

Reading Material

On

Administrative Law

CONTENTS

I. Administrative Law-An Overview: Issues and prospects

- *Introduction Concept, Definition scope and recent*
- *trends in Administrative Law*
- *Role of the Constitution and administrative Law,*
- *Constitutional Provisions like Separation of Power*
- *Rule of Law and*
- *Droit Administrative.*

II. Classification of Administrative Power

- *Rules Making Power*
- *Adjudicatory Power*
- *Administrative Powers*

III. Delegated Legislation and its Control

- *Delegated legislation, factors leading to delegated legislation*
- *Restraints on delegation of legislative power*
- *Control over delegated legislation.*

Administrative Law : Conceptual Analysis Issues and Prospects

Introductory

Administrative law has become very necessary in the developed society, the relationship of the administrative authorities and the people have become very complex. In order to regulate these complex, relations, some law is necessary, which may bring about regularity certainty and may check at the same time the misuse of powers vested in the administration. With the growth of the society, its complexity increased and thereby presenting new challenges to the administration we can have the appraisal of the same only when we make a comparative study of the duties of the administration in the ancient times with that of the modern times. In the ancient society the functions of the state were very few the prominent among them being protection from foreign invasion, levying of Taxes and maintenance of internal peace & order. It does not mean, however that there was no administrative law before 20th century. In fact administration itself is concomitant of organized Administration. In India itself, administrative law can be traced to the well-organized administration under the Mauryas and Guptas, several centuries before the Christ, following through the administrative, system of Mughals to the administration under the East India Company, the precursor of the modern administrative system. But in the modern society, the functions of the state are manifold, In fact, the modern state is regarded as the custodian of social welfare and consequently, there is not a single field of activity which is free from direct or indirect interference by the state. Along with duties, and powers the state has to shoulder new responsibilities. The growth in the range of responsibilities of the state thus ushered in an administrative age and an era of Administrative law. The development of Administrative law is an inevitable necessity of the modern times; a study of administrative law acquaints us with those rules according to which the administration is to be carried on. Administrative Law

has been characterized as the most outstanding legal development of the 20th-century.

Administrative Law is that branch of the law, which is concerned, with the composition of powers, duties, rights and liabilities of the various organs of the Government. The rapid growth of administrative Law in modern times is the direct result of the growth of administrative powers. The ruling gospel of the 19th century was *Laissez faire* which manifested itself in the theories of individualism, individual enterprise and self help. The philosophy envisages minimum government control, maximum free enterprise and contractual freedom. The state was characterized as the law and order state and its role was conceived to be negative as its internal 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 era of free enterprise. The management of social and economic life was not regarded as government responsibility. But *laissez faire* doctrine resulted in human misery. It came to be realized that the bargaining position of every person was not equal and uncontrolled contractual freedom led to the exploitation of weaker sections by the stronger e.g. of the labour by the management in industries. On the one hand, slums, unhealthy and dangerous conditions of work, child labour wide spread poverty and exploitation of masses, but on the other hand, concentration of wealth in a few hands, became the order of the day. It came to be recognized that the state should take active interest in ameliorating the conditions of poor. This approach gave rise to the favoured state intervention in and social control and regulation of individual enterprise. The state started to act in the interests of social justice; it assumed a “positive” role. In course of time, out of dogma of collectivism emerged the concept of “Social Welfare State” which lays emphasis on the role of state as a vehicle of socio-economic regeneration and welfare of the people.

Thus the growth of administrative law is to be attributed to a change of philosophy as to the role and function of state. The shifting of gears from ***laissez faire state to social welfare state*** has resulted in change of role of the state. This trend may be illustrated very forcefully by reference to the position in India. Before 1947, India was a police state. The ruling foreign power was primarily interested in strengthening its own domination; the administrative machinery was used mainly with the object in view and the civil service came to be designated as the “steel frame”. The state did not concern itself much with the welfare of the people. But all this changed with the advent of independence with the philosophy in the Indian constitution the preamble to the constitution enunciates the great objectives and the socio-economic goals for the achievement of which the Indian constitution has been conceived and drafted in the mid-20th century an era when the concept of social welfare state was predominant. It is thus pervaded with the modern outlook regarding the objectives and functions of the state. it embodies a distinct philosophy which regards the state as an organ to secure good and welfare of the people this concept of state is further strengthened by the

Directive Principles of state policy which set out the economic, social and political goals of Indian constitutional system. These directives confer certain non-justiciable rights on the people, and place the government under an obligation to achieve and maximize social welfare and basic social values of life education, employment, health etc. In consonance with the modern beliefs of man, the Indian constitution sets up machinery to achieve the goal of economic democracy along with political democracy, for the latter would be meaningless without former. Therefore, the attainment of socio-economic justice being a conscious goal of state policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with state power-holder. The Administrative law is an important weapon for bringing about harmony between power and justice. The basic law of the land i.e. the constitution governs the administrators.

Administrative law essentially deals with location of power and the limitations thereupon. Since both of these aspects are governed by the constitution, we shall survey the provisions of the constitution, which act as sources of limitations upon the power of the state. This brief outline of the Indian constitution will serve the purpose of providing a proper perspective for the study of administrative law.

India's Constitution is a very lengthy, elaborate and detailed document. It consists of 395 Articles arranged under 22 parts and 9 schedules. It is probably the longest of the organic law now extant in the world. Several reasons have contributed to the prolixity of the Indian Constitution.

Firstly, the Constitution deals with the organization and structure not only of the central Government but also of the states.

Secondly, in a federal constitution, Center-State relationship is a matter of crucial importance. While other federal constitutions have only skeletal provisions on this matter the Indian Constitution has detailed norms.

Thirdly, the Constitution has reduced to writing many unwritten conventions of the British Constitution as for example, the principle of collective responsibility of the Ministers, parliamentary procedure etc.

Fourthly, there exist various communities and groups in India. To remove mutual distrust among them, it was felt necessary to include in the Constitution detailed provisions on Fundamental Rights, safeguards to minorities, Scheduled tribes scheduled castes and backward classes.

Fifthly, to promote the social welfare concept on which the state of India is to be based. The constitution includes Directive Principles of State Policy.

Lastly, the Constitution contains not only the fundamental principles of governance but also many administrative details, such as the provisions regarding citizenship, official languages, government services, electoral machinery etc. In other constitutions, these are usually left to be regulated by the ordinary law of the land. The framers of the Indian Constitution however felt that unless these provisions were contained in the Constitution, an infant democracy might find itself in difficulties, and the smooth and efficient working of the Constitution and the democratic process in the country might be jeopardized. The form of administration has a close relation with the form of the Constitution and the former must be appropriate to the latter. It is quite possible to pervert the constitutional mechanism, without changing its form, by merely changing the form of the administration and making it inconsistent with, and opposed to, the spirit of the constitution. Since India was emerging as an independent country after a long spell of foreign rule, the country lacked democratic values. The constitution-makers therefore thought it prudent not to take unnecessary risks, and to incorporate in the constitution itself the form of administration as well, instead of leaving it to the legislature, so that the whole mechanism may become viable.

The preamble to the Constitution declares India to be a Sovereign Democratic Republic. The term 'Sovereign' denotes that India is subject to no external authority. The term 'democratic' signifies that India has a parliamentary form of government, which means a government responsible to an elected legislature.

The preamble to the Constitution enunciates the great objectives and the socio-economic goals for the achievement of which the Indian Constitution has been established. These are: to secure to all citizens of India social, economic and political justice; to secure to all Indian citizens liberty of thought, expression, belief, faith and worship; to secure to them equality of status and opportunity, and to promote among them fraternity so as to secure the dignity of the Individual and the unity of the nation. The Indian Constitution has been conceived and drafted in the mid-twentieth century-an era when the concept of social welfare state is predominant. It is thus pervaded with the modern outlook regarding the objectives and functions of the state. It embodies a distinct philosophy of government, and, explicitly declares that India will be organized as a social welfare state, i.e., a state that renders social services to the people and promotes their general welfare. In the formulations and declarations of the social objectives contained in the preamble, one can

clearly discern the impact of the modern political philosophy, which regards the state as an organ to secure the good and welfare of the people. This concept of a welfare state is further strengthened by the Directive Principles of State Policy, which set out the economic, social and political goals of the Indian constitutional system. These directives confer certain non-justiciable rights on the people, and place the governments under an obligation to achieve and maximize social welfare and basic social values like education, employment, health etc. In consonance with the modern beliefs of man, the Indian Constitution sets up a machinery to achieve the goal of economic democracy along with political democracy, for the latter would be meaningless without the former in a poor country like India.

India is a country of religions. There exist multifarious religious groups in the country but, in spite of this, the Constitution stands for a secular state of India.. The essential basis of the Indian Constitution is that all citizens are equal, and that the religion of a citizen is entirely irrelevant in the matter of his fundamental rights. The Constitution answers equal freedom for all religions and provide that the religion of the citizen has nothing to do in socio-economic matters.

The Indian Constitution has a chapter on Fundamental Rights and thus guarantees to the people certain basic rights and freedoms, such as, inter alia, equal protection of laws, freedom of speech and expression freedom of worship and religion. Freedom of assembly and association, freedom to move freely and to reside and settle an where in India, freedom to follow any occupation, trade or business, freedom of person, freedom against double jeopardy and against export facto laws. Untouchables, the age-old scourge afflicting the Hindu society, have been formally abolished. The people can claim their Fundamental Rights against the state subject to some restrictions, which the state can impose in the interests of social control. These restrictions on Fundamental Rights are expressly mentioned in the Constitution itself and, therefore, these rights can be qualified or a bridged only to the extent laid down. These rights, in substance, constitute inhibitions on the legislative and executive organs of the state. No law or executive action infringing a Fundamental Right can be regarded as valid. In this way, the Constitution demarcates an area of individual freedom and liberty wherein government cannot interfere. The judiciary ensures an effective and speedy enforcement of these rights. Since the inauguration of the Constitution, many significant legal battles have been fought in the area of Fundamental Rights and, thus, a mass of interesting case law has come into being in this area.

The Indian society lacks homogeneity, as there exist differences of religion, language, culture, etc. There are sections of people who are comparatively weaker than others-economically, socially and culturally and their lot can be ameliorated only when the state makes a special effort to that end. Mutual suspicion and distrust exist between various religious and linguistic groups. To promote a sense of security among the minorities, to ameliorate the conditions of the depressed and backward classes, to make them useful members of society, to weld the diverse elements into one national and

political stream, the Constitution contains a liberal scheme of safeguards to minorities, backward classes and scheduled castes. Provisions have thus been made, inter alia, to reserve seats in the State Legislatures and Lok Sabha and to make reservations services, for some of these groups, to promote the welfare of the depressed and backward classes and to protect the languages and culture of the minorities.

India has adopted adult suffrage as a basis of elections to the Lok Sabha and the State Legislative Assemblies. Every citizen, male or female, who has reached the age of 18 years or over, has a right to vote without any discrimination. It was indeed a very bold step on the part of the constitution-makers to adopt adult suffrage in a country of teeming millions of illiterate people, but they did so for some very sound reasons. If democracy is to be broad-based and the system of government is to have the ultimate sanction of the people as a whole, in a country like India where large masses of people are poor and illiterate, the introduction of any property or educational qualification for exercising the franchise would have amounted to a negation of democratic principles. Any such qualification would have disenfranchised a large number of depressed people. Further, it cannot be assumed that a person with a bare elementary education is in a better position to exercise the franchise and choose his representatives accordingly.

A notable feature of the Constitution is that it accords a dignified and crucial position to the judiciary. Well-ordered and well-regulated judicial machinery had been introduced in the country with the Supreme Court at the apex. The jurisdiction of the Supreme Court is very broadly worded. It is a general court of appeal from the High Court, is the ultimate arbiter in all-constitutional matters and enjoys an advisory jurisdiction. It can hear appeals from any court or tribunal in the country and can issue writ for enforcing the Fundamental Rights. There is thus a good deal of truth in the assertion that the highest court in any other federation. There is a High Court in each State. The High Courts have wide jurisdiction and have been constituted into important instruments of justice. The most significant aspect of their jurisdiction is the power to issue writs.

The judiciary in India has been assigned role to play. It has to dispense justice not only between one person and another, but also between the state and the citizens. It interprets the constitution and acts as its protector and guardian by keeping all authorities legislative, executive, administrative, judicial and quasi-judicial within bounds. The judiciary is entitled to scrutinize any governmental action in order to assess whether or not it conforms to the constitution and the valid laws made there under. The judiciary has powers to protect people's Fundamental Rights from any unreasonable encroachment by any organ of the state. The judiciary supervises the administrative process in the country, and acts as the balance wheel of federalism by settling disputes between the center and the states or among the states inter se.

India's Constitution is of the federal type. It established a dual polity, a two tier

governmental system with the Central Government at one level and the state Governments at the other. The Constitution marks off the sphere of action of each level of government by devising an elaborate scheme of distribution of legislative, administrative, and financial powers between the Centre and the States. A government is entitled to act within its assigned field and cannot go out of it, or encroach on the field assigned to the other government.

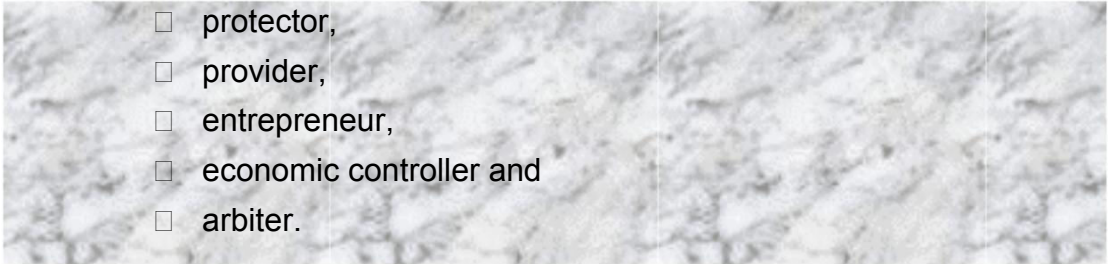
Thus the **Constitution of India** is having significant effect on laws including **administrative law**. It is under this fundamental laws are made and executed, all governmental authorities and the validity of their functioning adjudged. No legislature can make a law and no governmental agency can act, contrary to the constitution no act, executive, legislative, judicial or quasi-judicial, of any administrative agency can stand if contrary to the constitution. The constitution thus conditions the whole government process in the country. The judiciary is obligated to see any governmental organ does not violate the provisions of the constitution. This function of the judiciary entitles it to be called as guardian of the constitution.

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. It may be pointed out that the constitutional law deals with fundamentals while administrative with details. The learned author, Sh. I.P. Messey, has rightly pointed out, whatever may be the arguments and counter arguments, the fact remains that the administrative law is recognized as separate, independent branch of legal discipline,. Though at times the disciplines of constitutional law and administrative law may over lap. Further clarifying the point he said the correct position seems to be that if one draws two circles of administrative law and constitutional law at a certain place they may over lap and this area may termed as watershed in administrative law.

Need for the Administrative Law: Its Importance And Functions

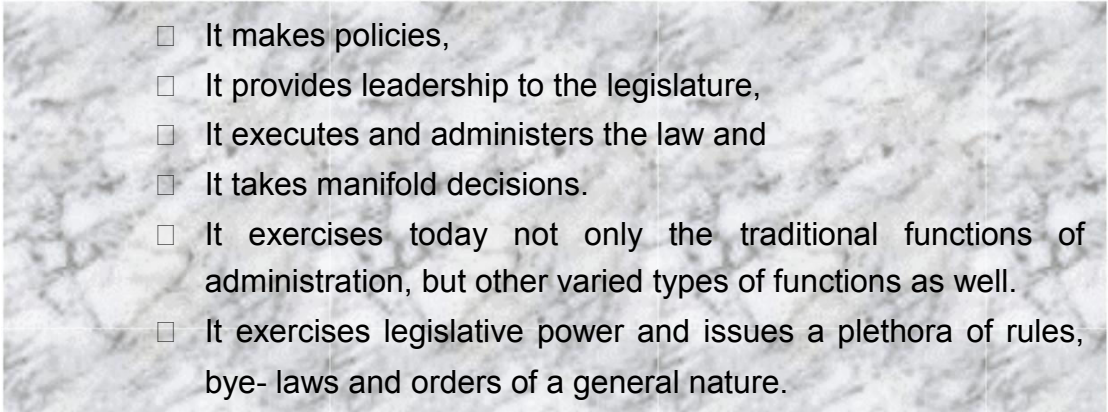
The emergence of the social welfare has affected the democracies very profoundly. It has led to state activism. There has occurred a phenomenal increase in the area of state operation; it has taken over a number of functions, which were previously left to private enterprise. The state today

pervades every aspect of human life. The functions of a modern state may broadly be placed into five categories, viz, the state as:-

- 
- protector,
 - provider,
 - entrepreneur,
 - economic controller and
 - arbiter.

Administration is the all-pervading feature of life today.

The province of administration is wide and embrace following things within its ambit:-

- 
- It makes policies,
 - It provides leadership to the legislature,
 - It executes and administers the law and
 - It takes manifold decisions.
 - It exercises today not only the traditional functions of administration, but other varied types of functions as well.
 - It exercises legislative power and issues a plethora of rules, bye- laws and orders of a general nature.

The advantage of **the administrative process** is that it could evolve new techniques, processes and instrumentalities, acquire expertise and specialization, to meet and handle new complex problems of modern society. Administration has become a highly complicated job needing a good deal of technical knowledge, expertise and know-how. Continuous experimentation and adjustment of detail has become an essential requisite of modern administration. If a certain rule is found to be unsuitable in practice, a new rule incorporating the lessons learned from experience has to be supplied. The Administration can change an unsuitable rule without much delay. Even if it is dealing with a problem case by case (as does a court), it could change its approach according to the exigency of the situation and the demands of justice. Such a flexibility of approach is not possible in the case of the legislative or the judicial process. Administration has assumed such an extensive, sprawling and varied character, that it is not now easy to define the term “administration” or to evolve a general norm to identify an administrative body. It does not suffice to say that an administrative body is one, which administers, for the administration does not only put the law into effect, but does much more; it legislates and adjudicates. At times, administration is explained in a negative manner by saying that what does not fall within the purview of the legislature or the judiciary is administration.

In such a context, a study of administrative law becomes of great significance. The increase in administrative functions has created a vast new complex of relations between the administration and the citizen. The modern administration impinges more and more on the individual; it has assumed a tremendous capacity to affect the rights and liberties of the people. There is not a moment of a person's existence when he is not in contact with the administration in one-way or the other. This circumstance has posed certain basic and critical questions for us to consider:

- ☐ Does arming the administration with more and more powers keep in view the interests of the individual?
- ☐ Are adequate precautions being taken to ensure that the administrative agencies follow in discharging their functions such procedures as are reasonable, consistent with the rule of law, democratic values and natural justice?
- ☐ Has adequate control mechanism been developed so as to ensure that the administrative powers are kept within the bounds of law, and that it would not act as a power drunk creature, but would act only after informing its own mind, weighing carefully the various issues involved and balancing the individual's interest against the needs of social control?

It has increasingly become important to control the administration, consistent with the efficiency, in such a way that it does not interfere with impunity with the rights of the individual. Between individual liberty and government, there is an age-old conflict the need for constantly adjusting the relationship between the government and the governed so that a proper balance may be evolved between private interest and public interest. It is the demand of prudence that when sweeping powers are conferred on administrative organs, effective control- mechanism be also evolved so as ensure that the officers do not use their powers in an undue manner or for an unwarranted purpose. It is the task of administrative law to ensure that the governmental functions are exercised according to law, on proper legal principles and according to rules of reason and justice fairness to the individual concerned is also a value to be achieved along with efficient administration

The goal of administrative law is to redress this inequality to ensure that, so far as possible, the individual and the state are placed on a plane of equality before the bar of justice. In reality there is no antithesis between a strong government and controlling the exercise of administrative powers. Administrative powers are exercised by thousands of officials and affect millions of people Administrative efficiency cannot be the end-all of administrative powers. There is also the questions of protecting individual's rights against bad administration will lead to good administration.

A democracy will be no better than a mere façade if the rights of the people are infringed with impunity without proper redressed mechanism. This makes the study of administrative law important in every country. For India, however, it is of special significance because of the proclaimed objectives of the Indian polity to build up a socialistic pattern of society. This has generated administrative process, and hence administrative law, on a large scale. Administration in India is bound to multiply further and at a quick pace. If exercised properly, the vast powers of the administration may lead to the welfare state; but, if abused, they may lead to administrative despotism and a totalitarian state. A careful and systematic study and development of administrative law becomes a desideratum as administrative law is an instrument of control of the exercise of administrative powers.

Nature and Definition of administrative Law

Administrative Law is, in fact, the body of those which rules regulate and control the administration. Administrative Law is that branch of law that is concerned with the composition of power, duties, rights and liabilities of the various organs of the Government that are engaged in public administration. Under it, we study all those rules laws and procedures that are helpful in properly regulating and controlling the administrative machinery.

There is a great divergence of opinion regarding the definition/conception of administrative law. The reason being that there has been tremendous increase in administrative process and it is impossible to attempt any precise definition of administrative law, which can cover the entire range of administrative process.

Let us consider some of the definitions as given by the learned jurists.

Austin has defined administrative Law. As the law, which determines the ends and modes to which the sovereign power shall be exercised. In his view, the sovereign power shall be exercised either directly by the monarch or directly by the subordinate political superiors to whom portions of those are delegated or committed in trust.

Holland regards Administrative Law “one of six” divisions of public law. In his famous book “Introduction to American Administrative Law 1958”,

Bernard Schwartz has defined Administrative Law as “the law applicable to those administrative agencies which possess of delegated legislation and adjudicatory authority.”

Jennings has defined Administrative Law as “the law relating to the administration. It determines the organization, powers and duties of administrative authorities.”

Dicey in 19th century defines it as.

Firstly, portion of a nation’s legal system which determines the legal statuses and liabilities of all State officials.

Secondly, defines the right and liabilities of private individuals in their dealings with public officials.

Thirdly, specifies the procedure by which those rights and liabilities are enforced.

This definition suffers from certain imperfections. It does not cover several aspects of administrative law, e.g. it excludes the study of several administrative authorities such as public corporations which are not included within the expression “State officials,” it excludes the study of various powers and functions of administrative authorities and their control. His definition is mainly concerned with one aspect of administrative. Law, namely, judicial control of public officials.

A famous jurist **Hobbes** has written that there was a time when the society was in such a position that man did not feel secured in it. The main reason for this was that there were no such things as administrative powers. Each person had to live in society on the basis of his own might accordingly to Hobbes, “ In such condition, there was no place for industry, arts, letters and society. Worst of all was the continual fear of danger, violent death and life of man solitary poor, nasty and brutish and short.

The jurists are also of the view that might or force as a means for the enforcement of any decision by man could continue only for some time. To put it in other words, the situation of “might is right” was only temporary. It

may be said to be a phase of development. This can be possible only through the medium of law. Hence, law was made and in order to interpret it and in order to determine the rights and duties on the basis of such interpretation, this work was entrusted to a special organ that we now call judiciary. The organ, which was given the function of enforcing the decision of judicial organ, is called executive. It has comparatively a very little concern with the composition of the executive organ.

