director / manager/ secretary) of anybody / society set up by central act or any other body financed / controlled by central government and any other person involved in act of abetting, bribe giving or bribe taking.

### **Salient features of The Lok pal and Lokayuktas Act, 2013**

- 1) The Lok pal and Lokayuktas Act, 2013 provided for Lok pal at the centre having jurisdiction of trying cases of corruption against all Members of Parliament and central government employees. The Lokayuktas have functions similar to the Lok pal, but they function on a state level.
- 2) The office of the Lok pal and Lokayuktas deals with charges of corruption against any public official and includes the office of the prime minister of the court but with reasonable safeguards. Both the Lok pal and the Lokayukta deal with charges of corruption against the government and its employees, in fact they even conduct investigations and based on the findings from such investigations they conduct trials.

3) The Act lays down the provision to set up a Lokayukta and its set of powers for each state without clearly defining the extent of the same, this has led to various different Lokayuktas being setup, some with more power than the others. In order to create uniformity a proposal to implement the Lokayukta uniformly across Indian states has been made. The Act provides that all states set up office of the Lok pal and/or Lokayukta within one year from the commencement of the said Act on the other hand, Lok pal will consist of a chairperson and a maximum of eight members, of which 50% will be judicial members, 50% members of Lok pal shall be from SC/ST/OBCs, minorities and women.

4) The newly enacted Lok pal Act provides for confiscation and attachment of any property of any government official which he or she has come to own through corrupt practices and the same can be done during pendency of proceedings against the said official.

5) The Lok pal Act mandates that all public officials should furnish the assets and liabilities of themselves as well as their respective dependents. In fact, the said Act even guarantees protection to any government official who acts as a whistle blower and as an ancillary a Whistle Blowers Protection Act has also been enacted.

### **Powers of Lok pal**

- 1) It has powers to superintendence over, and to give direction to CBI.
- 2) If it has referred a case to CBI, the investigating officer in such case cannot be transferred without approval of Lok pal.
- 3) Powers to authorize CBI for search and seizure operations connected to such case.
- 4) The Inquiry Wing of the Lok pal has been vested with the powers of a civil court.
- 5) Lok pal has powers of confiscation of assets, proceeds, receipts and benefits arisen or procured by means of corruption in special circumstances
- 6) Lok pal has the power to recommend transfer or suspension of public servant connected with allegation of corruption.
- 7) Lok pal has power to give directions to prevent destruction of records during preliminary inquiry.

The institution of Lok pal has been a land mark move in the history of Indian polity, The Lok pal and Lokayukta act 2013 has offered a productive solution to combat the never-ending menace of corruption.

The institution of Lok pal has tried to bring a much-needed change in the battle against corruption in the administrative structure of India but at the same time there are loopholes and lacunae which need to be corrected. Firstly, it is not free from political influence as the appointing committee itself consist of a parliamentarian, there is no criteria to decide who is an eminent jurist or a person of integrity and thus, this appointment can easily be manipulated. Further, the act provides no concrete immunity to the whistle blowers. The provision for initiation of inquiry against the complainant if the accused is found innocent will only discourage people from complaining. Also, there is no full proof way to determine whether the person who is appointed as the Lok pal will remain honest throughout.

The biggest lacuna is the exclusion of judiciary from the ambit of the Lok pal. The Lok pal is also not given a Constitutional backing. There are no adequate provisions for appeal against the Lok pal. The powers, composition and scope of Lokayuktas do not find any mention of the act. There is a long way to go to ensure transparency and crusade against corruption are still on and yet to reach its destination.