K.C. Davis has defined administrative law in the following words:

“ Administrative Law is the law concerning the powers and procedures of administrative agencies including specially the law governing judicial review of administrative action.”

In the view of **Friedman**, Administrative Law includes the following.

- ☐ The legislative powers of the administration both at common law and under a vast mass of statutes.
- ☐ The administrative powers of the administration.
- ☐ Judicial and quasi-judicial powers of the administration, all of them statutory.
- ☐ The legal liability of public authorities.
- ☐ The powers of the ordinary courts to supervise the administrative authorities.

The Indian Institution of Law has defined Administrative Law in the following words;

“ Administrative Law deals with the structure, powers and functions of organs of administration, the method and procedures followed by them in exercising their powers and functions, the method by which they are controlled and the remedies which are available to a person against them when his rights are infringed by their operation.”

A careful perusal of the above makes it clear that Administrative Law deals with the following problems:

- A.** Who are administrative authorities?
- B.** What is the nature and powers exercised by administrative authorities?
- C.** What are the limitations, if any, imposed on these powers?
- D.** How the administration is kept restricted to its laminose?
- E.** What is the procedure followed by the administrative authorities?

F. What remedies are available to persons adversely affected by administration?

Thus the concept of administrative law has assumed great importance and remarkable advances in recent times. There are several principles of administrative law, which have been evolved by the courts for the purpose of controlling the exercise of power. So that it does not lead to arbitrariness or despotic use of power by the instrumentalities or agencies of the state. During recent past judicial activism has become very aggressive. It was born out of desire on the part of judiciary to usher in rule of law society by enforcing the norms of good governance and thereby produced a rich wealth of legal norms and added a new dimension to the discipline administrative law.

In view of above discussion we can derive at the following conclusions so far as nature and scope of administrative law is concerned: -

The administrative law has growing importance and interest and the administrative law is the most outstanding phenomena in the welfare state of today. Knowledge of administrative law is as important for the officials responsible for carrying on administration as for the students of law.

Administrative law is not codified like the Indian Penal code or the law of Contracts. It is based on the constitution. No doubt the Court of Law oversees and ensure that the law of the land is enforced. However, the “very factor of a rapid development and complexity which gave rise to regulation made specific and complete treatment by legislation impossible and, instead, made necessary the choice of the body of officers who could keep abreast of the novelties and intricacies which the problems presented.”

Administrative law is essentially Judge made law. It is a branch of public law as compared to private law-relations inter-se. Administrative law is an ever-expanding subject in developing society and is bound to grow in size as well as quality in coming the decades. We need an efficient regulatory system, which ensures adequate protection of the people’s Rights.

Principles of administrative law emerge and development whenever any person becomes victim of arbitrary exercise of

public power. Therefore administrative law deals with relationship individual with power.

The administrative agencies derive their authority from constitutional law and statutory law. The laws made by such agencies in exercise of the powers conferred on them also regulate their action. The principle features are: (a) transfer of power by legislature to administrative authorities, (b) exercise of power by such agencies, and (c) judicial review of administrative decisions.

Administrative law relates to individual rights as well as public needs and ensures transparent, open and honest governance, which is more people-friendly.

Inadequacy of the traditional Court to respond to new challenges has led to the growth of administrative adjudicatory process. The traditional administration of justice is technical, expensive and dilatory and is not keeping pace with the dynamics of ever-increasing subject matter. Because of limitation of time, the technical nature of legislation, the need for flexibility, experimentations and quick action resulted in the inevitable growth of administrative legislative process.

Administrative law deals with the organization and powers of administrative and powers quasi-administrative agencies

Administrative law primarily concerns with official action and the procedure by which the official action is reached.

Administrative law includes the control mechanism (judicial review) by which administrative authorities are kept within bounds and made effective.

Sources of Administrative Law

There are four principal sources of administrative law in India:-

- ☐ **Constitution of India**
- ☐ **Acts and Statutes**
- ☐ **Ordinances, Administrative directions, notifications and Circulars**
- ☐ **Judicial decisions**

Future Role of Administrative Law

The administrative law has come to stay because it provides an instrument of control of the exercise of administrative powers. The administrative law has to seek balance between the individual right and public needs. As we know in the society there exists conflict between power and justice wherever there is power, there exist probabilities of excesses in exercise of the power. One way is to do nothing about this and let the celebrated Kautilyan Matsanayaya (big fish eating little fish) prevail. The other way is to try and combat this. Administrative law identifies the excesses of power and endeavors to combat there. The learned Author, Upender Baxi, while commenting on the administrative law has rightly observed in. (The Myth and reality of the Indian administrative law, Introduction by Upendra Baxi in administrative law ed. by I.P. Massey 2001 at XVIII)

“to understand the stuff of which administrative law is made one has to understand relevant domains of substantive law to which courts apply the more general principles of legality and fairness. In this way a thorough study of administrative law is in effect, a study of the Indian legal system a whole. More importantly, it is study of the pathology of power in a developing society.”

Growth in science and technology and modernization has resulted in great structural changes accompanied with increase in the aspirations of people as to quality of life. We know socio-economic and multi dimensional problems which people face due to technological development cannot be solved except by the growth of administration and the law regulating administration. No doubt the principles evolved by the court for the purpose of controlling the misuse of governmental power is satisfactory. Yet it is said that the administrative law in India is an instrument in the hands of middle class Indians to combat administrative authoritarianism through the instrumentality of the court and there is need to make administrative law a shield for the majority of Indians living in rural area and people under poverty line. Therefore **easy access to justice** is considered important form of accountability this may include informal procedure, speedy and less expensive trial, legal aid, public interest litigation, easy bail etc.

Further, the multifarious activities of the state extended to every social problems of man such as health education employment, old age pension production, control and distribution of commodities and other operations public utilities. This enjoins a new role for administration and also for the development of administrative law.

Separation of Powers

The doctrine of Separation of Powers is of ancient origin. The origin of the doctrine is traceable to Aristotle. In the 16th and 17th Centuries, French philosopher John Bodding and British Politician Locke respectively had expounded the doctrine of separation of powers. But it was Montesquieu, French jurist, who for the first time gave it a systematic and scientific formulation in his book 'Esprit des Lois' (The spirit of the laws).

Montesquieu's view: Montesquieu said that if the Executive and the Legislature are the same person or body of persons, there would be a danger of the Legislature enacting oppressive laws which the executive will administer to attain its own ends, for laws to be enforced by the same body that enacts them result in arbitrary rule and makes the judge a legislator rather than an interpreter of law. If one person or body of persons could exercise both the executive and judicial powers in the same matter, there would be arbitrary powers, which would amount to complete tyranny, if the legislative power would be added to the power of that person. The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. The different organs of government should thus be prevented from encroaching on the province of the other organ.

This theory has had different application in France, USA and England. In France, it resulted in the rejection of the power of the courts to review acts of the legislature or the executive. The existence of separate administrative

courts to adjudicate disputes between the citizen and the administration owes its origin to the theory of separating of powers. The principle was categorically adopted in the making of the Constitution of the United States of America. There, the executive power is vested in the president. Article the legislative power in congress and the judicial power in the Supreme Court and the courts subordinates thereto. The President is not a member of the Congress. He appoints his secretaries on the basis not of their party loyalty but loyalty to himself. His tenure does not depend upon the confidence of the Congress in him. He cannot be removed except by impeachment, However, the United States constitution makes departure from the theory of strict separation of powers in this that there is provision for judicial review and the supremacy of the ordinary courts over the administrative courts or tribunals.

In the **British Constitution** the Parliament is the Supreme legislative authority. At the same time, it has full control over the Executive. The harmony between the Legislator and the (Executive) is secured through the Cabinet. The Cabinet is collectively responsible to the Parliament. The Prime Minister is the head of the party in majority and is the Chief Executive authority. He forms the Cabinet. The Legislature and the Executive are not quite separate and independent in England, so far as the Judiciary is concerned its independence has been secured by the Act for Settlement of 1701 which provides that the judges hold their office during good behaviour, and are liable to be removed on a presentation of addresses by both the Houses of Parliament. They enjoy complete immunity in regard to judicial acts.

In India, the executive is part of the legislature. The President is the head of the executive and acts on the advice of the Council of Ministers. Article 53 and 74 (1) He can be impeached by Parliament. Article 56 (1) (b) read with Art 61, Constitution. The Council of Ministers is collectively responsible to the Lok Sabha Article 75 (3) and each minister works during the pleasure of the President. Article 75 (2) If the Council of Ministers lose the confidence of the House, it has to resign. Functionally, the President's or the Governor's assent is required for all legislations. (Articles 111, 200 and Art 368). The President or the Governor has power of making ordinances when both Houses of the legislature are not in session. (Articles 123 and 212). This is legislative power, and an ordinance has the same status as that of a law of the legislature. (**AK Roy v Union of India AIR 1982 SC 710**) The President or the Governor has the power to grant pardon (Articles 72 and 161) The legislature performs judicial function while committing for contempt those who defy its orders or commit breach of privilege (Articles 105 (3) 194 (3) Thus, the executive is dependent on the Legislature and while it performs some legislative functions such as subordinate it, also performs some executive functions such as those required for maintaining order in the house.

There is, however, considerable institutional separation between the judiciary and the other organs of the government. (**See Art 50**)

The Judges of the Supreme Court are appointed by the President in consultation with the Chief Justice of India and such of the judges of the Supreme Court and the High Courts as he may deem necessary for the purpose. (Article 124 (2))

The Judges of the High Court are appointed by the President after consultation with the Chief Justice of India, the Governor of the state, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court (Article 217 (1).)

It has now been held that in making such appointments, the opinion of the Chief Justice of India shall have primacy. (Supreme Court Advocates on Record Association.) The judges of the High Court and the judges of the Supreme Court cannot be removed except for misconduct or incapacity and unless an address supported by two thirds of the members and absolute majority of the total membership of the House is passed in each House of Parliament and presented to the President Article 124 (3) An impeachment motion was brought against a judge of the Supreme Court, Justice Ramaswami, but it failed to receive the support of the prescribed number of members of Parliament. The salaries payable to the judges are provided in the Constitution or can be laid down by a law made by Parliament. Article 125 (1) and Art 221 (1).

Every judge shall be entitled to such privileges and allowances and to such rights in respect of absence and pension, as may from time to time be determined by or under any law made by Parliament and until so determined, to such privileges, allowance and rights as are specified in the Second Schedule. Neither the privileges nor the allowance nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment.

Appointments of persons to be, and the posting and promotion of, district judges in any state shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such state (Article 233) The control over the subordinate courts is vested in the acts of the Legislature as well as the executive. The Supreme Court has power to make rules (Article 145) and exercises administrative control over its staff.

The judiciary has power to enforce and interpret laws and if they are found in violation of any provision of the Constitution, it can declare them unconstitutional and therefore, void. It can declare the executive action void if it is found against any provisions of the Constitution. Article 50 provides that the State shall take steps to separate the judiciary from the executive.

Thus, the three organs of the Government (i.e. the Executive, the Legislature and the Judiciary) are not separate. Actually the complete demarcation of the functions of these organs of the Government is not possible.

The Constitution of India does not recognize the doctrine of separation of power in its absolute rigidity, but the functions of the three organs of the government have been sufficiently differentiated. (*Ram Jawaya v. State of Punjab*, AIR 1955 SC 549) None of the three organs of the Government can take over the functions assigned to the other organs. (*Keshanand Bharti v. State of Kerala*, AIR 1973 SC 1461, *Asif Hameed v. State of J&K* 1989 AIR, SC 1899)

In *State of Bihar v. Bihar Distillery Ltd.*, (AIR 1997 SC 1511) the Supreme Court has held that the judiciary must recognize the fundamental nature and importance of the legislature process and must accord due regard and deference to it. The Legislative and Executive are also expected to show due regard and deference to the judiciary. The Constitution of India recognizes and gives effect to the concept of equality between the three organs of the Government. The concept of checks and balance is inherent in the scheme.

RULE OF LAW

The Expression “Rule of Law” plays an important role in the administrative law. It provides protection to the people against the arbitrary action of the administrative authorities. The expression ‘rule of law’ has been derived from the French phrase ‘la Principe de legality’. i.e. a government based on the principles of law. In simple words, the term ‘rule of law’, indicates the state of affairs in a country where, in main, the law rules. Law may be taken to mean mainly a rule or principle which governs the external actions of the human beings and which is recognized and applied by the State in the administration of justice.

Rule of Law is a dynamic concept.

It does not admit of being readily expressed. Hence, it is difficult to define it. Simply speaking, it means supremacy of law or predominance of law and essentially, it consists of values.

The concept of the rule of Law is of old origin. Edward Coke is said to be the originator of this concept, when he said that the King must be under God and Law and thus vindicated the supremacy of law over the pretensions of the executives. Prof. A.V. Dicey later developed on this concept in the course of his lectures at the Oxford University. Dicey was an individualist; he wrote about the concept of the Rule of law at the end of the golden Victorian era of laissez-faire in England. That was the reason why Dicey’s concept of the Rule of law contemplated the absence of wide powers in the hands of

government officials. According to him, wherever there is discretion there is room for arbitrariness. Further he attributed three meanings to Rule of Law.

(1) The First meaning of the Rule of Law is that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.

(2) The Second Meaning of the Rule of Law is that no man is above law. Every man whatever be his rank or condition. is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

(3) The Third meaning of the rule of law is that the general principle of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the court.

The view of Dicey as to the meaning of the Rule of Law has been subject of much criticism. The whole criticism may be summed up as follows.

Dicey has opposed the system of providing the discretionary power to the administration. In his opinion providing the discretionary power means creating the room for arbitrariness, which may create as serious threat to individual freedom. Now a days it has been clear that providing the discretion to the administration is inevitable. The opinion of the Dicey, thus, appears to be outdated as it restricts the Government action and fails to take note of the changed conception of the Government of the State.

Dicey has failed to distinguish discretionary powers from the arbitrary powers. Arbitrary power may be taken as against the concept of Rule of Law . In modern times in all the countries including England, America and India, the discretionary powers are conferred on the Government. The present trend is that discretionary power is given to the Government or administrative authorities, but the statute which provides it to the Government or the administrative officers lays down some guidelines or principles according to which the discretionary power is to be exercised. The administrative law is much concerned with the control of the discretionary power of the administration. It is engaged in finding out the new ways and means of the control of the administrative discretion.

According to Dicey the rule of law requires that every person should be subject to the ordinary courts of the country. Dicey has claimed that there is no separate law and separate court for the trial of the Government servants in England. He criticised the system of *droit administratif* prevailing in France. In France there are two types of courts Administrative Court and Ordinary Civil Courts. The disputes between the citizens and the Administration are decided by the Administrative courts while the other cases, (i.e. the disputes between the citizens) are decided by the Civil Court. Dicey was very critical to the separation for deciding the disputes between the administration and the citizens

According to Dicey the Rule of Law requires equal subjection of all persons to the ordinary law of the country and absence of special privileges for person including the administrative authority. This proportion of Dicey does not appear to be correct even in England. Several persons enjoy some privileges and immunities. For example, Judges enjoy immunities from suit in respect of their acts done in discharge of their official function. Besides, Public Authorities Protection Act, 1893, has provided special protection to the official. Foreign diplomats enjoy immunity before the Court. Further, the rules of 'public interest privilege may afford officials some protection against orders for discovery of documents in litigation.' Thus, the meaning of rule of law taken by Dicey cannot be taken to be completely satisfactory.

Third meaning given to the rule of law by Dicey that the constitution is the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts is based on the peculiar character of the Constitution of Great Britain.

In spite of the above shortcomings in the definition of rule of law by Dicey, he must be praised for drawing the attention of the scholars and authorities towards the need of controlling the discretionary powers of the administration. He developed a philosophy to control the Government and Officers and to keep them within their powers. The rule of law established by him requires that every action of the administration must be backed by law or must have been done in accordance with law. The role of Dicey in the development and establishment of the concept of fair justice cannot be denied.

The concept of rule of law, in modern age, does not oppose the practice of conferring discretionary powers upon the government but on the other hand emphasizing on spelling out the manner of their exercise. It also ensures that every man is bound by the ordinary laws of the land whether he be private citizens or a public officer; that private rights are safeguarded by the ordinary laws of the land (See *Journal of the Indian law Institute*, 1958-59, pp. 31-32)

Thus the rule of law signifies that nobody is deprived of his rights and liberties by an administrative action; that the administrative authorities perform their functions according to law and not arbitrarily; that the law of the land are not unconstitutional and oppressive; that the supremacy of courts is upheld and judicial control of administrative action is fully secured.

Basic Principles of the Rule of Law

- ☐ Law is Supreme, above everything and every one. No body is the above law.
- ☐ All things should be done according to law and not according to whim
- ☐ No person should be made to suffer except for a distinct breach of law.
- ☐ Absence of arbitrary power being hot and sole of rule of law
- ☐ Equality before law and equal protection of law

- ☐ Discretionary should be exercised within reasonable limits set by law
- ☐ Adequate safeguard against executive abuse of powers
- ☐ Independent and impartial Judiciary
- ☐ Fair and Justice procedure
- ☐ Speedy Trial

Rule of Law and Indian Constitution

In India the Constitution is supreme. The preamble of our Constitution clearly sets out the principle of rule of law.

It is sometimes said that planning and welfare schemes essentially strike at rule of law because they affect the individual freedoms and liberty in many ways. But rule of law plays an effective role by emphasizing upon fair play and greater accountability of the administration. It lays greater emphasis upon the principles of natural justice and the rule of speaking order in administrative process in order to eliminate administrative arbitrariness.

Rule of Law and Case law

In an early case **S.G. Jaisinghani V. Union of India and others**, (AIR 1967 SC 1427) the Supreme Court portrayed the essentials of rule of law in a very lucid manner. It observed: “The absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion when conferred upon executive authorities must be continued within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general such decision should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is antithesis of a decision taken in accordance with the rule of law”.

The Supreme Court in a case, namely, **Supreme Court Advocates on Record Association V. Union of India**, (AIR 1994 SC 268 at p.298) reiterated that absence of arbitrariness is one of the essentials of rule of law. The Court observed. “For the rule of law to be realistic there has to be room for discretionary authority within the operation of rule of law even though it has to be reduced to the minimum extent necessary for proper governance, and within the area of discretionary authority, the existence of proper guidelines or norms of general application excludes any arbitrary exercise of discretionary authority. In such a situation, the exercise of discretionary authority in its application to individuals, according to proper guidelines and norms, further reduces the area of discretion, but to that extent discretionary authority has to be given to make the system workable.

The recent expansion of rule of law in every field of administrative functioning has assigned it a place of special significance in the Indian administrative

law. The Supreme Court, in the process of interpretation of rule of law vis-à-vis operation of administrative power, in several cases, emphasized upon the need of fair and just procedure, adequate safeguards against any executive encroachment on personal liberty, free legal aid to the poor and speedy trial in criminal cases as necessary adjuncts to rule of law. Giving his dissenting opinion in the Death penalty case, Mr. Justice Bhagwati explains fully the significance of rule of law in the following words:

The rule of law permeates the entire fabric of the Constitution and indeed forms one of its basic features. The rule of law excludes arbitrariness, its postulate is 'intelligence without passion' and reason free from desire. Wherever we find arbitrariness or unreasonableness there is denial of the rule of law. Law in the context of rule of law does not mean any law enacted by legislative authority, howsoever arbitrary, despotic it may be, otherwise even in dictatorship it would be possible to say that there is rule of law because every law made by the dictator, however arbitrary and unreasonable, has to be obeyed and every action has to be taken in conformity with such law. In such a case too even where the political set-up is dictatorial it is the law that governs the relationship between men

The modern concept of the Rule of Law is fairly wide and, therefore, sets up an idea for 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.

During the last few years the Supreme Court in India has developed some fine principles of Third World jurisprudence. Developing the same new constitutionalism further, the Apex Court in **Veena Seth v. State** (AIR 1983 SC 339) of Bihar 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.

Recent aggressive judicial activism can only be seen as a part of the efforts of the Constitutional Courts in India to establish 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 rule of law and constitutional commands, which effectuate

fairly the objective standards laid down by law. Every public servant is a trustee of the society and is accountable for due effectuation of constitutional goals. This makes the concept of rule of law highly relevant to our context.

Droit Administratif

Meaning of Droit administratif French administrative law is known as *Droit Administratif* which means a body of rules which determine the organization, powers and duties of public administration and regulate the relation of the administration with the citizen of the country. *Droit Administrative* does not represent the rules and principles enacted by Parliament. It contains the rules developed by administrative courts.

Napoleon Bonaparte was the founder of the *Droit administrative*. It was he who established the Conseil d'Etat. He passed an ordinance depriving the law courts of their jurisdiction on administrative matters and another ordinance that such matters could be determined only by the Conseil d'Etat.

Waline, the French jurist, propounds three basic principles of *Droit administrative*:

1. the power of administration to act *suo motu* and impose directly on the subject the duty to obey its decision;
2. the power of the administration to take decisions and to execute them *suo motu* may be exercised only within the ambit of law which protects individual liberties against administrative arbitrariness;
3. the existence of a specialized administrative jurisdiction.

One good result of this is that an independent body reviews every administrative action. The **Conseil d'Etat** is composed of eminent civil servants, deals with a variety of matters like claim of damages for wrongful acts of Government servants, income-tax, pensions, disputed elections, personal claims of civil servants against the State for wrongful dismissal or suspension and so on. It has interfered with administrative orders on the ground of error of law, lack of jurisdiction, irregularity of procedure and *detournement depouvoir* (misapplication of power). It has exercised its jurisdiction liberally.

Main characteristic features of droit administratif. The following characteristic features are of the *Droit Administratif* in France:-

1. Those matters concerning the State and administrative litigation falls within the jurisdiction of administrative courts and cannot be decided by the land of the ordinary courts.
2. Those deciding matters concerning the State and administrative litigation, rules as developed by the administrative courts are applied.
3. If there is any conflict of jurisdiction between ordinary courts and administrative court, it is decided by the tribunal des conflicts.
4. *Conseil d'Etat* is the highest administrative court.

Prof. Brown and *Prof. J.P. Garner* have attributed to a combination of following factors as responsible for its success

- i) The composition and functions of the *Conseil d'Etat* itself;
- ii) The flexibility of its case-law;
- iii) The simplicity of the remedies available before the administrative courts;
- iv) The special procedure evolved by those courts; and
- v) The character of the substantive law, which they apply.

Despite the obvious merits of the French administrative law system, *Prof. Dicey* was of the opinion that there was no rule of law in France nor was the system so satisfactory as it was in England. He believed that the review of administrative action is better administered in England than in France.

The system of *Droit Administratif* according to *Dicey*, is based on the following two ordinary principles which are alien to English law—

Firstly, that the government and every servant of the government possess, as representative of the nation, a whole body of special rights, privileges or prerogatives as against private citizens, and the extent of rights, privileges or considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with the State does not, according to French law; stand on the same footing as that on which he stands in dealing with his neighbor.

Secondly, that the government and its officials should be independent of and free from the jurisdiction of ordinary courts.

It was on the basis of these two principles that *Dicey* observed that *Droit Administratif* is opposed to rule of law and, therefore, administrative law is alien to English system. But this conclusion of *Dicey* was misconceived. *Droit Administratif*, that is, administrative law was as much there in England as it was in France but with a difference that the French *Droit Administratif* was based on a system, which was unknown to English law. In his later days after examining the things closely, *Dicey* seems to have perceptibly modified his stand.

Despite its overall superiority, the French administrative law cannot be characterized with perfection. Its glories have been marked by the persistent slowness in the judicial reviews at the administrative courts and by the difficulties of ensuring the execution of its last judgment. Moreover, judicial control is the only one method of controlling administrative action in French administrative law, whereas, in England, a vigilant public opinion, a watchful Parliament, a self-disciplined civil service and the jurisdiction of administrative process serve as the additional modes of control over administrative action. By contrast, it has to be conceded that the French system still excels its counterpart in the common law countries of the world.

CLASSIFICATION OF ADMINISTRATIVE ACTION

Administrative action is a comprehensive term and defies exact definition. In modern times the administrative process is a by-product of intensive form of government and cuts across the traditional classification of governmental powers and combines into one all the powers, which were traditionally exercised by three different organs of the State. Therefore, there is general agreement among the writers on administrative law that any attempt of classifying administrative functions or any conceptual basis is not only impossible but also futile. Even then a student of administrative law is compelled to delve into field of classification because the present-day law especially relating to judicial review freely employs conceptual classification of administrative action. Thus, speaking generally, an administrative action can be classified into four categories:

- i) Rule-making action or quasi-legislative action.**
- ii) Rule-decision action or quasi-judicial action.**
- iii) Rule-application action or administrative action.**
- iv) Ministerial action**

i) Rule-making action or quasi-legislative action – Legislature is the law-making organ of any state. In some written constitutions, like the American and Australian Constitutions, the law making power is expressly vested in the legislature. However, in the Indian Constitution though this power is not so expressly vested in the legislature, yet the combined effect of Articles 107 to III and 196 to 201 is that the law making power can be exercised for the Union by Parliament and for the States by the respective State legislatures. It is the intention of the Constitution-makers that those bodies alone must exercise this law-making power in which this power is vested. But in the twentieth Century today these legislative bodies cannot give that quality and quantity of laws, which are required for the efficient functioning of a modern intensive form of government. Therefore, the

delegation of law-making power to the administration is a compulsive necessity. When any administrative authority exercises the law-making power delegated to it by the legislature, it is known as the rule-making power delegated to it by the legislature, it is known as the rule-making action of the administration or quasi-legislative action and commonly known as delegated legislation.

Rule-making action of the administration partakes all the characteristics, which a normal legislative action possesses. Such characteristics may be generality, prospectivity and a behaviour that bases action on policy consideration and gives a right or a disability. These characteristics are not without exception. In some cases, administrative rule-making action may be particularised, retroactive and based on evidence.

(ii) Rule-decision action or quasi-judicial action – Today the bulk of the decisions which affect a private individual come not from courts 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 of justice, which is required in a welfare State.

Administrative decision-making may be defined, as a power to perform acts administrative in character, but requiring incidentally some characteristics of judicial traditions. On the basis of this definition, the following functions of the administration have been held to be quasi-judicial functions:

1. Disciplinary proceedings against students.
2. Disciplinary proceedings against an employee for misconduct.
3. Confiscation of goods under the sea Customs Act, 1878.
4. Cancellation, suspension, revocation or refusal to renew license or permit by licensing authority.
5. Determination of citizenship.
6. Determination of statutory disputes.
7. Power to continue the detention or seizure of goods beyond a particular period.
8. Refusal to grant 'no objection certificate' under the Bombay Cinemas (Regulations) Act, 1953.
9. Forfeiture of pensions and gratuity.
10. Authority granting or refusing permission for retrenchment.

11. Grant of permit by Regional Transport Authority.

Attributes of administrative decision-making action or quasi-judicial action and the distinction between judicial, quasi-judicial and administrative action.

(iii) Rule-application action or administrative action – Though the distinction between quasi-judicial and administrative action has become blurred, yet it does not mean that there is no distinction between the two. If two persons are wearing a similar coat, it does not mean that there is no difference between them. The difference between quasi-judicial and administrative action may not be of much practical consequence today but it may still be relevant in determining the measure of natural justice applicable in a given situation.

In **A.K. Kraipak v. Union of India**, the Court was of the view that in order to determine whether the action of the administrative authority is quasi-judicial or administrative, one has to see the nature of power conferred, to whom power is given, the framework within which power is conferred and the consequences.

Therefore, administrative action is the residuary action which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide a right though it may affect a right. However, it does not mean that the principles of natural justice can be ignored completely when the authority is exercising “administrative powers”. Unless the statute provides otherwise, a minimum of the principles of natural justice must always be observed depending on the fact situation of each case.

No exhaustive list of such actions may be drawn; however, a few may be noted for the sake of clarity:

- 1) Making a reference to a tribunal for adjudication under the Industrial Disputes Act.
- 2) Functions of a selection committee.

Administrative 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 a legal force but in some cases it may be non-statutory, such as issuing directions to subordinates not having the force of law, but its 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 reasonable.

Therefore, at this stage it becomes very important for us to know what exactly is the **difference between Administrative and quasi-judicial Acts**.

Thus broadly speaking, acts, which are required to be done on the subjective satisfaction of the administrative authority, are called 'administrative' acts, while acts, which are required to be done on objective satisfaction of the administrative authority, can be termed as quasi-judicial acts. Administrative decisions, which are founded on pre-determined standards, are called objective decisions whereas decisions which involve a choice as there is no fixed standard to be applied are so called subjective decisions. The former is quasi-judicial decision while the latter is administrative decision. In case of the administrative decision there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh, submissions and arguments or to collate any evidence. The grounds upon which he acts and the means, which he takes to inform himself before acting, are left entirely to his discretion. The Supreme Court observed, "It is well settled that the old distinction between a judicial act and administrative act has withered away and we have been liberated from the pestilent incantation of administrative action.

(iv) **Ministerial action** – A further distillate of administrative action is ministerial action. Ministerial action is that action of the administrative agency, which is taken as matter of duty imposed upon it by the law devoid of any discretion or judgment. Therefore, a ministerial action involves the performance of a definitive duty in respect of which there is no choice. Collection of revenue may be one such ministerial action.

1. Notes and administrative instruction issued in the absence of any
2. If administrative instructions are not referable to any statutory authority they cannot have the effect of taking away rights vested in the person governed by the Act.

DELEGATED LEGISLATION

One of the most significant developments of the present century is the growth in the legislative powers of the executives. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law it only supplements the law under the authority of legislature. This type of activity namely, the power to supplement legislation been described as delegated legislation or subordinate legislation.

Why delegated legislation becomes inevitable The reasons as to why the Parliament alone cannot perform the jobs of legislation in this changed context are not far to seek. Apart from other considerations the inability of the Parliament to supply the necessary quantity and quality legislation to the society may be attributed to the following reasons :

- i) Certain emergency situations may arise which necessitate special measures. In such cases speedy and appropriate action is required. The Parliament cannot act quickly because of its political nature and because of the time required by the Parliament to enact the law.
- ii) The bulk of the business of the Parliament has increased and it has no time for the consideration of complicated and technical matters. The Parliament cannot provide the society with the requisite quality and quantity of legislation because of lack of time. Most of the time of the Parliament is devoted to political matters, matters of policy and particularly foreign affairs..
- iii) Certain matters covered by delegated legislation are of a technical nature which require handling by experts. In such cases it is inevitable that powers to deal with such matters is given to the appropriate administrative agencies to be exercised according to the requirements of the subject matter. "Parliaments" cannot obviously provide for such matters as the members are at best politicians and not experts in various spheres of life.
- iv) Parliament while deciding upon a certain course of action cannot foresee the difficulties, which may be encountered in its execution. Accordingly various statutes contain a 'removal of difficulty clause' empowering the administration to remove such difficulties by exercising the powers of making rules and regulations. These clauses are always so worded that very wide powers are given to the administration.
- iv) The practice of delegated legislation introduces flexibility in the law. The rules and regulations, if found to be defective, can be modified quickly. Experiments can be made and experience can be profitably utilized.

However the attitude of the jurists towards delegated legislation has not been unanimous. The practice of delegated legislation was considered a factor, which promoted centralization. Delegated Legislation was considered a danger to the liberties of the people and a device to place despotic powers in few hands. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power in new hands. But the tide of delegated legislation was high and these protests remained futile.

A very strong case was made out against the practice of Delegated Legislation by Lord Hewart who considered increased governmental interference in individual activity and considered this practice as usurpation of legislative power of the executive. He showed the dangers inherent in the practice and argued that wide powers of legislation entrusted to the executive lead to tyranny and absolute despotism. The criticism was so

strong and the picture painted was so shocking that a high power committee to inquire into matter was appointed by the Lord Chancellor. This committee thoroughly inquired into the problem and to the conclusion that delegated legislation was valuable and indeed inevitable. The committee observed that with reasonable vigilance and proper precautions there was nothing to be feared from this practice.

Nature and Scope of delegated legislation Delegated legislation means legislation by authorities other than the Legislature, the former acting on express delegated authority and power from the later.

Delegation is considered to be a sound basis for administrative efficiency and it does not by itself amount to abdication of power if restored to within proper limits. The delegation should not, in any case, be unguided and uncontrolled. Parliament and State Legislatures cannot abdicate the legislative power in its essential aspects which is to be exercised by them. It is only a nonessential legislative function that can be delegated and the moot point always lies in the line of demarcation between the essential and nonessential legislative functions.

The essential legislative functions consist in making a law. It is to the legislature to formulate the legislative policy and delegate the formulation of details in implementing that policy. Discretion as to the formulation of the legislative policy is prerogative and function the legislature and it cannot be delegated to the executive. Discretion to make notifications and alterations in an Act while extending it and to effect amendments or repeals in the existing laws is subject to the condition precedent that essential legislative functions cannot be delegated authority cannot be precisely defined and each case has to be considered in its setting.

In order to avoid the dangers, the scope of delegation is strictly circumscribed by the Legislature by providing for adequate safeguards, controls and appeals against the executive orders and decisions.

The power delegated to the Executive to modify any provisions of an Act by an order must be within the framework of the Act giving such power. The power to make such a modification no doubt, implies certain amount of discretion but it is a power to be exercised in aid of the legislative policy of the Act and cannot

- i) travel beyond it, or
- ii) run counter to it, or
- iii) certainly change the essential features, the identity, structure or the policy of the Act.

Under the constitution of India, articles 245 and 246 provide that the legislative powers shall be discharged by the Parliament and State legislature. The delegation of legislative power was conceived to be inevitable and therefore it was not prohibited in the constitution. Further, Articles 13(3)(a) of

the Constitution of India lays down that law includes any ordinances, order by-law, rule regulation, notification, etc. Which if found inviolation of fundamental rights would be void. Besides, there are number of judicial pronouncements by the courts where they have justified delegated legislation. For e.g.

In re Delhi Laws Act case, AIR 1961 Supreme Court 332; Vasantlal Magan Bhaiv. State of Bombay, air 1961 SC 4; S. Avtar Singh v. State of Jammu and Kashmir, AIR 1977 J&K 4.

While commenting on indispensability of delegated legislation Justice Krishna Iyer has rightly observed in the case of Arvinder Singh v. State of Punjab, **AIR A1979 SC 321**, that the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility that our massive legislature may not get off to a start if they must directly and comprehensively handle legislative business in their plentitude, proliferation and particularization Delegation of some part of legislative power becomes a compulsive necessity for viability.

A provision in a statute which gives an express power to the Executive to amend or repeal any existing law is described in England as **Henry viii Clause** because the King came to exercise power to repeal Parliamentary laws. The said clause has fallen into disuse in England, but in India some traces of it are found here and there, for example, Article 372 of the Constitution authorizes the president of India to adopt pro Constitutional laws, and if necessary, to make such adaptations and modifications, (whether by way of repeal or amendment) so as to bring them in accord with the provisions of the Constitution. The State Reorganization Act, 1956 and some other Acts similar thereto also contain such a provision. So long as the modification of a provision of statute by the Executive is innocuous and immaterial and does not effect any essential change in the matter.

Types of delegation of legislative power in India There are various types of delegation of legislative power.

1. Skeleton delegation In this type of delegation of legislative power, the enabling statutes set out broad principles and empowers the executive authority to make rules for carrying out the purposes of the Act.

A typical example of this kind is the Mines and Minerals (Regulation and Development) Act, 1948.

2. Machinery type This is the most common type of delegation of legislative power, in which the Act is supplemented by machinery provisions, that is, the power is conferred on the concerned department of the Government to prescribe –

- i) **The kind of forms**
- ii) **The method of publication**

- iii) **The manner of making returns, and**
- v) **Such other administrative details**

In the case of this normal type of delegated legislation, the limits of the delegated power are clearly defined in the enabling statute and they do not include such exceptional powers as the power to legislate on matters of principle or to impose taxation or to amend an act of legislature. The exceptional type covers cases where –

- i) the powers mentioned above are given , or
- ii) the power given is so vast that its limits are almost impossible of definition, or
- iii) while limits are imposed, the control of the courts is ousted.

Such type of delegation is commonly known as the Henry VIII Clause.

An outstanding example of this kind is Section 7 of the Delhi Laws Act of 1912 by which the Provincial Government was authorized to extend, with restrictions and modifications as it thought fit any enactment in force in any part of India to the Province of Delhi. This is the most extreme type of delegation, which was impugned in the Supreme Court in the Delhi Laws Act case. A.I.R. 1951 S.C.332. It was held that the delegation of this type was invalid if the administrative authorities materially interfered with the policy of the Act, by the powers of amendment or restriction but the delegation was valid if it did not effect any essential change in the body or the policy of the Act.

That takes us to a term "**bye-law**" whether it can be declared ultra vires ? if so when ? Generally under local laws and regulations the term bye-law is used such as

- i) public bodies of municipal kind
- ii) public bodies concerned with government, or
- iii) corporations, or
- iv) societies formed for commercial or other purposes.

The bodies are empowered under the Act to frame bye-laws and regulations for carrying on their administration.

There are five main grounds on which any bye-law may be struck down as ultra vires. They are :

- a) That is not made and published in the manner specified by the Act, which authorises the making thereof;
- b) That is repugnant of the laws of the land;
- c) That is repugnant to the Act under which it is framed;

- d) That it is uncertain ; and
- e) That it is unreasonable.

Modes of control over delegated legislation The practice of conferring legislative powers upon administrative authorities though beneficial and necessary is also dangerous because of the possibility of abuse of powers and other attendant evils. There is consensus of opinion that proper precautions must be taken for ensuring proper exercise of such powers. Wider discretion is most likely to result in arbitrariness. The exercise of delegated legislative powers must be properly circumscribed and vigilantly scrutinized by the Court and Legislature is not by itself enough to ensure the advantage of the practice or to avoid the danger of its misuse. For the reason, there are certain other methods of control emerging in this field.

The control of delegated legislation may be one or more of the following types: -

- 1) **Procedural;**
- 2) **Parliamentary; and**
- 3) **Judicial**

Judicial control can be divided into the following two classes: -

- i) **Doctrine of ultra vires and**
- vi) **Use of prerogative writs.**

Procedural Control over Delegated Legislation

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

(B) Prior publicity of proposed rules and regulations: Another method is antecedent publicity of statutory rules to inform those likely to be affected by the proposed rules and regulations so as to enable them to make representation for consideration of the rule-making authority. The rules of

Publication Act, 1893, S.I. provided for the use of this method. The Act provided that notice of proposed 'statutory rules' is given and the representations of suggestions by interested bodies be considered and acted upon if proper. But the Statutory Instruments Act, 1946 omitted this practice in spite of the omission, the Committee on Ministers Powers 1932, emphasized the advantages of such a practice.

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

(d) Parliamentary control in India over delegation In India, the question of control on rule-making power engaged the attention of the Parliament. Under the Rule of Procedure and Conduct of Business of the House of the People provision has been made for a Committee which is called 'Committee on Subordinate Legislation'.

The First Committee was constituted on 1st December, 1953 for

- i) Examining the delegated legislation, and
- ii) Pointing out whether it has-
 - a) Exceeded or departed from the original intentions of the Parliament, or
 - b) Effected any basic changes.

Originally, the committee consisted to 10 members of the House and its strength was later raise to 13 members. It is usually presided over by a member of the Opposition. The Committee

- i) scrutinizes the statutory rules, orders. Bye-laws, etc. made by any-making authority, and
- ii) report to the House whether the delegated power is being properly exercised within the limits of the delegated authority, whether under the Constitution or an Act of Parliament. It further examines whether
 - i) The Subordinate legislation is in accord with the general objects of the Constitution or the Act pursuant to which it is made;
 - ii) it contains matter which should more properly be dealt within an Act of Parliament;
 - iii) it contains imposition of any tax;

- iv) it, directly or indirectly, ousts the jurisdiction of the courts of law;
- v) it gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly confer any such power;
- vi) It is constitutional and valid;
- vii) it involves expenditure from the Consolidated Fund of India or the Public Revenues;
- viii) its form or purpose requires any elucidation for any reason;
- ix) it appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; and
- x) there appears to have been unjustifiable delay in its publication on its laying before the Parliament.

The Committee of the first House of the People submitted a number of reports and continues to do useful work. The Committee considered the question of bringing about uniformity in the provisions of the Acts delegating legislative powers. It made certain recommendations in its First report (March, 1954) which it later modified in its Third Report (May, 1955) after noting the existing divergent legislation in India. The following are the modified recommendations

1. That, in future, the Acts containing provisions for making rules, etc., shall lay down that such rules shall be laid on the Table as soon as possible.
2. That all these rules shall be laid on the Table for a uniform and total period of 30 days before the date of their final publication.

But it is not deemed expedient to lay any rule on the Table before the date of publication; such rule may be laid as soon as possible after publication. An Explanatory Note should, however, accompany such rules at the time they are so laid, explaining why it was not deemed expedient to lay these rules on the Table of the House before they were published.

3. On the recommendation of the Committee, the bills are generally accompanied with Memoranda of Delegated Legislation in which; -
 - i) full purpose and effect of the delegation of power to the subordinate authorities,
 - ii) the points which may be covered by the rules,
 - iii) the particulars of the subordinate authorities or the persons who are to exercise the delegated power, and
 - iv) the manner in which such power has to be exercised, are mentioned.

They point out if the delegation is of normal type or unusual.

The usefulness of the Committee lies more in ensuring that the standards of legislative rule-making are observed than in merely formulating such standards. It should effectively point out the cases of any unusual or unexpected use of legislative power by the Executive.

Parliamentary control of delegated legislation is thus exercised by

- i) taking the opportunity of examining the provisions providing for delegation in a Bill, and
- ii) getting them scrutinized by parliamentary committee of the Rules, Regulations, Bye-laws and orders,
When the Bill is debated,----
 - i) the issue of necessity of delegation, and
 - ii) the contents of the provisions providing for delegation, can be taken up.

After delegation is sanctioned in an Act, the exercise of this power by the authority concerned should receive the attention of the House of the Parliament. Indeed, it is this later stage of parliamentary scrutiny of the delegated authority and the rules as framed in its exercise that is more important. In a formal sense, this is sought to be provided by making it necessary that the rules, etc., shall be laid on the Table of the House. The members are informed of such laying in the daily agenda of the House. The advantage of this procedure is that members of both the Houses have such chances as parliamentary procedure –

- i) the modification or the repeal of the enactment under which obnoxious rules and orders are made, or
- ii) revoking rules and orders themselves.

The matter may be discussed in the House during the debates or on special motions.

The provisions for laying the rule, etc., are being made now practically in every Act which contains a rule making provision. Such provisions are enacted in the following form: -

(1) The Government may by notification in the official Gazette, make rules for carrying out all or any of the purposes of this Act.

(2) Every rule made under this section shall be laid, as soon as may be, after it is made, before each House of Parliament while it is in session for a total period of fourteen days which may be comprised in one session or in the successive session immediately following, both Houses agree in making any modification in the Rule or in the annulment of the rule. The rule thereafter have effect only in such modified form or shall stand annulled, 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."

If the Parliamentary control is not effective it becomes necessary to provide for certain procedural safeguards, which go to make the delegated legislation ascertainable and accessible.

Control of delegated legislation by procedure---- The following requirements are made necessary for the exercise of the delegated authority under different statutes so that procedural safeguards are ensured.

- i) **The Doctrine of ultra vires----** The chief instrument in the hands of the judiciary to control delegated legislation is the "Doctrine of ultra vires."

The doctrine of ultra vires may apply with regard to-

- i) procedural provision; and
- ii) substantive provisions.

i) **Procedural defects** The Acts of Parliament delegating legislative powers to other bodies or authorities often provide certain procedural requirements to be complied with by such authorities while making rules and regulations, etc. These formalities may consist of consultation with interested bodies, publication of draft rules and regulations, hearing of objections, considerations of representations etc. If these formal requirements are mandatory in nature and are disregarded by the said authorities then the rules etc. so made by these authorities would be invalidated by the Judiciary. In short subordinate legislation in contravention of mandatory procedural requirements would be invalidated by the court as being ultra vires the parent statute. Provision in the parent Statute for consulting the interested parties likely to be affected, may, in such cases, avoid all these inconveniences and the Railway authorities may not enact such rule after they consult these interests. A simple provision regarding consultation thus assumes importance. On the other hand, if the procedural requirements were merely of directory nature, then a disregard thereof would not affect the validity of subordinate legislation.

The fact that procedural requirements have far reaching effects, may be made clear by just one example. Suppose the Railway authorities want to relieve pressure of work of unloading goods during daytime at a station amidst a big and brisk business center. The public wants a reduction in the traffic jams due to heavy traffic because of unloading. The traffic authorities and Railway authorities decide to tackle the problem effectively by making the rule that the unloading be done during late hours of night. The railway authorities make an order to this effect, without consulting interested bodies. Such rule might cause many hardships e.g. –

i) The conditions of labour are such that unloading of goods during the night would adversely affect the profit margin as the workers would charge more if they work in night shifts.

ii) It may not be without risk to carry money from one place to another during late hours of night. If safety measures are employed, that in addition to the element of a greater risk, expenses would increase, adversely affecting the margin of profits.

iii) The banking facilities may not be available freely during night.

iv) Additional staff may be necessary in various concerns for night duty.

v) This business are loading and unloading during night may cause inconvenience and disturbance in the locality.

Now in face of these difficulties another alternative which appears to be desirable is better supervision of unloading and better regulation of traffic by posting more police officers and stricter enforcement of traffic laws.

Provisions in the parent statute for consulting the interested parties likely to be affected may, in such cases, avoid all these inconveniences, and the Railway authorities may not act such a rule after they consult these interests. A simple provision regarding consultation thus assumes importance.

The question of the effectiveness of the application of the doctrine of ultra vires, so far as procedure is concerned, would largely depend upon the words used in the particular statute. If the words are specific and clearly indicate the bodies to be consulted, then it would be possible to show noncompliance.

But in case where the minister is vested with the discretion to consult these bodies which he considers to be representative of the interests likely to be affected or where he is to consult such bodies, if any, it is very difficult to prove noncompliance with the procedural requirements.

(ii) Substantive Defects In case of delegated legislation, unlike an Act of the Parliament, the court can inquire into whether it is within the limits laid down by the present statute. If a piece of delegated legislation were found to be beyond such limits, court would declare it to be ultra vires and hence invalid. (R.V.Minister of Health, (1943), 2 ALL ER591).The administrative authorities exercising legislative power under the authority of an Act of the Parliament must do so in accordance with the terms and objects of such statute. To find out whether administrative authorities have properly exercised the powers, the court have to construe the parent statute so as to find out the intention of the legislature. The existence and extent of the powers of administrative authorities is to be affixed in the light of the provisions of the parent Act.

Mandatory or directory procedural provision The question whether particular procedural requirements are mandatory or directory must be examined with care. In case the statute provided for the effect of noncompliance of such requirements, then it is to be followed by the courts without difficulty. But uncertainty creeps in where the statute is silent on the point and decision is to be made by the judiciary. The courts is determining whether the provisions to this effect in a particular Statute are mandatory or directory are guided by

various factors. They must take into consideration the whole scheme of legislation and particularly evaluate the position of such provisions in their relation with the object of legislation. The nature of the subject matter to be regulated, the object of legislation, and the provisions as placed in the body of the Act must all be considered carefully, so as to find out as to what was the intention of the legislature. Much would depend upon the terms and scheme of a particular legislation, and hence broad generalizations in this matter are out of place.

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

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

The delegation can be challenged in the courts of law as being unconstitutional, excessive or arbitrary.

The scope of permissible delegation is fairly wide. Within the wide limits. Delegation is sustained it does not otherwise, infringe the provisions of the Constitution. The limitations imposed by the application of the rule of ultra vires are quite clear. If the Act of the Legislature under which power is delegated, is ultra vires, the power of the legislature in the delegation can never be good. No delegated legislation can be inconsistent with the provisions of the Fundamental Rights. If the Act violates any Fundamental Rights the rules, regulations and bye-laws framed there under cannot be better.

Where the Act is good, still the rules and regulations may contravene any Fundamental Right and have to be struck down.

The validity of the rules may be assailed at the stage in two ways :-

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

The method under these sub-heads for the application of the rule of ultra vires is described as the method of substantive ultra vires. Here the substance of rules and regulations is gone into and not the procedural requirements of the rule making that may be prescribed in the statute. The latter is looked into under the procedural ultra vires rule.

Power of Parliament to repeal law Under the provision to clause (2) of Article 254, Parliament can enact at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State,

Ordinarily, the Parliament would not have the power to repeal a law passed by the State Legislature even though it is a law with respect to one of the matters enumerated in the Concurrent List. Section 107 of the Government of India Act, 1935 did not contain any such power. Art. 254 (2) of the Constitution of India is in substance a reproduction of section 107 of the

1935 Act, the concluding portion whereof being incorporated in a proviso with further additions.

Now, by the proviso to Art. 254 (2), the Indian Constitution has enlarged the powers of Parliament and, under that proviso, Parliament can do what the Central Legislature could not do under section 107 of the Government of India Act, and can enact a law adding to, amending, varying or repealing a law of the State when it relates to a matter mentioned in the concurrent List. Therefore the Parliament can, acting under the proviso to Art. 254 (2) repeal a State Law.

While the proviso does confer on Parliament a power to repeal a law passed by the State Legislature, this power is subject to certain limitations. It is limited to enacting a law with respect to the same matter adding to, amending, varying or repealing a law so made by the State Legislature. The law referred to here is the law mentioned in the body of Art. 254 (2), It is a law made by the State Legislature with reference to a matter in the Concurrent List containing provisions repugnant to an earlier law made by Parliament and with the consent to an earlier law made by Parliament and with the consent of the President. It is only such a law that can be altered, amended, repealed under the proviso.

The power of repeal conferred by the proviso can be exercised by Parliament alone and cannot be delegated to an executive authority.

The repeal of a statute means that the repealed statute must be regarded as if it had never been on the statute book. It is wiped out from the statute book.

In the case of *Delhi Laws Act, 1951 S.C.R. 747*, it was held that to repeal or abrogate an existing law is the exercise of an essential legislative power.

Parliament, being supreme, can certainly make a law abrogating or repealing by implication provisions of any preexisting law and no exception can be taken on the ground of excessive delegation to the Act of the Parliament itself.

(a) Limits of permissible delegation: When a legislature is given plenary power to legislate on a particular subject, there must also be an implied power to make laws incidental to the exercise of such power. It is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power. A legislature cannot certainly strip itself of its essential functions and vest the same on an extraneous authority. The primary duty of law making has to be discharged by the legislature itself but delegation may be resorted to as a subsidiary or ancillary measure. (*Edward Mills Co. Ltd. v. State of Ajmer*, (1955) 1. S.C.R. 735)

Mahajan C.J. in *Hari Shankar Bagla v. State of Madhya Pradesh*, A.I.R. 1954 S.C. 555 : (1955) 1.S.C.R. 380 at p. 388 observed :

"The Legislature cannot delegate its functions of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The

legislature must declare the policy of the law and the legal principles which are to control and given cases and must provide a standard to guide the officials of the body in power to execute the law".

Therefore the extent to which delegation is permissible is well settled. The legislature cannot delegate its essential legislative policy and principle and must afford guidance for carrying out the said policy before it delegates its delegates its subsidiary powers in that behalf. (Vasant Lal Maganbhai Sanjanwala v. State of Bombay, A.I.R. 1961 S.C. 4)

The guidance may be sufficient if the nature of things to be done and the purpose for which it is to be done are clearly indicated. The case of Hari Shankar Bagla v. State of Madhya Pradesh, A.I.R. 1954 S.C. 465: (1955) 1 S.C.R. 380 is an instance of such legislation.

The policy and purpose may be pointed out in the section conferring the powers and may even be indicated in the preamble or elsewhere in the Act.

(b) Excessive delegation as a ground for invalidity of statute In dealing with the challenge the vires of any State on the ground of Excessive delegation it is necessary to enquire whether - The impugned delegation involves the delegation of an essential legislative functions or power, and In Vasant lals case (A.I.R. 1961 S.C. 4). Subba Rao, J. observed as follows;

"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 the multifarious activities of a welfare State, it (the legislature) cannot presumably work out all the details to sit the varying aspects of complex situations. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may-

- a) not lay down any policy at all;
- b) declare its policy in vague and general terms;
- c) not set down any standard for the guidance of the executive;
- d) confer and arbitrary power to the executive on change or

modified the policy laid down by it without reserving for itself any control over subordinate legislation.

The self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation.

It is for a Court to hold on a fair, generous and liberal construction of on impugned statute whether the legislature exceeded such limits.

Contents

I. Administrative Discretion and its Control

- *Judicial behaviour and administrative Discretion in India*
- *Control at the stage of delegation of discretion*
- *Control at the stage of exercise of the discretion*
- *Abuse of discretion*
- *Administrative discretion and fundamental rights under *articles 14 and 19 and 31(2) of the Constitutional*
- *Legitimate expectation as a ground of judicial review*
- *Administrative directions*
- *Power of inquiry and Investigation*

I. Administrative Adjudication / Tribunal

- *The characteristics of administrative tribunals*
- *Structure of tribunals*
- *Procedure for application to the tribunals*

II. Principles of Natural Justice or fairness

- *Conceptual formulation*
- *Application of principles of natural justice to judicial, quasi-judicial and administrative proceedings*
- *Bias*
- *Right to hearing*
- *Ingredients of fair hearing*
- *Natural justice and Indian Constitution*
- *Effect of Failure of natural justice*

III. Disciplinary action against Public Servants: Its significance

**Constitutional Provisions *Causes
of disciplinary proceedings *Types
of Disciplinary Action*

ADMINISTRATIVE DISCRETION AND ITS JUDICIAL CONTROL

Discretion in layman's language means choosing from amongst the various available alternatives without reference to any predetermined criterion, no matter how fanciful that choice may be. 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.

The problem of administrative discretion is complex. It is true that in any intensive form of government, the government cannot function without the exercise of some discretion by the officials. But it is equally true that absolute discretion is a ruthless master. 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.

There is no set pattern of conferring discretion on an administrative officer. Modern drafting technique uses the words 'adequate', 'advisable', 'appropriate', 'beneficial', 'reputable', 'safe', 'sufficient', 'wholesome', 'deem fit', 'prejudicial to safety and security', 'satisfaction', 'belief', 'efficient', 'public purpose', etc. or their opposites. It is true that with the exercise of discretion on a case-to-case basis, these vague generalizations are reduced into more specific moulds, yet the margin of oscillation is never eliminated. Therefore, the need for judicial correction of unreasonable exercise of administrative discretion cannot be overemphasized.

Judicial Behavior and Administrative Discretion in India

Though courts in India have developed a few effective parameters for the proper exercise of discretion, the conspectus of judicial behavior still remains halting, variegated and residual, and lacks the activism of the American courts. Judicial control mechanism of administrative discretion is exercised at two stages:

- I) at the stage of delegation of discretion;
- II) at the stage of the exercise of discretion.

(1) Control at stage of delegation of discretion

The court exercise control over delegation of discretionary powers to the administration by adjudicating upon the constitutionality of the law under which such powers are delegated with reference to the fundamental rights enunciated in Part III of the Indian Constitution. Therefore, if the law confers vague and wide discretionary power on any administrative authority, it may be declared ultra vires Article 14, Article 19 and other provisions of the Constitution.

In certain situations, the statute though it does not give discretionary power to the administrative authority to take action, may give discretionary power to frame rules and regulations affecting the rights of citizens. The court can control the bestowal of such discretion on the ground of excessive delegation.

(2) Control at the stage of the exercise of discretion

In India, unlike the USA, there is no Administrative Procedure Act providing for judicial review on the exercise of administrative discretion. Therefore, the power of judicial review arises from the constitutional configuration of courts. Courts in India have always held the view that judge-proof discretion is a negation of the rule of law. Therefore, they have developed various formulations to control the exercise of administrative discretion. These formulations may be conveniently grouped into two broad generalizations:

- i) That the authority is deemed not to have exercised its discretion at all.
- ii) That the authority has not exercised its discretion properly.

i) That the authority is deemed not to have exercised its discretion at all

Under this categorization, courts exercise judicial control over administrative discretion if the authority has either abdicated its power or has put fetters on its exercise or the jurisdictional facts are either non-existent or have been wrongly determined.

Purtabpore Company Ltd. V. Cane Commissioner of Bihar, (AIR 1970 SC 1896) is a notable case in point. In this case the Cane Commissioner who had the power to reserve sugarcane areas for the respective sugar factories, at the dictation of the Chief Minister excluded 99 villages from the area reserved by him in favor of the appellant-company. The court quashed the exercise of discretion by the Cane Commissioner on the ground that he abdicated his power by exercising it at the dictation of some other authority; therefore, it was deemed that the authority had not exercised its discretion at all. Thus the exercise of discretion or in compliance with instructions of some other person amounts to failure to exercise the discretion altogether. It is immaterial that the authority invested with the discretion itself sought the instructions.

ii) That the authority has not exercised its discretion properly This is an all-embracing formulation developed by courts in India to control the exercise of discretion by the administrative authority. Improper exercise of discretion includes everything that English courts include in 'unreasonable' exercise of discretion and American courts include in 'arbitrary and capricious' exercise of discretion. Improper exercise of discretion includes such things as 'taking irrelevant considerations into account', 'acting for improper purpose', 'asking wrong questions', 'acting in bad faith', 'neglecting to take into consideration relevant factors' or 'acting unreasonable'.

S.R. Venkataraman v. Union of India, (1979 2SCC 491) the appellant, a Central Government officer, was prematurely retired from service in 'public interest' under Rule 56(j)(i) on attaining the age of 50 years. Her contention was that the government did not apply its mind to her service record and that in the facts and circumstances of the case the discretion vested under Rule 56(j)(I) was not exercised for furtherance of public interest and that the order was based on extraneous circumstances. The government conceded that there was nothing on record to justify the order. The Supreme Court, quashing the order of the government, held that if a discretionary power has been exercised for an unauthorized purpose, it is generally immaterial whether its repository was acting in good faith or bad faith. An administrative order based on a reason or facts that do not exist must be held to be infected with an abuse of power.

R.D. Shetty v. International Airport Authority (1979 3SCC 459): It is heartening to see the law catching up with the vagaries of the State's dealings in the exercise of its discretion. In this case the issue was the awarding of a contract for running a second-class hotelier's and it was clearly stipulated that the acceptance of the tender would rest with the Airport Director who would not bind himself to accept any tender and reserved to himself the right to reject all or any of the tenders received without assigning any reason. The highest of all. A writ petition was filed by a person who was himself neither a tenderer nor an hotelier was filed by a person who was himself neither a tenderer nor a hotelier. His grievance was that he was in the same position as the successful tenderer because if an essential condition could be ignored in the tenderer's case why not in the petitioner's? The Supreme Court accepted

the plea of locus stand in challenging the administrative action. Justice P.N. Bhagwati, who delivered the judgment of the Court, held:

- 1) **Exercise of discretion is an inseparable part of sound administration and, therefore, the State which is itself a creature of the Constitution, cannot shed its limitation at any time in any sphere of State activity.**
- 2) **It is a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them.**
- 3) It is indeed unthinkable that in a democracy governed by the rule of law the executive government or any of its officers should possess arbitrary powers over the interests of an individual. Every action of the executive government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement.
- 4) The government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licenses only in favor of those having gray hair or belonging to a particular political party or professing a particular religious faith. The government is still the government when it acts in the matter of granting largesse and it cannot act arbitrarily. It does not stand in the same position as a private individual.

The exercise of discretion must not be arbitrary, fanciful and influenced by extraneous considerations. In matters of discretion the choice must be dictated by public interest and must not be unprincipled or unreasoned.

It has been firmly established that the discretionary powers given to the governmental or quasi-government authorities must be hedged by policy, standards, procedural safeguards or guidelines, failing which the exercise of discretion and its delegation may be quashed by the courts. This principle has been reiterated in many cases.

Thus within the area of administrative discretion the courts have tried to fly high the flag of Rule of Law which aims at the progressive diminution of arbitrariness in the exercise of public power.

In India the administrative discretion, thus, may be reviewed by the court on the following grounds.

I. Abuse of Discretion.

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

- i) **Use for improper purpose:** - The discretionary power is required to be used for the purpose for which it has been given. If it is given for one purpose and used for another purpose. It will amount to abuse of power.
- ii) **Malafide or Bad faith:** - If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court. Malafide exercise of discretionary power is always bad and taken as abuse of discretion. Malafide (bad faith) may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently. If its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest.
- iii) **Irrelevant consideration:** - The decision of the administrative authority is declared void if it is not based on relevant and germane considerations. The considerations will be irrelevant if there is no reasonable connection between the facts and the grounds.
- iv) **Leaving out relevant considerations:** - The administrative authority exercising the discretionary power is required to take into account all the relevant facts. If it leaves out relevant consideration, its action will be invalid.
- v) **Mixed consideration:** - Sometimes the discretionary power is exercised by the authority on both relevant and irrelevant grounds. In such condition the court will examine whether or not the exclusion of the irrelevant or non-existent considerations would have affected the ultimate decision. If the court is satisfied that the exclusion of the irrelevant considerations would have affected the decision, the order passed by the authority in the exercise of the discretionary power will be declared invalid but if the court is satisfied that the exclusion of the irrelevant considerations would not be declared invalid.
- vi) **Unreasonableness:** - The Discretionary power is required to be exercised by the authority reasonably. If it is exercised unreasonably it will be declared invalid by the court. Every

authority is required to exercise its powers reasonably. In a case *Lord Wrenbury* has observed that a person in whom invested a discretion must exercise his discretion upon reasonable grounds. Where a person is conferred discretionary power it should not be taken to mean that he has been empowered to do what he likes merely because he is minded to do so. He is required to do what he ought and the discretion does not empower him to do what he likes. He is required, by use of his reason, to ascertain and follow the course which reason directs. He is required to act reasonably

- vii) **Colourable Exercise of Power:** - Where the discretionary power is exercised by the authority on which it has been conferred ostensibly for the purpose for which it has been given but in reality for some other purpose, It is taken as colourable exercise of the discretionary power and it is declared invalid.
- viii) **Non-compliance with procedural requirements and principles of natural justice:** - If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or directory is decided by the court. Principles of natural justice are also required to be observed.
- ix) **Exceeding jurisdiction:** - The authority is required to exercise the power within the limits of the statute. Consequently, if the authority exceeds this limit, its action will be held to be *ultra vires* and, therefore, void.

II. Failure to exercise Discretion.

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

- i) **Non-application of mind:** - Where an authority is given discretionary powers it is required to exercise it by applying its mind to the facts and circumstances of the case in hand. If he does not do so it will be deemed to have failed to exercise its discretion and its action or decision will be bad.
- ii) **Acting under Dictation:** - Where the authority exercises its discretionary power under the instructions or dictation from superior authority. It is taken, as non-exercise of power by the authority and its decision or action is bad. In such condition the authority purports to act on its own but in substance the power is not exercised by it but by the other authority. The authority entrusted with the powers does not take action on its own judgement and does not apply its mind. For example in **Commissioner of Police v. Gordhandas** the Police

Commissioner empowered to grant license for construction of cinema theatres granted the license but later cancelled it on the discretion of the Government. The cancellation order was declared bad as the Police Commissioner did not apply his mind and acted under the dictation of the Government.

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

Administrative Discretion and fundamental rights

No law can clothe administrative discretion with a complete finality, for the courts always examine the ambit and even the mode of its exercise for the angle of its conformity with fundamental rights.

The fundamental rights thus provide a basis to the judiciary in India to control administrative discretion to a large extent. There have been a number of cases in which a law, conferring discretionary powers, has been held violative of a fundamental right. The following discussion will illustrate the cases of judicial restraints on the exercise of discretion in India.

Administrative Discretion and Article 14.

Article 14 prevents arbitrary discretion being vested in the executive. Equality is antithetic to arbitrariness. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. Right to equality affords protection not only against discretionary laws passed by legislature but also prevents arbitrary discretion being vested in the executive. Often executive or administrative officer or Government is given wide discretionary power.

In a number of cases, the Statute has been challenged on the ground that it conferred on an administrative authority wide discretionary powers of selecting persons or objects discriminately and therefore, it violated Article 14. The Court in determining the question of validity of such statute will examine whether the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of selection or classification. The Court will not tolerate the delegation of uncontrolled power in the hands of the Executive to such an extent as to enable it to discriminate.

In **State of West Bengal v. Anwar Ali**, AIR 1952 SC 75 . It was held that in so far as the Act empowered the Government to have cases or class of offences tried by special courts, it violated Article 14 of the Constitution. The court further held the Act invalid as it laid down “no yardstick or measure for the grouping

either of persons or of cases or of offences” so as to distinguish them from others outside the purview of the Act. Moreover, the necessity of “speedier trial” was held to be too vague, uncertain and indefinite criterion to form the basis of a valid and reasonable classification.

Under Article 19

Article 19 guarantees certain freedoms to the citizens of India, but they are not absolute. Reasonable restrictions can be imposed on these freedoms under the authority of law. They cannot be contended merely on executive action. The reasonableness of the restrictions is open to judicial review. These freedoms can also be afflicted by administrative discretion. Such cases can be examined below.

A number of cases have come up involving the question of validity of law conferring discretion on the Executive to restrict the right under Article 19(1)(b) and (e). The State has conferred powers on the Executive to extern a person from a particular area in the interest of peace and safety in a number of statutes. **In Dr. Ram Manohar v. State of Delhi, AIR 1950 SC 211.**, where the D.M. was empowered under East Punjab Safety Act, 1949, to make an order of externment from an area in case he was satisfied that such an order was necessary to prevent a person from acting in any way prejudicial to public peace and order, the Supreme Court upheld the law conferring such discretion on the execution on the grounds, inter alia, that the law in the instant case was of temporary nature and it gave a right to the externee to receive the grounds of his externment from the Executive.

In Hari v. Deputy Commissioner of Police, AIR 1956 SC 559, the Supreme Court upheld the validity of section 57 of the Bombay Police Act authorizing any of the officers specified therein to extern convicted persons from the area of his jurisdiction if he had reasons to believe that they are likely to commit any offence similar to that of which they were convicted. This provisions of law, which apparently appears to be a violation of the residence was upheld by court mainly on the considerations that certain safeguards are available to the externee, i.e., the right of hearing and the right to file an appeal to the State Government against the order.

In a large number of cases, the question as to how much discretion can be conferred on the Executive to control and regulate trade and business has been raised. The general principle laid down in that the power conferred on the Executive should not be arbitrary, and that it should not be left entirely to the discretion of any authority to do anything it likes without any check or control by any higher authority.” “Any law or order which confers arbitrary and uncontrolled power upon the Executive in the matter of the regulating trade or business is normally available in commodities control cannot but be held to be unreasonable.” and no provisions to ensure a proper execution of the power and to operate as a check against injustice resulting from its improper exercise. The Supreme Court in **H.R. Bantthis v. Union of India (1979 1 SCC 166)** declared a licensing provision invalid as it conferred an uncontrolled and

unguided power on the Executive. The Gold (Control) Act, 1968, provided for licensing of dealers in gold ornaments. The Administrator was empowered under the Act to grant or renew licenses having regard to the matters, inter alia, the number of dealers existing in a region, anticipated demand, suitability of the applicant and public interest. The Supreme Court held that all these factors were vague and unintelligible. The term 'region' was nowhere defined in the Act. The expression 'anticipated demand' was a vague one. The expression 'suitability of the applicant and 'public interest' did not contain any objective standards or norms.

Where the Act provides some general principles to guide the exercise of the discretion and thus saves it from being arbitrary and unbridled, the court will uphold it, but where the Executive has been granted 'unfettered power to interfere with the freedom of property or trade and business, the court will strike down such provision of law.

Under Article 31(2):

Article 31(2) of the Constitution provided for acquisition of private property by the Government under the authority of law. It laid down two conditions, subject to which the property could be requisitioned 1) that the law provided for an amount (after 25th Amendment) to be given to the persons affected, which was non-justiciable; and (2) that the property was to be acquired for a public purpose. In an early case, where the law vested the administrative officer with the power to acquire estates of food grains at any price, it was held to be void on the grounds, inter alia, that it failed to fix the amount of compensation or specify the principles, on which it could be determined. Since the matter was entirely left to the discretion of the officer concerned to fix any compensation it liked, it violated Article 31(2).

The property under Article 31(2) could be acquisitioned for a public purpose only. The Executive could be made the sole judge to decide a public purpose. No doubt, the Government is in best position to judge as to whether a public purpose could be achieved by issuing an acquisition order, but it is a justiciable issue and the final decision is with the courts in this matter. **In West Bengal Settlement Kanungo Co-operative Credit Society Ltd. V. Bela Bannerjee**, (AIR 1954 SC 170) the provision that a Government's declaration as to its necessity to acquire certain land for public purpose shall be conclusive evidence thereof was held to be void. The Supreme Court observed that as Article 31(2) made the existence of a public purpose a necessary condition of acquisition, it is, therefore, necessary that the existence of such a purpose as a fact must be established objectively and the provision relating to the conclusiveness of the declaration of the Government as to the nature of the purpose of the acquisition must be held unconstitutional.

The Courts have, however, attempted to construe the term public purpose rather broadly; the judicial test adopted for the purpose being that whatever furthers the general interests of the community as opposed to the particular interests of the individual is a public purpose. The general tendency of the

Legislature is to confer the power of acquisition on the Executive in an undefined way by using vague expressions such as “purposes of the State” or “purposes of the Union”, so as to give wider latitude to the courts to uphold it.

Thus, we have seen in the above illustrations how the courts have used the mechanism of fundamental rights to control the administrative discretion. In fact fundamental rights are very potential instruments by which the Judiciary in India can go a long way in warding off the dangers of administrative discretion.

Judicial Control of Administrative discretion – The broad principles on which the exercise of discretionary powers can be controlled, have now been judicially settled. These principles can be examined under two main heads:

- a) where the exercise of the discretion is in excess of the authority, i.e., ultra vires;
- b) where there is abuse of the discretion or improper exercise of the discretion.

These two categories, however, are not mutually exclusive. In one sense the exercise of the discretion may be ultra vires, in other sense the same might have been exercised on irrelevant considerations. As regards the ultra vires exercise of administrative discretion, the following incidents are pre-eminent:

-

- 1) where an authority to whom discretion is committed does not exercise that discretion himself;
- 2) where the authority concerned acts under the dictation of another body and disables itself from exercising a discretion in each individual case;
- 3) where the authority concerned in exercise of the discretion, does something which it has been forbidden to do, or does an act which it has been authorized to do;
- 4) where the condition precedent to the exercise of its discretion is non-existent, in which case the authority lacks the jurisdiction to act as all.

Under the second category, i.e., abuse of discretionary power, the following instances may be considered: -

- 1) where the discretionary power has been exercised arbitrarily or capriciously;
- 2) where the discretionary power is exercised for an improper purpose, i.e., for a purpose other than the purpose of carrying into effect in the best way the provisions of the Act;

- 3) where the discretionary power is exercised inconsistent with the spirit and purpose of the statute;
- 4) where the authority exercising the discretion acts on extraneous considerations, that is to say, takes into account any matters which should not have been taken into account;
- 5) where the authority concerned refuses or neglects to take into account relevant matter or material considerations;
- 6) where the authority imposes a condition patently unrelated to or inconsistent with the purpose or policy of the **expectation** statute;
- 7) where in the exercise of the discretionary power, it acts mala fide;
- 8) where the authority concerned acts unreasonably.

Legitimate expectation as ground of judicial review

Besides the above grounds on which the exercise of discretionary powers can be examined, a third major basis of judicial review of administrative action is legitimate expectation, which is developing sharply in recent times. The concept of legitimate expectation in administrative law has now, undoubtedly, gained sufficient importance. It is stated that the legitimate expectation is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place besides such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future, perhaps, the unreasonableness, the proportionality.

In **Union of India v. Hindustan Development Corporations**, (1993 3SCC 499) the court held that it only operates in public law field and provides locus standi for judicial review. Its denial is a ground for challenging the decision but denial can be justified by showing some overriding public interest. In the instant case, question arose regarding the validity of the dual policy of the government in the matter of contracts with private parties for supply of goods. There was no fixed procedure for fixation of price and allotment of quality to be supplied by the big and small suppliers. The government adopted a dual price policy, lower price for big suppliers and higher price for small suppliers in public interest and allotment of quantity by suitably adjusting the same so as to break the cartel. The court held that this does not involve denial of any legitimate expectation. The court observed: legitimate expectations may come in various forms and owe their existence to different kind of circumstances and it is not possible to give an exhaustive list in the context of vast and fast expansion of governmental activities. By and large they arise in cases of promotions, which are in normal course expected, though not guaranteed by way of statutory right, in cases of contracts, distribution of largess by the Government and in somewhat similar situations.

Legitimate expectation gives the applicant sufficient locus standi for judicial review. The doctrine of legitimate expectation is to be confined mostly to right

of fair hearing before a decision, which results in negating a promise, or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate does not require the fulfillment of the expectation where an overriding public interest requires otherwise. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation, which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits. A person, who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is foundation and thus he has locus standi to make such a claim. There are stronger reasons as to why the legitimate expectation should not be substantively protected than the reason as to why it should be protected. If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or arbitrary, discriminatory unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is “not the key which unlocks the treasury of natural justice and it ought not to unlock the gate which shuts, the court out of review on the merits”, particularly when the element of speculation and uncertainty is inherent in that very concept. The courts should restrain themselves and restrict such claims duly to the legal limitations.

Further in **Food Corporation of India v. M/s. Kamdhenu Cattle Seed Industries** AIR 1993 SC 1601. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and this extent.

The Court observed:

“The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process.”

In **Lala Sachinder Kumar v. Patna Regional Development Authority**, (AIR 1994 PATNA 128) the court again applied the doctrine of legitimate expectation and held the order of allotment of residential plots issued by the Patna

Regional Development Authority as bad. In the instant case Regional Development Authority issued an advertisement inviting applications for the allotment of residential plots. In this process preference was given to the employees of the Patna Regional Development Authority without considering the case of applicant petitioner, whereas Rules did not provide for any such preferential allotment. The court held that allotment in favour of employees is arbitrary. The applicant petitioner has legitimate expectations to be considered for allotment.

ADMINISTRATIVE ADJUDICATION AND ADMINISTRATIVE TRIBUNALS

There are a large number of laws which charge the Executive with adjudicatory functions, and the authorities so charged are, in the strict scene, administrative tribunals. Administrative tribunals are agencies created by specific enactments. Administrative adjudication is term synonymously used with administrative decision-making. The decision-making or adjudicatory function is exercised in a variety of ways. However, the most popular mode of adjudication is through tribunals.

The main characteristics of Administrative Tribunals are as follows:

- ☐ Administrative Tribunals is the creation of a statute.
- ☐ An Administrative Tribunals is vested in the judicial power of the State and thereby performance quasi-judicial functions as distinguished form pure administrative functions.
- ☐ Administrative Tribunals is bound to act judicially and follow the principles of natural justice.
- ☐ It has some of the trapping of a court and are required to act openly, fairly and impartially.
- ☐ An administrative Tribunal is not bound by the strict rules of procedure and evidence prescribed by the civil procedure court.

Let us now study the evolution of the Administrative Tribunals with special reference to Central Administrative Tribunal, State and Joint Administrative Tribunals, their jurisdiction, powers and authority. The composition of the Tribunal and its functioning will also be dealt with.

ADMINISTRATIVE TRIBUNALS – EVOLUTION

The growth of Administrative Tribunals both in developed and developing countries has been a significant phenomenon of the twentieth century. In India also, innumerable Tribunals have been set up from time to time both at the center and the states, covering various areas of activities like trade, industry, banking, taxation etc. The question of establishment of Administrative Tribunals to provide speedy and inexpensive relief to the government employees relating to grievances on recruitment and other conditions of service had been under the consideration of Government of India for a long time. Due to their heavy preoccupation, long pending and backlog of cases, costs involved and time factors, Judicial Courts could not offer the much-needed remedy to the government servants, in their disputes with the government. The dissatisfaction among the employees, irrespective of the class, category or group to which they belong, is the direct result of delay in their long pending cases or cases not attended properly. Hence, a need arose to set up an institution, which would, help in dispensing prompt relief to harassed employees who perceive a sense of injustice and lack of fair play in dealing with their service grievances. This would motivate the employees better and raise their morale, which in turn would increase their productivity.

The Administrative Reforms Commission (1966-70) recommended the setting up of Civil Service Tribunals to function as the final appellate authority, in respect of government orders inflicting major penalties of dismissal, removal from service and reduction in rank. As early as 1969, a Committee under the chairmanship of J.C. Shah had recommended that having regard to the very number of pending writ petitions of the employees in regard to the service matters, an independent Tribunal should be set up to exclusively deal with the service matters.

The Supreme Court in 1980, while disposing of a batch of writ petitions observed that the public servants ought not to be driven to or forced to dissipate their time and energy in the courtroom battles. The Civil Service Tribunals should be constituted which should be the final arbiter in resolving the controversies relating to conditions of service. The government also suggested that public servants might approach fact-finding Administrative Tribunals in the first instance in the interest of successful administration.

The matter came up for discussion in other forums also and a consensus emerged that setting up of Civil Service Tribunals would be desirable and necessary, in public interest, to adjudicate the complaints and grievances of the government employees. The Constitution (through 42nd amendment Article 323-A).

This Act empowered the Parliament to provide for adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and constitutions of service of persons appointed to public service and posts in connection with the affairs of the union or of any state or local or other authority within the territory of India or under the control of the government or any corporation owned or controlled by the government.

In pursuance of the provisions of Article 323-A of the Constitution, the Administrative Tribunals Bill was introduced in Lok Sabha on 29th January 1985 and received the assent of the President of India on 27th February 1985.

STRUCTURE OF THE TRIBUNALS

The Administrative Tribunals Act 1985 provides for the establishment of one Central Administrative Tribunal and a State Administrative Tribunal for each State like Haryana Administrative Tribunal etc; and Joint Administrative Tribunal for two or more states. The Central Administrative Tribunal with its principal bench at Delhi and other benches at Allahabad, Bombay, Calcutta and Madras was established on 1st November 1985. The Act vested the Central Administrative Tribunal with jurisdiction, powers and authority of the adjudication of disputes and complaints with respect to recruitment and service matters pertaining to the members of the all India Services and also any other civil service of the Union or holding a civil post under the Union or a post connected with defense or in the defense services being a post filled by a civilian. Six more benches of the Tribunal were set up by June, 1986 at Ahmedabad, Hyderabad, Jodhpur, Patna, Cuttack, and Jabalpur. The fifteenth bench was set up in 1988 at Ernakulam.

The Act provides for setting up of State Administrative Tribunals to decide the services cases of state government employees. There is a provision for setting up of Joint Administrative Tribunal for two or more states. On receipt of specific requests from the Government of Orissa, Himachal Pradesh, Karnataka, Madhya Pradesh and Tamil Nadu, Administrative Tribunals have been set up, to look into the service matters of concerned state government employees. A joint Tribunal is also to be set up for the state of Arunachal Pradesh to function jointly with Guwahati bench of the Central Administrative Tribunal.

COMPOSITION OF THE TRIBUNALS

Each Tribunal shall consist of Chairman, such number of Vice-Chairman and judicial and administrative members as the appropriate Government (either the Central Government or any particular State Government singly or jointly) may deem fit (vide Sec. 5(1) Act No. 13 of 1985). A bench shall consist of one judicial member and one administrative member. The bench at New Delhi was designated the Principal Bench of the Central Administrative Tribunal and for the State Administrative Tribunals. The places where their principal and other benches would sit specified by the State Government by Notification (vide Section 5(7) and 5(8) of the Act).

QUALIFICATION FOR APPOINTMENT

In order to be appointed as Chairman or Vice-Chairman, one has to be qualified to be (is or has been) a judge of a High Court or has held the post of secretary to the Government of India for at least two years or an equivalent-pay-post either under the Central or State Government (vide Sec. 6(i) and (ii) Act No. 13 of 1985).

To be a judicial member, one has to be qualified for appointment as an administrative member, one should have held at least for two years the post of Additional Secretary to the Government of India or an equivalent pay-post under Central or State Government or has held for at least three years a post of Joint Secretary to the Govt. Of India or equivalent post under Central or State Government and must possess adequate administrative experience.

APPOINTMENTS

The Chairman, Vice-Chairman and every other members of a Central Administrative Tribunal shall be appointed by the President and, in the case of State or joint Administrative Tribunal(s) by the President after consultation with the Governor(s) of the concerned State(s), (vide Section 6(4), (5) and (6), Act No. 13 of 1985).

But no appointment can be made of a Chairman, vice-chairman or a judicial member except after consultation with the Chief Justice of India.

If there is a vacancy in the office of the Chairman by reason of his resignation, death or otherwise, or when he is unable to discharge his duties / functions owing to absence, illness or by any other cause, the Vice-Chairman shall act and discharge the functions of the Chairman, until the Chairman enters upon his office or resumes his duties.

TERMS OF OFFICE

The Chairman, Vice-Chairman or other member shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of

- a) Sixty five, in the case of Chairman or vice-Chairman,
- b) Sixty-two, in the case of any other member, whichever is earlier.

RESIGNATION OR REMOVAL

The Chairman, Vice-Chairman or any other member of the Administrative Tribunal may, by notice in writing under his hand addressed to the President, resign, his office; but will continue to hold office until the expiry of three months from the date of receipt of notice or expiry of his terms of office or the date of joining by his successor, whichever is the earliest.

They cannot be removed from office except by an order made by the President on the ground of proven misbehavior or incapacity after an inquiry has been made by a judge of the Supreme Court; after giving them a reasonable opportunity of being heard in respect of those charges (vide Sec. 9(2). Act No. 13 of 1985).

ELIGIBILITY FOR FURTHER EMPLOYMENT

The Chairman of the Central Administrative Tribunal shall be ineligible for further employment under either Central or State government, but Vice-Chairman of the Central Tribunal will be eligible to be the Chairman of that or any other State Tribunal or Vice-Chairman of any State or Joint Tribunal(s).

The Chairman of a State or Joint Tribunal(s) will, however, be eligible for appointment as Chairman of any other State or Joint Tribunals. The Vice-Chairman of the State or Joint Tribunal can be the Chairman of the State Tribunal or Chairman, Vice-Chairman of the Central Tribunal or any other State or Joint Tribunal. A member of any Tribunal shall be eligible for appointment as the Chairman or Vice-

Chairman of such Tribunal or Chairman, Vice-Chairman or other member of any other Tribunal.

Other than the appointments mentioned above the Vice-Chairman or member of a Central or State Tribunal, and also the Chairman of a State Tribunal, cannot be made eligible for any other employment either under the Government of India or under the Government of a State.

JURISDICTION, POWERS AND AUTHORITY

Chapter III of the Administrative Tribunal Act deals with the jurisdiction, powers and authority of the tribunals. Section 14(1) of the Act vests the Central Administrative Tribunal to exercise all the jurisdiction, powers and authority exercisable by all the courts except the Supreme Court of India under Article 136 of the Constitution.

One of the main features of the Indian Constitution is judicial review. There is a hierarchy of courts for the enforcement of legal and constitutional rights. One can appeal against the decision of one court to another, like from District Court to the High Court and then finally to the Supreme Court, But there is no such hierarchy of Administrative Tribunals and regarding adjudication of service matters, one would have a remedy only before one of the Tribunals. This is in contrast to the French system of administrative courts, where there is a hierarchy of administrative courts and one can appeal from one administrative court to another. But in India, with regard to decisions of the Tribunals, one cannot appeal to an Appellate Tribunal. Though Supreme Court under Article 136 has jurisdiction over the decisions of the Tribunals, as a matter of right, no person can appeal to the Supreme Court. It is discretionary with the Supreme Court to grant or not to grant special leave to appeal.

The Administrative Tribunals have the authority to issue writs. In disposing of the cases, the Tribunal observes the canons, principles and norms of 'natural justice'. The Act provides that "a Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure 1908, but shall be guided by the principles of natural justice. The Tribunal shall have power to regulate its own procedure including the fixing of the place and times of its enquiry and deciding whether to sit in public or private".

A Tribunal has the same jurisdiction, powers and authority, as those exercised by the High Court, in respect of "Contempt of itself" that is, punish for contempt, and for the purpose, the provisions of the Contempt of Courts Act 1971 have been made applicable. This helps the Tribunals in ensuring that they are taken seriously and their orders are not ignored.

PROCEDURE FOR APPLICATION TO THE TRIBUNALS

Chapter IV of the Administrative Tribunals Act prescribes for application to the Tribunal. A person aggrieved by any order pertaining to any matter within the jurisdiction of the Tribunal may make an application to it for redressal of grievance. Such applications should be in the prescribed form and have to be accompanied by relevant documents and evidence and by such fee as may be prescribed by the Central Government but not exceeding one hundred rupees for filing the application. The Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant has availed of all remedies available to him under the relevant service rules. This includes the making of any administrative appeal or representation. Since consideration of such appeals and representations involve delay, the applicant can make an application before the Tribunal, if a period of six months has expired after

the representation was made no order has been made. But an application to the Tribunal has to be made within one year from the date of final order or rejection of the application or appeal or where no final order of rejection has been made, within one year from the date of expiry of six months period. The Tribunal may, however admit any application even after one year, if the applicant can satisfy the Tribunal that he/she had sufficient cause for not making the application within the normal stipulated time.

Every application is decided by the Tribunal or examination of documents, written representation and at times depending on the case, on hearing of oral arguments. The applicant may either appear in person or through a legal practitioner who will present the case before the Tribunal. The orders of the Tribunal are binding on both the parties and should be complied within the time prescribed in the order or within six months of the receipt of the order where no time limit has been indicated in the order. The parties can approach the Supreme Court against the orders of the Tribunal by way of appeal under Article 136 of the Constitution.

The Administrative Tribunals are not bound by the procedure laid down in the code of Civil Procedure 1908. They are guided by the principles of natural justice. Since these principles are flexible, adjustable according to the situation, they help the Tribunals in molding their procedure keeping in view the circumstances of a situation.

ADVANTAGES OF THE TRIBUNAL:

- ☐ **Appropriate and effective justice.**
- ☐ **Flexibility**
- ☐ **Speedy**
- ☐ **Less expensive**

Limitations of the Tribunals:

- ☐ **The tribunal consists of members and heads that may not possess any background of law.**
- ☐ **Tribunals do not rely on uniform precedence and hence may lead to arbitrary and inconsistent decision.**

Natural Justice

Meaning and Development

The concept of natural justice is the backbone of law and justice. In the quest for justice the principles of natural justice have been utilized since the dawn of civilization. Principles of natural justice trace their ancestry to ancient civilization and centuries long past. Initially natural justice was conceived as a concomitant of universal natural law. Judges have

used natural justice as to imply the existence of moral principles of self evident and unarguable truth. To justify the adoption, or continued existence, of a rule of law on the ground of its conformity to natural justice in this sense conceals the extent to which a judge is making a subjective moral judgment and suggests on the contrary, an objective inevitability.

Natural Justice used in this way is another name for natural law although devoid of at least some of the theological and philosophical overtones and implications of that concept. This essential similarity is clearly demonstrated by Lord Esher M.R's definition of natural justice as, "the natural sense of what right and wrong." ¹ (Voinet v Barrett, (1885) 55, L.J. Q. B, 39, 41).

Most of the thinkers of fifteenth to eighteenth century considered natural law and justice as consisting of universal rules based on reason and thus were immutable and inviolable. The history of natural law is a tale of the search of mankind for absolute justice and its failure. Again and again in the course of the last 2500 years the idea of natural law has appeared in some form or the other, as an expression for the search for an ideal higher than positive law.

(W.G. Friedman, Legal Theory 95. 5th ed. 1967).

Greek thinkers laid the basis for natural law. The Greek philosophers traditionally regarded law as closely to both justice and ethics.

Roman society was highly developed commercial society and Natural law played a creative and constructive role, thereby *jus civil*, was adopted to meet new demands.

Similarly in the middle Ages, the Christian legal philosophy, considered natural law founded on reasons and a reflection of eternal laws. In the seventeenth and eighteenth century, the authority of church was challenged and natural law was based on reason and not divine force.

The use of natural law ideas in the development of English law revolves around two problems: the idea of the supremacy of law, and, in particular, the struggle between common law judges and parliament for legislative supremacy on one hand, and the introduction of equitable considerations of "Justice between man and man" on the other. The first ended in a clear victory for parliamentary supremacy and the defeat of higher law ideas; the latter, after a long period of comparative stagnation, is again a factor of considerable influence in the development of the law.

A number of cases are evidenced with the beginning of seventeenth century wherein a statute was declared void and not binding for not being in conformity with the principles of Natural Justice.

The concept of natural justice can be traced from Biblical Garden of Eden, as also from Greek, Roman and other ancient cultures like Hindu. The Vedic Indians too were familiar with the natural theory of law. The practice of confining the expression natural justice to the procedural principles (that no

one shall be judge in his own case and both sides must heard) is of comparatively recent origin and it was always present in one way or the other form. The expression was used in the past interchangeably with the expressions Natural Law, Natural enquiry, the laws of God, Sampan jus and other similar expressions. (H.H. Marshall, Natural Justice 5 (1959) London)

Thus, the widespread recognition, in many civilizations and over centuries the principle of natural justice belong rather to the common consciousness of the mankind than to juridical science.

CONCEPTUAL FORMULATION

A comprehensive definition of natural justice is yet to be evolved. However, it is possible to enumerate with some certainty the main principles constituting natural justice in modern times. English and Indian courts have frequently resorted to such alternatives to natural justice as “fair play in action”, (Ridge V. Baldwin, (1963) 2 all E.R. 66; Wisemen V. Borneman (1969), 3 all E.R. 215; Mohinder Singh Gill V. Chief Election Commissioner, A. I. R 1978 S.C. 851.) **Common fairness**, (R.V. Secretary of State for the Home Department, exp. Hose ball, (1977) 1 W.L..R 766, 784). or **the fundamental principles of a fair trail.**(Tameshwar V The Queen, (1957) A. C. 476-486; Maneka Gandhi V Union of India A. I. R 1978 S.C 597).

In Spackman’s case, (Spackman V. Plumstead District Board of Works, (1885) 10 App case 229, 240). Earl of Selborne, L.C observed that no doubt in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not the judge in the proper sense of the word but he must give the parties an opportunity of being heard before him and stating their case and their view. There would be no decision within the meaning of the statute, if there were anything of that sort done contrary to essence of justice.

Emphasizing for observance of natural justice again is Lesson’s case, (Lesson V. General Council of Medical Education (1889) US Ch. D 366, 383. Brown C.J using the term ‘natural justice’ stressed that the statute imparts that substantial element of natural justice must be found to have been present at the enquiry. The accused person must have notice of what he is accused and must be given an opportunity of being heard.

The courts took these procedural safeguards in the past among different words. Conveying meaning i.e. the eternal justice or natural justice. The list of the words is long which were as :

**Substantial justice;
The essence of justice;
Fundamental justice;
Universal justice and
Rational justice etc.**

So the term natural justice has very impressive ancestry and has been retained all over the world with some modifications. The very basic thing, which emerges from it, is. **Fairness in the administration of justice**, more than any other legal principle is not susceptible to concise definition. It has a different meaning in different countries. History and tradition shape and distort it. To judge these divergent procedures according to a common standard of fairness is therefore no easy matter. What fair means will surely irritate governments and plague jurists. Fair hearing, some say it constitutes as fifth freedom supplementing freedom of speech and religion, freedom from want and fear. Robert Jackson, J., reminds us that procedural fairness and regularity are of indispensable essence of liberty.

The concept of natural justice is not fixed one but has been changing from time, keeping its spirit against tyranny and injustice. Despite the many appellations applied to it and the various meanings attributed to it, through the ages, one thing remains constant. It is by its very nature a barrier against dictatorial power and therefore has been and still is an attribute of an civilized community that aspires to preserve democratic freedom. (Rene Dussault, "Judicial Review of Administrative Action in Quebec," Can Bar Rev. 79 (1967). The concept of natural justice is flexible and has been interpreted in many ways to serve the ends of justice.

Thus the doctrine of natural justice is the result of a natural evolution. So let us try to find out what does natural justice mean?

☐ **Natural Justice is rooted in the natural sense of what is right and wrong. It mandates the Adjudicator or the administrator, as the case may be, to observe procedural fairness and propriety in holding/conducting trial, inquiry or investigation or other types of proceedings or process.**

☐ **The object of Natural Justice is to secure Justice by ensuring procedural fairness. To put it negatively, it is to prevent miscarriage of Justice.**

☐

☐ The term "Natural Justice" may be equated with "procedural fairness" or "fair play in action".

☐ It is concerned with procedure and it seeks to ensure that the procedure is just, fair and reasonable.

☐ It may be regarded as counterpart of the American "Due Process".

Co-relationship between Law and Natural Justice.

- (a) Law is the means, Justice is the end. Law may be substantive as well as procedural.
- (b) Natural Justice also aims at Justice. It, however, concerns itself only with the procedure. It seeks to secure justice by ensuring procedural fairness. It creates conditions for doing justice.
- (c) Natural justice humanizes the Law and invests the Law with fairness.
- (d) Natural Justice supplements the Law but can supplant the Law.
- (e) Natural Justice operates in areas not specifically covered by the enacted law. An omission in statute, likely to deprive a procedure of fairness, may be supplied by reading into the relevant provision the appropriate principle of Natural Justice.

Applicability of the principles of Natural Justice

To

Judicial, quasi-judicial and administrative proceedings.

The natural justice principles in India are transmigration of common law to the sub-continent during the British rule. Before the commencement of constitution the courts in India insisted on fair hearing where punishments were awarded under the statutory provisions and they demanded fair hearing, even in statutory requirements. But the decision of the Privy Council in the *Shanker Sarup's* (28 1.A 203 P.C) case, held an order of distribution under Section 295 CPC to be in the nature of administrative Act, though right of the individual was affected. Similar other cases dealing with the orders of the administrative officer were held administrative in character. Such decisions subjected the working of the common law principle of hearing and this tendency continued to shape the Indian law. The principle established in the above cases clearly shows that the principles of natural justice were confined to judicial proceedings.

So Indian courts clung to the traditional distinction between judicial, quasi-judicial and administrative functions. The application of natural justice was for considerable time confined to the judicial and quasi-judicial proceedings. The meaning and connotations of term quasi-judicial has engaged judicial attention repeatedly to determine questions affecting the rights of subjects and having the duty to act judicially is said to be exercising a quasi-judicial functions.

The decision of the House of Lords in *Ridge's* case and subsequent cases has influenced most of the development of law in this respect in India. The influence of *Ridge's* case judgment has been of considerable and valuable importance "in deciding the scope of the application of principles of natural justice."

In state of Bina Pani's case (AIR 1967 S.C. 1259) the Supreme Court has tried to abandon the traditional view of first holding an act judicial and then to observe the principles of natural justice and stated:

“ It is true that the order is administrative in Character but even an administrative order must be made consistently with the rules of natural justice.”

The dichotomy between administrative and quasi-judicial proceedings vis-à-vis the doctrine of natural justice was finally discarded as unsound by the court in Re-H (K) (infant) and Schmidt cases in England. This development in the law had its parallel in India in the form of Associated Cement Companies Ltd.'s case, where in the Supreme Court with approval referred to the decision in Ridge's case and latter in the Bina Pani's case.

The decision of Supreme Court in A.K.Kripak's case (AIR 1973 S.C. 150) is landmark in the application of principles of natural justice. In the instant case court held:

“ the dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated.”

The observations of Hegde,J are remarkable. The learned judge after examining various English and Indian cases has tried to remove all the clouds of doubt relating to application of natural justice. To his Lordship, the concept of rule of law would loose its vitality if the instrumentalities of the state are not charged with the duty of discharging their functions in a fair and just manner.

In D.F.O South Kheri's case, (AIR 1973 S.C. 203) the court reiterated that law must now be taken to be settled, that even in administrative proceedings, which involve civil consequences, the doctrine of natural justice must be held to be applicable.

In order to put the controversy at rest Bhagwati,J. in Maneka's case emphasized that enquiries which were considered administrative at one time are now considered quasi-judicial in character. Arriving at a just decision is the aim of both administrative and quasi-judicial enquiries. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. From the above discussion, so hear the other side is a rule of fairness. Fairness is a component of rule of law, which pervades the constitution. The dispensation of natural justice by statute will render any decision without observance of natural justice as unjust and hence is not acceptable.

The Two Fundamental Principles of Natural Justice.

There are two fundamental principles of Natural Justice. They are:

(i)

Nemo Judex in Causa Sua:

(a) Rule against bias

(b) None should be a Judge in his own cause.

(ii)

Audi Alter am Par tem

(a) Hear the other side.

(b) Hear both sides.

(c) No person should be condemned unheard.

Doctrine of Bias

One of the essential elements of judicial process is that administrative authority acting in a quasi-judicial manner should be impartial, fair and free from bias. Rules of judicial conduct, since early times, have laid down that the deciding Officer should be free from any prejudices. Where a person, who discharges a quasi-judicial function, has, by his conduct, shown that he is interested, or appears to be interested, that will disentitle him from acting in that capacity.

In this connection the Supreme Court pointed out that one of the fundamental principles of natural justice is that in case of quasi-judicial proceedings, the authority, empowered to decide the dispute between opposing parties must be one without bias, by which is meant an operative prejudice, whether conscious or unconscious towards one side or the other in the dispute. (Wade, Administrative Law, Page 311, (1982) de Smith. Judicial Review of Administrative Action 151 (1980)).

No tribunal can be Judge in his own cause and any person, who sits in judgment over the rights of others, should be free from any kind of bias and must be able to bear an impartial and objective mind to the question in controversy.

Bias and Mala fide. In case of mala fide, Courts insist on proof of mala fide while as in case of bias, proof of actual bias is not necessary. What is necessary is that there was “real likelihood” of bias and the test is that of a reasonable man. “The reason underlying this rule”, according to prof. M.P. Jain, is that bias being a mental condition there are serious difficulties in the path of proving on a balance of probabilities that a person required to act judicially was in fact biased. Bias is the result of an attitude of mind leading to a predisposition towards an issue. Bias may arise unconsciously. It is not necessary to prove existence of bias in fact, what is necessary is to apply the test what will reasonable person think about the matter?

Further, justice should not only be done but seem to be done. Therefore, the existence of actual bias is irrelevant. What is relevant is the impression which a reasonable man has of the administration of justice.” (See M.P. Jain ‘Evolving Indian administrative Law’, p. 78.)

Rule of bias is only a principle of judicial conduct and is imposed strictly on the exercise of the judicial or quasi-judicial authorities. In the matters of sole discretion of the authority or in the matters depending upon the subjective satisfaction of the authority concerned, the Court will not issue any order on the ground of bias for quashing it. The search for mala fide intention and scrutinizing the honest intention of the administrative authorities have always been subject-matter of judicial review by the English Courts. (See Griffith and Street “Principles of Administrative Law”, p. 20.)

Bias and Prejudice. Of a slightly lesser type of evil is prejudice. It is nearer to bias and sometimes it is likely to be misunderstood for bias. Judicial pronouncements on this aspect have made the distinction clear. The compilation of the words and phrases, which have been judicially defined, made by the West Publishing Co., mentions; Bias and prejudice are not synonymous terms. Prejudice is defined by Webster as to prepossess unexamined opinion or opinions formed without due knowledge of the facts and circumstances attending to the question, to bias, the mind by hasty and incorrect notion, and to give it an unreasonable bent to one side or other of a cause. Bias is the leaning of the mind, inclination, prepossession, and propensity towards some persons or objects, not leaving the mind indifferent. Bias is a particular influential power, which sways the judgment, the inclination of mind towards a particular object and is not synonymous with prejudice. A man may not be prejudiced without being biased about another, but he may be biased without being prejudiced.

Thus bias is usually of three types:

- (1) **Pecuniary bias;**
- (2) **Personal bias; and**
- (3) **Bias as to subject matters.**

(1) **Pecuniary Bias.** A series of consistent decisions in English Courts have laid down the rule that the pecuniary interest, howsoever small, will invalidate the proceedings. So great enthusiasm was there in the minds of the English Judges against the pecuniary interest that very small amount and negligible quantity of interest were considered to be a valid ground, for reversing the judgment of Lord Chancellor Cottenham by the Appellate Court in Dimes case.(1852, 3 HLR 759) In this case the appellant was engaged in prolonged litigations against the respondent company. Against a decree passed by the V. C. Dimes he appealed before the Lord Chancellor, who gave the decision against him. It later came to the knowledge of the appellant that Lord Chancellor had a share in the respondent company. In appeal, their Lordships of House of Lords held that through Lord Chancellor forgot to mention about the interest in the company by mere inadvertence, yet the interest was sufficient to invalidate the decision given by the Lord Chancellor.

Indian Courts also invariably followed the decision in Dimes' case. The Privy Council made a reference to this famous case in the case of Vassiliadas.(AIR 1945 SC 38) .Thus a pecuniary interest, howsoever insufficient, will disqualify a person from acting as a Judge.

(2) **Personal Bias.** Personal bias has always been matter of judicial interpretation. It can be claimed that no other type of bias came for judicial scrutiny as much as this type At least for a full century. With the growing interdependability of human relations, cases of personal bias favouring one or the other party, have grown tremendously. Personal bias can be of two types viz.

(a) Where the presiding officer has formed the opinion without finally completing the proceeding.

(b) Where he is interested in one of the parties either directly as a party or indirectly as being related to one of the parties. In fact, there are number of situations which may create a personal bias in the Judge's mind against one party in dispute before him. He may be friend of the party, or hostility against one of the parties to a case. All these situations create bias either in favour of or against the party and will operate as a disqualification for a person to act as a Judge.

The leading case on the point is Mineral Development Ltd. V. State of Bihar,(AIR 1960 SC 468) in this case, the petitioner company was owned by Raja Kamkshya Narain Singh, who was a lessee for 99 years of 3026 villagers, situated in Bihar, for purposes of exploiting mica from them. The Minister of Revenue acting under Bihar Mica Act cancelled his license. The owner of the company raja Kamalkshya Narain singh, had opposed the Minister in general election of 1952 and the Minister had filed a criminal case under section 500, Indian Penal Code, against him and the case was transferred to a Magistrate in Delhi. The act of cancellation by the Minister was held to be a quasi- judicial act. Since the personal rivalry between the owner of the petitioner's company and the minister concerned was established, the cancellation order became vitiated in law.

The other case on the point is Manek Lal v. Prem Chand (AIR 1957 S.C. 425) Here the respondent had filed a complaint of professional misconduct against Manek Lal who was an advocate of Rajasthan High Court. The chief Justice of the High Court appointed bar council tribunal to enquire into the alleged misconduct of the petitioner. The tribunal consisted of the Chairman who had earlier represented the respondent in a case. He was a senior advocate and was once the advocate-General of the State. The Supreme Court held the view that even though Chairman had no personal contact with his client and did not remember that he had appeared on his behalf in certain proceedings, and there was no real likelihood of bias, yet he was disqualified to conduct the inquiry. He was disqualified on the ground that justice not only be done but must appear to be done to the litigating public. Actual proof of prejudice was not necessary; reasonable ground for assuming the

possibility of bias is sufficient. A Judge should be able to act judicially, objectively and without any bias. In such cases what the court should see is not whether bias has in fact affected the judgment, but whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal.

(3) Bias as to the Subject-matter. A judge may have a bias in the subject matter, which means that he is himself a party, or has some direct connection with the litigation, so as to, constitute a legal interest. "A legal interest means that the Judge is in such a position that bias must be assumed." The smallest legal interest will disqualify the Judge.

Thus for example, members of a legal or other body, who had taken part in promulgating an order or regulation cannot afterwards sit for adjudication of a matter arising out of such order because they become disqualified on the ground of bias. Subject to statutory exceptions persons who once decided a question should not take part in reviewing their own decision on appeal.

To disqualify on the ground of bias there must be intimate and direct connection between adjudicator and the issues in dispute

To vitiate the decision on the ground of bias as for the subject matter there must be real likelihood of bias such bias has been classified by Jain and Jain into four categories:-

- (a) Partiality of connection with the issues;
- (b) Departmental or official bias;
- (c) Prior utterances and pre-judgement of Issues.
- (d) Acting under dictation.

II Audi Alter am Par tem

(Hear the other side)

Rule of Fair Hearing

Meaning, Object and Ambit

The second principle of natural justice is audi alteram partem (hear the other side) i.e. no one should be condemned unheard. It requires that both sides should be heard before passing the order. This rule insists that before passing the order against any person the reasonable opportunity must be given to him. This rule implies that a person against whom an order to his prejudice is passed should be given information as to the charges against him and should be given opportunity to submit his explanation thereto. 4 (See also National Central Cooperative Bank v. Ajay Kumar, A.I.R. 1994 S.C. 39).

Ingredients of fair hearing

Hearing' involves a number of stages. Such stages or ingredients of fair hearing are as follows:-

1. Notice: Hearing starts with the notice by the authority concerned to the affected person. Consequently, notice may be taken as the starting point of hearing. Unless a person knows the case against him, he cannot defend himself. Therefore, before the proceedings start, the authority concerned is required to give to the affected person the notice of the case against him. The proceedings started without giving notice to the affected party, would violate the principles of natural justice. The notice is required to be served on the concerned person properly.

However, the omission to serve notice would not be fatal if the notice has not been served on the concerned person on account of his own, fault. For example, in a case some students were guilty of gross violence against other students. The notice could not be served on them because they had absconded. The action of the authority was held to be valid as the notice could not be served on the students on account of their own fault.

The notice must give sufficient time to the person concerned to prepare his case. Whether the person concerned has been allowed sufficient time or not depends upon the facts of each case. The notice must be adequate and reasonable.

The notice is required to be clear and unambiguous. If it is ambiguous or vague, it will not be treated as reasonable or proper notice. If the notice does not specify the action proposed to be taken, it is taken as vague and therefore, not proper.

2. Hearing: An important concept in Administrative law is that of natural justice or right to fair hearing. A very significant question of modern Administrative law is, where can a right to hearing be claimed by a person against whom administrative action is prepared to be taken?

We know that right to hearing becomes an important safeguard against any abuse, or arbitrary or wrong use, of its powers by the administration in several ways. A large volume of present day case law revalues around the theme, wherein courts are called upon to decide whether or not, in a particular situation, failure on the part of the administration to give as hearing is fatal to the action taken. There is no readymade formula to judge this question and every case is to be considered on its own merits.

The right to hearing can be claimed by the individual affected by the administrative action from 3 sources.

Firstly, the requirement of hearing may be spelt out of certain fundamental rights granted by constitution.

Secondly, the statute under which an administrative action is being taken may itself expressly impose the requirements of hearing. Thus Art. 311 of constitution lays down that no civil servant shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action.

According to the prevalent principles of judicial review of administrative action, courts have far greater control over administrative action involving a hearing (or “fair hearing” to be sure) than they have otherwise. Thus, a more effective control-mechanism comes into force.

Thirdly it has been reiterated over and over again that a quasi-judicial body must follow principles of natural justice. But this gives rise to another intricate question: what is quasi-judicial? Answer to this question is not easy as no “ quasi-judicial” from “ administrative”. A general test sometimes adopted for the purpose is that “ any person or body having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially” acts in a quasi -judicial manner. But it is not clearly defined as to what is meant by “acting judicially.” This proposition is vague in the extreme; it is even a tautology to say that the function is quasi- judicial if it is to be done judicially. How is one to ascertain whether an authority is required to act judicially or not? The statutes, it becomes a matter of implication or inference fro the courts to decide, after reading a statute, whether the concerned authority acting under it is to act judicially. In the absence of any such explicit indication in a statute, it becomes a matter of implication or inference for the courts to decide, after reading a statute, whether the concerned authority is to act judicially or not. The courts make the necessary inference from “the cumulative effect of the courts make the necessary inference from “the cumulative effect of the nature of the right affected, the manner of the disposal provided, the objective criteria to be adopted, the phraseology use, the nature of the power conferred, of the duty imposed on the authority and the other indication afforded by the statute. “This prime facie is too broad a generalization, which is hardly adequate or articulate to predicate the nature of a function or a body with any certainty. The personality of a judge could make a substantial difference in the end-result, for one judge may be more inclined to lean towards a quasi-judicial approach by the administration in a particular context than another judge.

The extension of the right of hearing to the person affected by administrative process has been consummated by extension of the scope of quasi-judicial and natural justice as well as by discarding the distinction between “quasi-judicial’ and ‘administrative’ and invoking the concept of fairness in administrative action. Hearing has thus become the

norm, rather than an exception, in administrative process at the present-day.

Requirements of fair hearing: A hearing will be treated as fair hearing if the following conditions are fulfilled:-

1. Adjudicating authority receives all the relevant material produced by the individual

A hearing to be treated a fair hearing the adjudicating authority should provide the person-affected opportunity to produce all the relevant materials, which he wishes to produce. If the adjudicating authority does not allow the person affected to produce material evidence, the refusal will be violative of the rule of fair hearing. If the adjudicating authority refuses to hear a person who does not appear at the first hearing but appears subsequently during the course of hearing. It would be against the principle of natural justice.

2. The adjudicating authority discloses the individual concerned evidence or material which it wishes to use against him.

It is the general principle that all the evidence which the authority wishes to use against the party, should be placed before the party for his comment and rebuttal. If the evidence is used without disclosing it to the affected party, it will be against the rule of fair hearing.

The extent and context and content of the information to be disclosed depend upon the facts of each case.

Ordinarily the evidence is required to be taken in the presence of the party concerned. However, in some situations this rule is relaxed. For example, where it is found that it would be embarrassing to the witness to testify in the presence of the party concerned, the evidence of the witness may be taken in the absence of the party.

3. The adjudicating authority provides the person concerned an opportunity to rebut the evidence or material which the said authority issues to use against him

The hearing to be fair the adjudicating authority is not required only to disclose the person concerned the evidence or material to be taken against him but also to provide an opportunity to rebut the evidence or material.

Cross-examination: The important question is, does it include right of cross-examination of witnesses? Whether it includes the right to cross-examination or not depends upon the provisions of the statute under which the hearing is being held and the facts and circumstances of the

each case. Where domestic enquiry is made by the employees, right of cross examination is regarded as an essential part of the natural justice. In the case disciplinary proceedings initiated by the Government against the civil servants, the right to cross examination is not taken orally and enquiry is only a fact finding one.

Hira Nath Mishra v. Rajendra Medical College, (A.I. R 1973 S.C. 1260)

in this case some male students were charged of some indecent behaviour towards some girl students. The accused male students were not allowed to cross-examine the girl students. The refusal allow the accused male students to cross examine the girl students was upheld and was not treated as violation of natural justice because allowing them the right of cross examination would have been embarrassing for the girl students. The refusal was necessary for protecting the girl students from any harassment later on.

Sometimes the identity of the witness is required to be kept confidential because the disclosure thereto may be dangerous to their person or property. In a case the externment order was served on a person by the Deputy Commissioner under the Bombay Police act. The said person was not allowed to cross-examine the witnesses. The refusal was not taken as violation of the natural justice because the witnesses would not like to give evidence openly against the persons of bad characters due to fear of violence to their person or property.

Similarly in another case the business premises of a persons where searched and certain watched were confiscated by the authority under Sea Customs Act. The said person was not allowed to cross-examine the persons who gave information to the authority. There was no violation of the natural justice. The court held that the principles of natural justice do not require the authority to allow the person concerned the right to cross-examine the witnesses in the matters of seizure of goods under the Sea Customs Act. If the person concerned is allowed the right to cross-examine, it is not necessary to follow the procedure laid down in the Indian Evidence Act.

Legal Representation: An important question is whether right to be heard includes right to legal representation? Ordinarily the representation through a lawyer in the administrative adjudication is not considered as an indispensable part of the fair hearing. However, in certain situations denial of the right to legal representation amounts to violation of natural justice. Thus where the case involves a question of law or matter which is complicated and technical or where the person is illiterate or expert evidence is on record or the prosecution is conducted by legally trained persons, the denial of legal representation will amount to violation of natural justice because in such conditions the party may not be able to meet the case effectively and therefore he must be given some protect ional assistance to make his right to be heard meaningful.

Institutional Decision

(One who decides must hear)

In ordinary judicial proceedings, the person who hears must decide. In the judicial proceedings, thus the decision is the decision of the specific authority. But in many of the administrative proceedings the decision is not of one man or one authority i.e. it is not the personal decision of any designated officer individually. It is treated as the decision of the concerned department. Such decision is called institutional decisions. In such decision often one person hears and another person decides. In such decision there may be division in the decision making process as one person may hear and another person may decide.

In *Gullapalli Nageswara Rao v. A. P. State Road Transport Corporation* the Supreme Court the hearing by one person and decision by another person has been held to be against the rule of fair hearing.

But the actually the Administrative practice continues to permit the hearing by one person and decision by another.

Post Decisional Hearing

Post decisional hearing may be taken to mean hearing after the decision sometimes public interest demands immediate action and it is not found practicable to afford hearing before the decision or order. In such situation the Supreme Court insists on the hearing after the decision or order. In short, in situations where prior hearing is dispensed with on the ground of public interest or expediency or emergency the Supreme Court insists on the post decisional hearing.

In *Charan Lal Sadu V. Union of India* the Supreme Court has held that where a statute does not in terms exclude the rule of predecisional hearing but contemplates a post decisional hearing amounting to a full review of the original order on merits it would be construed as excluding the rule of *audi alteram partem* at the pre-decisional stage. If the statute is silent with regard o the giving of a pre-decisional hearing, then the administrative action after the post decisional hearing will be valid.

The opinion of Chief Justice P. N. Bhagwati with regard to the post decisional hearing is notable. In his foreword to Dr. I. P. Massey's book *Administrative Law*, he has stated that the Supreme Court's decisions in *Mohinder Singh Gill V. E. C.* (A.I.R. 1978 S.C. 851) and *Maneka Gandhi V. Union of India* (A.I.R. 1978 S.C. 597) have been misunderstood. It is clear that if prior hearing is required to be given as part of the rule of natural

justice, failure to give it would indubitably invalidate the exercise of power and it cannot be read into the statute because to do so would be to defeat the object and purpose of the exercise of the power, that past decisional hearing is required to be given and if that is not done, the exercise of the power would be vitiated. (Management of M/S M.S. Nally Bharat Engineering Co. Ltd. v. State of Bihar 1990 S.C.C. 48)

In normal cases pre-decisional hearing is considered necessary, however in exceptional cases, the absence of the provision for predcisional hearing does not vitiate the action if there is a provision for post decisional hearing.

Reasoned decision (Speaking Order)

Meaning and Importance

Reasoned decision may be taken to mean a decision which contains reason in its support. When the adjudicators bodies give reasons in support of their decisions, the decisions are treated as reasoned decision. A decision, thus supported by reasons is called reasoned decision. It is also called speaking order. In such condition the order speaks for itself or it tells its own story.

The reasoned decision introduces fairness in the administrative powers. It excludes or at least minimizes arbitrariness.

- ☐ The right to reasons is an indispensable part of sound judicial review. The giving of reasons is one of the fundamental of good administration.
- ☐ It has been asserted that a part of the principle of natural justice is that a party is entitled to know the reason for the decision apart from the decision itself.
- ☐ In another words, a party is entitled to know the reason, for the decision, be it judicial or quasi-judicial. This requirement to give reasons, however, is an approach quite new to administrative law, as the prevailing law is that the quasi-judicial bodies need not give reasons in support of their decisions, although in some cases, the court did insist upon making ‘speaking orders’. But a change in the approach is being noticed since last few years and a growing emphasis is being laid on these bodies to give reasons for their decisions.
- ☐ The reasoned decision gives satisfaction to the person against whom the decision has been given. It will convince the person against whom the decision has been given that the decision is not arbitrary but genuine. It will enable the person against

whom the decision has been given to examine his right of appeal. If reasons are not stated, the affected party may not be able to exercise his right of appeal effectively.

Thus, the giving of reasons in support of the decision is now considered one of the fundamentals of good administration.

In *Sunil Batra v. Delhi administration*, the Supreme Court while interpreting section 56 of the prisons act, 1894, observed that there is an implied duty on the jail superintendent to give reasons for putting bar fetters on a prisoner to avoid invalidity of that provision under article 21 of the constitution. Thus the Supreme Court laid the foundation of a sound administrative process requiring the adjudicatory authorities to substantiate their order with reasons. The court has also shown a tendency to emphasize upon the fact that the administrative order should contain reasons when they decide matters affecting the right of parties.

Natural, Justice and Indian Constitution:

The principles of natural justice in the modern context describe certain rules of procedure. It supplies the omissions of formulated law. The principles of natural justice are implicit in Article 14 and 21.

The principles of natural justice have come to be recognized as being a part of the guarantee contained in Article 14 of the Constitution because of the new and dynamic interpretation given by the Supreme Court to the concept of equality, which is the subject matter of that Article. Violation of a rule of natural justice results in arbitrariness, which is the same as discrimination. Where discrimination is the result of State action, it is violation of Article 14. Therefore, a violation of principle of natural justice by a state action is a violation of Article 14. Article 14, however, is not the sole repository of the principles of natural justice. The principles of natural justice apply not only to legislation and State action but also where any tribunal, authority or body of men not coming within the definition of “State” in article 12, is charged with the duty of deciding a matter. In such a case, the principles of natural justice require that it must decide such matter fairly and impartially.

The constitution of India, while guaranteeing right to life and personal liberty in Article 21 in the same under “procedure established by law”, the expression procedure established by law was substituted by constituent Assembly for due process clause as embodied in American constitution Art. 21 of the constitution envisage.

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

Thus the first attempt to incorporate the American principle (which includes principles of natural justice) in the Indian constitution was failed. Later in the A.K. Gopalan's case, (AIR 1950 S.C 27) Supreme Court held that procedure established by law meant procedure prescribed by the statute. Obviously it implies that law enacted by the state need not be in conformity with the principles of natural justice. Law in Art. 21 meant statute law and nothing more. In case of a procedure prescribed by law it cannot be questioned on the ground that it violates principles of natural justice. There is no guarantee that it will not enact a law contrary to the principles of A learned author was prompted to observe that this position of Art.21of the Indian constitution was more of a statute justice land not natural justice.

The interpretation of Art. 21 given in the Gopalan case in fact placed the liberty of the citizen at the mercy of the party in power. Natural justice supplies the procedural omissions of a formulated law.

According to Jackson J.

“It might be preferable to live under Russian law applied by common law Procedures, rather than under the Common law enforced by Russian procedure.”

Gopalan's decision dominated the Indian scene for twenty eight years till the decision of Supreme Court in the celebrated case of **Monika Gandhi's** which revolution the application rules of natural justice in India. In the instant case, a writ petition was filed under Art. 32 challenging the impugned order interlaid amongst other grounds for being impugned for denial of opportunity of being heard prior the impoundment of passport. As per Maneka's rationale, a procedure could no more be a mere enacted or state prescribed procedure as laid down in Gopalan's but had to be fair, just and reasonable procedure. The most notable and innovative holding in Maneka was that the principle of reasonableness legally as well as philosophically is an essential element of equality or non-arbitrariness and pervades Art. 14 like a boarding omnipresence and the procedure contemplated by Art. 21 must stand the test of reasonableness in Art. 14.

Bhagwati J, for majority referring to audi alteram partem which mandates that no one shall be condemned unheard, remarked:

“Natural justice is a great humanizing principle intended to invest law with fairness and to secure justice and ever the year it has grown into a widely pervasive rule affecting large areas of administrative action. Thus the soul of natural justice is fair play in action and that is why it has received the widest recognition throughout the democratic world. In the United States, the right to

an administrative bearing is regarded as essential requirement of fundamental fairness and in England too it has been held that fair play in action demands that before any prejudicial or adverse action is taken against a person he must be given an opportunity to be heard.”

So the rules of natural justice were applicable to administrative proceedings positively. The learned judge emphasized that the Audi alteram rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice or to make the law lifeless, absurd, stultifying, self defeating or plainly contrary to the common sense of the situation.

Further Bhagwai observed that it must not be forgotten that natural justice is pragmatically flexible and is amenable to capsulation under the pressure of circumstances. The core of it must however remain namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine and not an empty public relations exercise. This rule should be sufficiently flexible to suit the exigencies of myriad kinds of situations, which may arise. The learned judge insisted for post decisional hearing in situations was urgency demands prompt action which cannot wait for a formal hearing because than world defeat the very purpose of a action.

Thus Maneka decision has resurrected American procedural due process in Art, 21 which was freed from the confines of Gopalan’s after about twenty eight years on ‘procedure’.

In one more case of the Mohinder Singh Gill, deserves attention due to observation made by *Krishna Iyer, J* on the principles of natural justice. The judicial history of natural justice in England and India has been remarkably traced by *Krishana Iyer, J* in this case by observing that the natural justice in no mystic testament of judgment juristic, but the pragmatic yet principled, requirement of fair play in action as the norm of civilized justice- system and minimum of good government-crystallized clearly in our jurisprudence by catena of cases here and elsewhere. Further, *Krishana Iyer* observed in the instant cases:

“The rules of natural justice are rooted in all legal systems, not any new theology and are manifested in the twin principles.... while natural justice is universally respected, the standards vary withy situations contracting into a brief, even post-decisional opportunity, or expanding into trial-type trappings...good administration demands fair play in action and this simple desideratum is the foundation of natural justice.

The rules of natural justice are not rigid norms of unchanging contents. Each of the two main rules embrace a number of sub rules, which may vary in their application according to the context. In the words of the Supreme Court, the extent and application of the doctrine of natural justice cannot be imprisoned within the straitjacket of rigid formula. 33 (V.N. Shukla, The Constitution of India, 388 (-1974).

Following Exceptions to Natural Justice

Though the normal rule is that a person who is affected by administrative action is entitled to claim natural justice, that requirement may be excluded under certain exceptional circumstances.

Statutory Exclusion: The principle of natural justice may be excluded by the statutory provision. Where the statute expressly provides for the observance of the principles of natural justice, the provision is treated as mandatory and the authority is bound by it. Where the statute is silent as to the observance of the principle of natural justice, such silence is taken to imply the observance thereto. However, the principles of natural justice are not incapable of exclusion. The statute may exclude them. When the statute expressly or by necessary implication excludes the application of the principles of natural justice the courts do not ignore the statutory mandate. But one thing may be noted that in India, Parliament is not supreme and therefore statutory exclusion is not final. The statute must stand the test of constitutional provision. Even if there is not provision under the statute for observance of the principle of natural justice, courts may read the requirement of natural justice for sustaining the law as constitution.

Emergency: In exceptional cases of urgency or emergency where prompt and preventive action is required the principle of natural justice need not be observed. Thus, the pre-decisional hearing may be excluded where the prompt action is required to be taken in the interest of the public safety or public morality, e.g., where a person who is dangerous to peace in the so morality e.g. Where a person who is dangerous to peace in the society is required to be detained or extended or where a building which is dangerous to the human lives is required to be demolished or a trade which is dangerous to the society is required to be prohibited, a prompt action is required to be taken in the interest of public and hearing before the action may delay the administrative action and thereby cause injury to the public interest and public safety. Thus in such situation dire social necessity requires exclusion of the pre-decisional hearing. However, the determination of the situation requiring the exclusion of the rules of natural justice by the administrative authorities is not final and the court may review such determination.

In Swadeshi Cotton Mills v. Union of India, the Supreme Court held that the word ‘immediate’ in Section 18AA of the Industries Act does not imply that the rule of natural justice can be excluded.

Public Interest: The requirement of notice and hearing may be excluded where prompt action is to be taken in the interest of public safety, or public health, and public morality. In case of pulling down property to extinguish fire, destruction of unwholesome food etc., and action has to be taken without giving the opportunity of hearing.

In Maneka Gandhi v. Union of India the Supreme Court observed that a passport may be impounded in public interest without compliance with the principles of natural justice but as soon as the order impounding the passport has been made, an opportunity of post decisional hearing, remedial in aim, should be given to the person concerned. In the case the court has also been held that “public interest” is a justiciable issue and the determination of administrative authority on it is not final.

Interim disciplinary action: The rules of natural justice are not attracted in the case of interim disciplinary action. For example, the order of suspension of an employee pending an inquiry against him is not final but interim order and the application of the rules of natural justice is not attracted in the case of such order.

In Abhay Kumar v. K. Srinivasan an order was passed by the college authority debarring the student from entering the premises of the college and attending the class till the pendency of a criminal case against him for stabbing a student. The Court held that the order was interim and not final. It was preventive in nature. It was passed with the object to maintain peace in the campus. The rules of natural justice were not applicable in the case such order.

Academic evolution: Where a student is removed from an educational institution on the grounds of unsatisfactory academic performance, the requirement of pre-decisional hearing is excluded. The Supreme Court has made it clear that if the competent academic authority assesses the work of a student over period of time and thereafter declare his work unsatisfactory the rule of natural justice may be excluded. but this exclusion does not apply in the case of disciplinary matters.

Impracticability: Where the authority deals with a large number of person it is not practicable to give all of them opportunity of being heard and therefore in such condition the court does not insist on the observance of the rules of natural justice. In *R. Radhakrishna v. Osmania University*, the entire M.B.A. entrance examination was cancelled on the ground of mass copying. The court held that it was not possible to give all the examinees the opportunity of being heard before the cancellation of the examination.

EFFECT OF FAILURE OF NATURAL JUSTICE

In England, for sometimes now, a question of some complexity which has been cropping up before the courts time and again is: When an authority required observing

natural justice in making an order fails to do so, should the order made by it be regarded as void or voidable?

Generally speaking, a voidable order means that the order was legally valid at its inception, and it remains valid until it is set aside or quashed by the courts, that is, it has legal effect up to the time it is quashed. On the other hand, a void order is no order at all from its inception; it is a nullity and void *ab initio*. The controversy between void and voidable is making the England administrative law rather complicated. Before we go further, it may be necessary to enter into a caveat at this place with respect to a void *ab initio*, the uncertainties of administrative law are such that in most cases a person affected by such an order cannot be sure whether the order is really valid or not until the court decided the matter. Therefore, the affected person cannot just ignore the order treating it as a nullity. He has to go to a Court for an authoritative determination as to the nature of the order is void.

For example, an order challenged as a nullity for failure of natural justice gives rise to the following crucial question: Was the authority required to follow natural justice? As the discussion in the previous pages shows, there is quite a good deal of uncertainty on both these points.

Meagerly, J., brings out this point clearly

Nevertheless, conceptually, there is a lot of difference between a void and voidable order. The question arises in various contexts and has a number of ramifications. It has great practical value insofar as the courts have taken recourse to conceptualistic logic to answer a number of questions. For example, the following are some of the questions which arise in regard to orders passed infringing natural justice and which the courts have sought to answer by reasoning based on differentiation between void and avoidable orders, though not always with entire satisfaction: can infringement of natural justice be waived by the person affected? Are they protected? What is the effect of privatization clauses on such orders? Are they protected? Can the defect of failure of natural justice be cured later by the same body or by a higher body? Can the court issue a writ (certiorari) to quash such an order without the affected person having taken recourse to the alternative remedy available under the statute in question? Can the person affected ignore such an order without incurring any liability, civil or criminal? Can the government seek to enforce an order challenged as void because of failure of natural justice pending the court decision on the matter? Who can challenge such an order? If the law prescribes a time limit within which the order may be challenged, can it be challenged after the period of limitation? Can an order be challenged in collateral proceedings or only in direct proceedings to set it aside? Usually, a voidable order cannot be challenged in collateral proceedings. It has to be set aside by the court in separate proceedings for the purpose. Suppose, a person is prosecuted criminally for infringing an order. He cannot then plead that the order is avoidable. He can raise such a plea if the order is void. But, as de Smith points out the case-law on the point is far from being coherent. Certiorari and not a declaration is regarded as a suitable remedy for setting aside a voidable decision.

In India, by and large, the Indian case law has been free from the void/voidable controversy and the judicial thinking has been that a quasi-judicial order made without following natural justice is void and nullity.

The most significant case in the series is *Nawabkhan v. Gujarat S. 56* of the Bombay Police Act, 1951 empowers the Police Commissioner to intern any undesirable person on certain grounds set out therein. An order passed by the commissioner on the petitioner was disobeyed by him and he was prosecuted for this in a criminal court. During the pendency of his case, on a writ petition filed by the petitioner, the High Court quashed the internment order on the ground of failure of natural justice. The trial court then acquitted the appellant. The government appealed against the acquittal and the High Court convicted him for disobeying the order. The High Court took the position that the order in question was not void *ab initio*; the appellant had disobeyed the order much earlier than the date it was infringed by him; the High Court's own decision invalidating the order in question was not retroactive and did not render it non-existent or a nullity from its inception but it was invalidated only from the date the court declared it to be so by its judgment. Thus, the arguments adopted by the High Court were consistent with the view that the order in question was voidable and not void.

However, the matter came in appeal before the Supreme Court, which approached the matter from a different angle. The order of internment affected a Fundamental Right (art. 19) of the appellant in a manner which was not reasonable. The order was thus illegal and unconstitutional and hence void. The court ruled definitively that an order infringing a constitutionally guaranteed right made without hearing the party affected, where hearing was required, would be void *ab initio* and ineffectual to bind the parties from the very beginning and a person cannot be convicted for non-observance of such an order. "Where hearing is obligated by statute which affects the fundamental right of a citizen, the duty to give the hearing stands in constitutional requirement; a failure to comply with such a duty is fatal. The appellant could not thus be convicted for flouting the police commissioner's order which encroached upon his Fundamental Right and had been made without due hearing and was thus void *ab initio* and so was never really in existence.

Nawabkhan raises some critical issues. A few general comments may, however, be made at this place. Much of the confusion in Administrative Law in India can be avoided if the rule is accepted that an order made ought to have been observed, is void *ab initio*. A person disobeys an administrative order at his own risk, for if he disobeys an order, and the court later holds it as not void, then he suffers the consequence, for whether an order is void or not can only be settled conclusively by a court order. Accepting the voidness rule will make authorities take care in passing orders after fulfilling all the necessary formalities. It will also denude the courts of discretion whether to set aside an order or not in case of violation of natural justice. However, there may be some situations when the nullity of a void order may not be excusable, e.g. when a prisoner escapes from thereon thinking that the administrative order under which he has been detained is void.

It is an area where no general principle can be held applicable to all the varying situations because what has to be reconciled here is public interest with private rights. In most of the cases i.e. staying the implementation of the order challenged until the court is able to decide the question on merits.

DISCIPLINARY ACTION AGAINST PUBLIC SERVANTS: ITS SIGNIFICANCE

In every organization the conduct and discipline is very important. Every organization, public or private, has certain rules and regulations governing the conduct or behavior of its employees. A high moral standard of conduct among the public servants is of utmost necessity to set an example to the public at large. Integrity and discipline in the service are essential for an efficient personnel system. In order to prevent misuse of powers, a code of conduct to regulate the behaviour of the civil servants is enforced.

With the transformation of passive police state into an active welfare state, drastic changes have been brought in the role of the state. Its administrative machinery influences every aspect of human life in numerous ways. Along with the ever-increasing responsibilities of powers of civil servants, administrative inefficiencies, such as red tapism, lethargy, corruption etc. crept into administration. Rapid growth in the numerical strength, continuous extension in the powers of civil servants, change in the concept of civil neutrality, shift from negative to positive work and increasing emphasis on moral and professional standards have become the modern trends of personnel administration and thus it gained momentum. If the public servants – the backbone of the government – are undermined by indiscipline and misconduct, it will lead to the collapse of administrative machinery.

Constitutional Protection to Civil Servants

In India government is the biggest provider of jobs to the people. According to an estimate in 1947 the strength of civil servants was 10 lakhs, which rose to 20 lakhs in 1978 and became 30 lakhs in 1993. However, this does not include the jobs in public sector undertakings. Maximum numbers of jobs provided by the government are in defense, railways and post offices.

This tremendous growth in civil services was mainly due to the fact that without a big army of civil servants it was not possible to realize the dream of a Welfare State, which was the cornerstone of the Indian Constitution.

India is the only country where law relating to service matters of the civil servants is provided in the constitution. Therefore Chapter XIV containing Articles from 308 to 323 providing protection to civil servants was included in the Constitution. However, Article 314 that provided protection to the members of Indian Civil Service was repealed by the Twenty-eight-Constitution Amendment Act, 1972 after the last member to the service retired.

DISCIPLINARY ACTION – MEANING

Disciplinary action means the administrative steps taken to correct the misbehaviour of the employee in relation to the performance of his/her job. Corrective action is initiated to prevent the deterioration of his/her job. Corrective action is initiated to prevent the deterioration of individual inefficiency and to ensure that it does not spread to other employees.

A distinction needs to be drawn between disciplinary action of civil or criminal procedure. The former deals with the fault committed in office violating, the internal regulations or rules of the administration while the latter is concerned with the violation of law to be dealt with by civil and criminal courts. The following matters are covered in the Conduct Rules. More strictness is observed in those services where more discretion is involved:

- i) Maintenance of correct behaviour official superiors,
- ii) Loyalty to the State.
- iii) Regulation of political activities to ensure neutrality of the personnel,
- iv) Enforcement of a certain code of ethics in the official, private and domestic life.
- v) Protection of the integrity of the officials by placing restrictions on investments, borrowings, engaged in trade or business, acquisition or disposal of movable and immovable valuable property, acceptance of gifts and presents, and
- vi) Restriction on more than one marriage.

CAUSES OF DISCIPLINARY PROCEEDINGS

The following are the various causes of disciplinary proceedings.

1) Acts Amounting to Crimes

- a) Embezzlement
- b) Falsification of accounts not amounting to misappropriation of money
- c) Fraudulent claims (e.g. T.A.)
- d) Forgery of documents
- e) Theft of Government property
- f) Defrauding Government
- g) Bribery
- h) Corruption
- i) Possession of disproportionate assets
- j) Offences against other laws applicable to Government Servants.

2) Conduct Amounting to Misdemeanor

- a) Disobedience of orders
- b) Insubordination
- c) Misbehaviour

- i) with superior officers
 - ii) with colleagues
 - iii) with subordinates
 - iv) with members of public
- d) Misconduct
 - i) violation of conduct rules
 - ii) violation of standing orders
 - iii) intrigues and conspiracy
 - iv) insolvency

TYPES OF DISCIPLINARY ACTION

Disciplinary action may be informal or formal. Informal disciplinary action may mean assignment to a less desirable work, closer supervision, loss or withholding of privileges, failure of consultations in relevant matters, rejection of proposals or recommendation. It may include curtailing of his/her authority and diminishing his/her responsibility. The reason for taking informal disciplinary action may be that offences are too slight, or too subtle, or too difficult to prove, to warrant direct and formal action.

Formal disciplinary action follows where the offence is serious and can be legally established. In such cases the penalties that are imposed on a member of the service are;

1) Minor Penalties

- a) Censure
- b) Withholding of promotions
- c) Recovery from pay of the whole or part of any loss caused to Government or to a company, association or body of individuals. And
- d) Withholding of increments of pay.

2) Major Penalties

- a) Reduction to a lower stage in the time scale of pay for a specified period.
- b) Reduction to a lower time scale of pay, grade or post, and
- c) Compulsory retirement.

In very serious cases of offence, even judicial proceedings against the offender may also be launched.

MODE OF TAKING DISCIPLINARY ACTION

Usually following provisions are made either in the Constitution or in the statute to check the misuse of power to take disciplinary actions :

- a) No employee shall be demoted or dismissed by an officer below in rank to one who had appointed him/her.
- b) No employee shall be punished except for a cause, specified in some statute or departmental regulation.
- c) No employee shall be punished unless he / she has been given reasonable opportunity to defend his / her case.
- d) The employee shall be informed of the charges laid against him / her.
- e) Where a board of Inquiry is appointed, it shall consist of not less than two senior officers, provided that at least one member of such board shall be an officer of the service to which the employee belongs.
- f) After the inquiry against an employee has been completed and after the punishing authority has arrived at any provisional conclusion in regard to the penalty to be imposed, if the penalty proposed is dismissal, removal, reduction in rank or compulsory retirement, the employee charged shall be supplied with a copy of the report of inquiry and be given a further opportunity to show cause why the proposed penalty should not be imposed on him / her.

CONSTITUTION OF INDIA – DEALING WITH DISCIPLINARY MATTERS

Article 309 provides that the Acts of the appropriate legislature may regulate the recruitment and conditions of service of the persons appointed to public services and posts in connection with the affairs of the Union or of any State. It shall be competent for the President or Governor as the case may be, to make rules regulating and recruitment and conditions of service of public service until provisions are made by an Act of the appropriate legislature.

According to Article 310, every person who is a member of a defence service or the civil service of the Union or an All India Service or holds any post connected with defense or any civil post under the union holds office during the pleasure of the president, and every person who is a member of a civil service of a state or holds a civil post under a state holds office during the pleasure of the Governor of the State. Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or the Governor of the State, any contract under which a person, (not being a member of a defence service or of an All India Service or of a civil service of the Union or a State) is appointed under the

Constitution to hold such a post may, if the President or the Governor deems it necessary in order to secure the services of persons having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is required to vacate that post.

Article 311 as amended by Forty-second. Amendment provides that no person who is a member of a civil post under the union or a state shall be dismissed or removed by an authority subordinate to that by which he / she was appointed. No such person is aforesaid shall be dismissed or removed or reduced in rank except after an enquiry in which he / she has been informed of the charges against him / her given a reasonable opportunity of being heard in respect of those charges. Where it is proposed after such enquiry to impose upon him / her any such penalty, such penalty may be imposed on the basis of the evidence provided during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed. This clause shall not apply where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his / her conviction on a criminal charge or where the authority empowered to dismiss or remove a person or to reduce him / her in rank is satisfied that for some reason to hold such enquiry. Or where the President of the Governor, as the case may be, is satisfied that in the interests of the security of the State, it is not expedient to hold such enquiry. If in respect of any such person as aforesaid, a question arises, whether it is reasonably practicable to hold the enquiry mentioned above, the decision thereon of the authority empowered the dismiss or remove such person or reduce him / her in rank shall be final.

SUCCESSIVE STEPS INVOLVED IN DISCIPLINARY PROCEEDINGS

The successive steps of the procedure of disciplinary action are:

- i) Calling for an explanation from the employee to be subjected to disciplinary action.
- ii) If the explanation is not forthcoming or is unsatisfactory, framing of charges;
- iii) Suspension of the employee if his / her remaining in the service is likely to prejudice the evidence against him / her.
- iv) Hearing of the charges, and giving opportunity to the employee to defend himself / herself;
- v) Findings and report;
- vi) Giving another opportunity to the employee to defend himself/herself against the purposed punishment.
- vii) Punishment order, or exoneration; and
- viii) Appeal, if any.

ISSUES AND PROBLEMS

There are various problems concerning the disciplinary proceedings.

They are as follows:

i) Lack of knowledge of the Disciplinary Procedure

It has been seen many a time that the appointing authorities as well as employees are unaware of the details of the disciplinary procedures resulting in many problems.

ii) Delays

The time taken to take disciplinary action is very long. When an employee knows of the impending action, he / she becomes more and more irresponsible and problematic. Delays cause hardship to the employees.

iii) Lack of fair Play

There is a tendency that the appellate authority generally supports the decision of his / her subordinates. This defeats the purpose of appeal.

iv) Withholding of Appeal

Most of the officers do not like appeals against their decisions. There is a tendency to withhold appeals.

v) Inconsistency

Disciplinary action should be consistent under the same offence. Otherwise it leads to favoritism, nepotism and corruption.

Contents

I. Judicial review of Administrative Action

- *The doctrine of ultra virus*
- *Malafide exercise of Powers*
- *Exclusion of judicial review*

II. Constitutional Remedies

- *The judicial Control of administrative action*
- *Constitutional provisions to control administrative actions under article 32 *226 and 136 of the Constitution.*
- *Existence of alternative remedies*
- *Scope of high Court's jurisdiction under article 226*
- *Remedy through special leave to appeal under article 136 *Ordinary remedies*
- *Injunction*
- *Declaratory action and*
- *Action for damages*

III. Judicial Control of Administrative Action through Writs

- *Writ of habeas Corpus*
- *Writ of Mandamus*
- *Writ of Certiorari*
- *Writ of Quowarranto*
- *Writ of prohibition*

IV. Public Interest Litigation

- *Meaning of public interest litigation*
- *Reasons for the growth of Public interest litigation*
- *Development of Public interest litigation in India.*

Judicial Control of Administrative Action

It is a admitted fact that the administrative authorities now a days are conferred on wide administrative powers which are required to be controlled otherwise they will become new despots. The Administrative Law aims to find out the ways and means to control the powers of the administrative authorities.

In the context of increased powers for the administration, judicial control has become an important area of administrative law, because Courts have proved more effective and useful than the Legislature or the administration in the matter. “It is an accepted axiom” observed Prof. Jain & Jain that “the real kernel of democracy lies in the Courts enjoying the ultimate authority to restrain all exercise of absolute and arbitrary power. Without some kind of judicial power to control the administrative authorities, there is a danger that they may commit excess and degenerate into arbitrary authorities, and such a development would be inimical to a democratic Constitution and the concept of rule of law. “

Judicial Control (Judicial Remedies).

Judiciary has been given wide powers for controlling the administrative action. The Courts have been given power to review the acts of the legislature and executive (administration) and declare them void in case they are found in violation of the provisions of the Constitution.

In India the modes of judicial control of administrative action can be conveniently grouped into three heads:

- (A) **Constitutional;**
- (B) **Statutory;**
- (C) **Ordinary or Equitable.**

JUDICIAL REVIEW & ITS EXCLUSION

Judicial review, in short, is the authority of the Courts to declare void the acts of the legislature and executive, if they are found in the violation of the provisions of the Constitution. Judicial Review is the power of the highest Court of a jurisdiction to invalidate on Constitutional grounds, the acts of other Government agency within that jurisdiction.

The doctrine of judicial review has been originated and developed by the American Supreme Court, although there is no express provision in the American Constitution for the judicial review. In *Marbury v. Madison* the Supreme Court made it clear that it had the power of judicial review.

In England there is supremacy of Parliament and therefore, the Act passed or the law made by Parliament cannot be declared to be void by the Court. The function of the judiciary is to ensure that the administration or executive function conforms to the law.

The Constitution of India expressly provides for judicial review. Like U.S.A., there is supremacy of the Constitution of India. Consequently, an Act passed by the legislature is required to be in conformity with the requirements of the Constitution and it is for the judiciary to decide whether or not the Act is in conformity with the Constitutional requirements and if it is found in violation of the Constitutional provisions the Court has to declare it unconstitutional and therefore, void because the Court is bound by its oath to uphold the Constitution.

The Constitution of India, unlike the American Constitution expressly provides for the judicial review. The limits laid down by the Constitution may be express or implied. Articles 13, 245 and 246, etc. provide the express limits of the Constitution.

The provisions of Article 13 are:

Article 13 (1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution of India, in so far as they are inconsistent with the provision of Part III dealing with the fundamental rights shall, to the extent of such inconsistency, be void. Article 13 (2) provides the State Shall not make any law which takes away or abridges the fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void.

Article 245 makes it clear that the legislative powers of Parliament and of the State Legislatures are subject to the provisions of the Constitution. Parliament may make laws for the whole or any part of the territory of India and the legislature of State may make laws for the whole or any part of the State. No law made by Parliament shall be deemed to be invalid on the ground that it would have been extra-territorial operation. The State Legislature can make law only for the State concerned and, therefore, the law made by the state Legislature having operation outside the State would be beyond its competence and, therefore ultra vires and void.

The doctrine of ultra vires has been proved very effective in controlling the delegation of legislative function by the legislature and for making it more effective it is required to be applied more rigorously. Sometimes the Court's attitude is found to be very liberal.

Supreme Court has held that the legislature delegating the legislative power must lay down the legislative policy and guideline regarding the exercise of essential legislative function, which consists of the determination of legislative policy and its formulation as a rule of conduct. Delegation without laying down the legislative policy or standard for the guidance of the delegate will amount to abdication of essential legislative function by the Legislature. The delegation of essential legislative function falls in the category of excessive delegation and such delegation is not permissible.

The power of judicial review controls not only the legislative but also the executive or administrative act. The Court scrutinizes the executive act for determining the issue as to whether it is within the scope of the authority or power conferred on the authority exercising the power. For this purpose the ultra vires rules provides much assistance in the Court. Where the act of the executive or administration is found ultra virus the Constitution or the relevant Act, it is declared ultra virus and, therefore, void. The Courts attitude appears to be stiffer in respect of the discretionary power of the executive or administrative authorities. The Court is not against the vesting of the discretionary power in the executive, but it expects that there would be proper guidelines or normal for the exercise of the power. The Court interferes when the uncontrolled and unguided discretion is vested in the executive or administrative authorities or the repository of the power abuses its discretionary power.

The judicial review is not an appeal from a decision but a review of the manner in which the decision has been made. The judicial review is concerned not with the decision but with the decision making process.

The Supreme Court has expressed the view that in the exercise of the power of judicial review the Court should observe the self-restraint and confine itself the question of legality. Its concern should be:

1. *Whether a decision making authority exceeding its power?*
2. *Committed an error of law.*
3. *Committed a breach of the rules of natural justice.*
4. *Reached a decision which no reasonable tribunal would have reached, or*
5. *Abused its power.*

It is not for the Court to determine whether a particular policy or a particular decision taken in the furtherance of the policy is fair. The Court is only concerned with the manner in which those decisions have been taken. The

extents of the duty to act fairly vary from case to case. The aforesaid grounds may be classified as under:

- (i) *Illegality*
- (ii) *Irrationality*
- (iii) *Procedural impropriety.*

Mala fide exercise of power is taken as abuse of power : Mala fides may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory power it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently. If its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest. The burden to prove mala fide is on the person who wants the order to be quashed on the ground of mala fide.

The judicial review is the supervisory jurisdiction.

It is concerned not with the merit of a decision but with the manner in which the decision was made. The court will see that the decision making body acts fairly. It will ensure that the body acts in accordance with the law. Whenever its act is found unreasonable and arbitrary it is declared ultra vires and, therefore, void. In exercising the discretionary power the principles laid down in article 14 of the Constitution have to be kept in view. The power must be only be tested by the application of Waynesburg's principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides.

The administrative action is subject to judicial review on the ground of **procedural impropriety** also. If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or the Court decides directory. Principles of natural justice also need to be observed. If the order passed by the authority in the exercise of its power affected any person adversely. It is required to observe the principles of natural justice. In case of violation of the principles of natural justice, the order will be held to be void. The principles of natural justice are treated as part of the constitutional guarantee contained by Article 14 and their violation is taken as the violation of Article 14.

Key points on judicial review

- The jurisdiction of the Supreme Court under Articles 32 and 136 and of High Court under Articles 226 and 227 have been proved of tremendous importance in the preservation and enforcement of the rule of law in India. Any statute cannot exclude the jurisdiction under these Articles.

- In several cases, the Supreme Court has observed that the jurisdiction under Articles 32, 136, 226 and 227 cannot be excluded even where the action of the administration is made final by the Constitutional amendment.
- Judicial review is an unavoidable necessity wherever there is a constant danger of legislative or executive lapses and appealing erosion of ethical standards in the society.
- The judicial review is the basic feature of the Constitution, which has been entrusted to the Constitutional Courts, namely, the Supreme Court of India and High Courts under Article 32 and Articles 226 and 227 respectively. It is the Constitutional duty and responsibility of the Constitutional Courts as assigned under the Constitution, to maintain the balance of power between the Legislature, the Executive, and the judiciary.
- The judicial review is life-breath of constitutionalism. Judicial review passes upon constitutionality of legislative Acts or administrative actions. The Court either would enforce valid Acts/actions or refuse to enforce them when found unconstitutional.
- Judicial review does not concern itself with the merits of the Act or action but of the manner in which it has been done and its effect on constitutionalism. It, thereby, creates harmony between fundamental laws namely, the Constitution and the executive action or legislative Act.

The Supreme Court of India has played significant role in the Constitutional development. The Scope of judicial review in India is sufficient to make the Supreme Court a powerful agency to control the activities of both the legislature and the executive.

In *Indira Nehru Gandhi v. Raj Narain*, (A.I.R. 1975 S.C. 2299) the Supreme Court has held that even where the Constitution itself provides that the action of the administrative authority shall be final. The judicial review provided under Articles 32, 136, 226 and 227 is not barred. Judicial review is the part of the basic structure of the Constitution.

Exclusion of Judicial Review (Ouster clause or finality clause)

Finality clause may be taken to mean a section in the statute, which bars the jurisdiction of the ordinary Courts. The modern legislative tendency is to insert such clause to preclude the Courts from reviewing the law. On account of such tendency the danger of infringing the rights of the individuals is increasing. The rule of law requires that the aggrieved person should have right to approach the court for relief and, therefore, Courts do not appear to have accepted the Court or ouster clause in its face value and have evolved

several rules to waive such clauses for providing justice to the aggrieved person.

Extent of Judicial Exclusion.

The jurisdiction of the Courts is excluded in several ways. Exclusive may be express or implied.

For example S.2 of the Foreigners act, 1946 may be mentioned as an example of express exclusion. It provides that the action taken under the act shall not be called in question in any legal proceeding before any Court of law.

In India the position on the **finality clause** is not well settled. It is extremely complex issue. For this purpose the judicial review may be divided into two categories-

Constitutional modes of judicial review and Non-Constitutional modes of judicial review.

The judicial review available under article 32, 136 226 and 227 is taken as Constitutional mode of judicial review, i.e. the judicial review available under Articles 32, 136, 226, 227 cannot be excluded by the finality clause contained in the statute and expressed in any languages. Any statute or ordinary laws cannot take the jurisdiction of the Court under article 32, 136, 226 and 227 as the Constitution of India provides them. Thus, any ordinary law cannot bar the jurisdiction of the Supreme Court under Article 32 and 136 and of the High Court under Articles 226 and 227.

In *Keshava Nanda Bharti v. State of Kerala*, (A.I.R. 1973 S.C. 1461) the Supreme Court has held the Parliament has power to amend the Constitution but it cannot destroy or abrogate the basic structure or framework of the Constitution. Article 368 does not enable Parliament to abrogate or take away Fundamental right or to completely alter the fundamental features of the Constitution so as to destroy its identity. Judicial review therefore it cannot be taken away.

In *Indira Nehru Gandhi v. Raj Narain*, the validity of Clause (4) of Article 329 – A inserted by the Constitution (39th Amendment) Act, 1975 was challenged on the ground that it destroyed the basic structure of the Constitution. The said Clause (4) provided that notwithstanding any Court order declaring the election of the Prime Minister or the Speaker of Parliament to be void, it would continue to be void in all respects and any such order and any finding on which such order was based would be deemed always to have been void and of no effect. This clause empowered Parliament to establish by law some

authority or body for deciding the dispute relating to the election of the Prime Minister or Speaker. It provides that the decision of such authority or body could not be challenged before the Court. This clause was declared unconstitutional and void as being violation of free and fair election, democracy and rule of law, which are parts of the basic structure of the Constitution. In case judicial review, democracy, free and fair election and rule of law were included in the list of the basic features of the Constitution. Consequently any Constitutional amendment, which takes away, any of them will be unconstitutional and therefore void.

The non-constitutional mode of judicial review is conferred on the civil Courts by statute and therefore it may be barred or excluded by the statute. S. 9 of the Civil Procedure Code, 1908 confers a general jurisdiction to Civil Courts to entertain suits except where its jurisdiction is expressly or impliedly excluded.

Implied exclusion of the jurisdiction of the Civil Courts is usually given effect where the statute containing the exclusion clause is a self contained Code and provides remedy for the aggrieved person or for the settlement of the disputes.

When not excluded.

However, it is to be noted that the exclusion clause or ouster clause or finality clause does not exclude the jurisdiction of the Court in the condition Stated below:

1. **Unconstitutionality of the statute :** Exclusion clause does not bar the jurisdiction of the Court to try a suit questioning the constitutionality of an action taken there under. If the statute, which contains the exclusion clause, is itself unconstitutional, the bar will not operate. The finality should not be taken to mean that unconstitutional or void laws be enforced without remedy.
2. **Ultra vires Administrative action :** The exclusion clause does not bar the jurisdiction of the Court in case where the action of the authority is ultra vires. If action is ultra vires the powers of the administrative authority; the exclusion clause does not bar the jurisdiction of the Courts. The rule is applied not only in the case of substantive ultra vires but also in the case of procedural ultra vires. If the authority acts beyond its power or jurisdiction or violates the mandatory procedure prescribed by the statute, the exclusion or finality clause will not be taken as final and such a clause does not bar the jurisdiction of the Court.
3. **Jurisdictional error :** The exclusion or ouster or finality clause does not bar the jurisdiction of the Court in case the administrative action is challenged on the ground of the jurisdictional error or lack of jurisdiction. The lack of jurisdiction or jurisdictional error may arise where the authority assumes jurisdiction, which never belongs to it or has exceeded its jurisdiction indicating the matter or has misused or abused its jurisdiction. The lack of

jurisdiction also arises where the authority exercising the jurisdiction is not properly constituted.

4. Non compliance with the provisions of the statute : the exclusion clause will not bar the jurisdiction of the Court if the statutory provisions are not complied with. Thus if the provisions of the statute are not complied with, the Court will have jurisdiction inspite of the exclusion or finality clause.

5. Violation of the Principles of natural Justice : If the order passed by the authority is challenged on the ground of violation of the principles of natural justice; the ouster clause or exclusion clause in the statute cannot prevent the Court from reviewing the order

6. When finality clause relates to the question of fact and not of law : Where the finality clause makes the finding of a Tribunal final on question of facts, the decision of the Tribunal may be reviewed by the Court on the question of law.

(A) CONSTITUTIONAL REMEDIES

The judicial control of administrative action provides a fundamental safeguard against the abuse of power. Since our Constitution was built upon the deep foundations of rule of law, the framers of the Constitution made sincere efforts to incorporate certain Articles in the Constitution to enable the courts to exercise effective control over administrative action. Let us discuss those articles of the constitution: -

(a) Under article 32, the Supreme Court has been empowered to enforce fundamental rights guaranteed under Chapter III of the Constitution.

Article 32 of the Constitution provides remedies by way of writs in this country. The Supreme Court has, under Article 32(2) power to issue appropriate directions, or orders or writs, including writs in the nature of *habeas corpus*, *certiorari*, *mandamus*, *prohibition* and *quo-warranto*. The court can issue not only a writ but can also make any order or give any direction, which it may consider appropriate in the circumstances. It cannot turn down the petition simply on the ground that the proper writ or direction has not been prayed for.

(b) Under article 226 concurrent powers have been conferred on the respective High Courts for the enforcement of fundamental rights or any other legal rights. It empowers every High Court to issue to any person or authority including any Government, in relation to which it exercises jurisdictions, directions, orders or writs including writs of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*.

In a writ petition, High Court cannot go into the merits of the controversy. For example, in matters of retaining or pulling down a building the decision is not to be taken by the court as to whether or not it requires to be pulled down and a new building erected in its place.

(c) Under Article 136 the Supreme Court has been further empowered, in its discretion, to grant special leave to appeal from any judgment, decree, determination, sentence or order by any Court or tribunal in India. Article 136 conferred extraordinary powers on the Supreme Court to review all such administrative decisions, which are taken by the administrative authority in quasi-judicial capacity.

The right to move the Supreme Court in itself is a guaranteed right, and Gajendragadkar, J., has assessed the significance of this in the following manner:

“The fundamental right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why it is natural that this Court should in the words of *Patanjali Sastri, J.*, regard itself as the protector and guarantor of fundamental rights and should declare that it cannot consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringement of such rights.

Since Article 32 is itself fundamental right, it cannot be whittled down by a legislation. It can be invoked even where an administrative action has been declared as final by the statute.

An order made by a quasi-judicial authority having jurisdiction under an Act which is *intra virus* is not liable to be questioned on the sole ground that the provisions of the Act on the terms of the notification issued there under have been misinterpreted.

**The rule of maintainability of petition under Article 32 held above
is subject to three exceptions.**

First, if the statute for a provision thereof *ultra vires* any action taken there under by a quasi-judicial authority which infringes or threatens to infringe a fundamental right, will give rise to the question of enforcement of that right and petition under Article 32 will lie.

Second, if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing error as to a right, the question of enforcement of that arises and a petition under Article 32 will lie even if the statute is *intra vires*.

Third, if the action taken by a quasi-judicial authority is procedurally *ultra virus*, a petition under Article 32 would be competent.

Under Article 32 of the Constitution the following person may complain of the infraction of any fundamental rights guaranteed by the Constitution:

Any person including corporate bodies who complains of the infraction of any of the fundamental rights guaranteed by the Constitution is at liberty to move the Supreme Court except where the language of the provision or the nature of the right implies the inference that they are applicable only to natural person.

The right that could be enforced under article 32 must ordinarily be the rights of the petitioner himself who complains of the infraction of such rights and approaches the Court for relief. An exception is as held in the *Calcutta Gas Case*, (AIR 1962 SC 1044) that in case of habeas corpus not only the man who is or detained in confinement but any person provided he is not an absolute stranger, can institute proceeding to obtain a writ of habeas corpus for the purpose of liberation.

The Constitution of India assigns to the Supreme Court and the High Courts the role of the custodian and guarantor of fundamental rights. Therefore, where a fundamental right is involved, the courts consider it to be their duty to provide relief and remedy to the aggrieved person. In matters other than the fundamental rights, generally the jurisdiction of the courts to grant relief is considered to be discretionary. The discretion is, however, governed by the broad and fundamental principles, which apply to the writs in England.

A petition under Art 32 may be rejected on the ground of inordinate delay. However, a writ petition made after 12 years by a person belonging to lower echelons of service against the Department which and not counted his service in the officiating capacity, was entertained because the Department had not given reply to his representations.

It was held in one of the decided case (A.I.R 1964 S.C. 1013; *Supreme Court Employees Welfare Association versus union of India* A.I.R 1990 334) that a petition under Art 32 would be barred by *res judicata* if a petition on the same cause of action filed before the High Court was earlier rejected.

The Court went further and said that the principle of **res judicata** did not apply to successive writ petitions in the Supreme Court and the High Court under Arts 32 and 226 respectively. The Court observed that a petition based on fresh or additional grounds would not be barred by *res judicata*. A petition under Art 32, however, will not lie against the final order of the Supreme Court under art 32 of the constitution. It was held that a petition would not lie under Art 32 challenging the correctness of an order of the Supreme Court passed on a special leave petition under Art 136 of the Constitution setting aside the award of enhanced salary and interest under the land acquisition Act, 1894.

Existence of alternative remedies

When statutory remedies are available for determining the disputed questions of fact or law, such questions cannot be raised through a petition under Art 32.

The Supreme Court would not undertake a fact-finding enquiry in the proceedings under Art 32. If the facts are disputed, they must be sorted out at the appropriate forum. In *Ujjam Bai v. State of UP* (AIR 1962 SC 1621) the Supreme Court held that a petition under Art 32 could not impugn error of law or fact committed in the exercise of the jurisdiction conferred on an authority by law. The Court here made a distinction between acts, which were ultra vires, or in violation of the principles of natural justice and those, which were erroneous though within jurisdiction. While the former could be impugned, the latter could not be impugned in a writ petition under art 32. This dictum was, however, narrowed down by subsequent decisions. It was held that where an error of law or fact committed by a tribunal resulted in violation of a fundamental right; a petition under Art 32 would be maintainable.

The fact that the right to move the Supreme Court for the enforcement of fundamental rights under Art 32 is a fundamental right should not bind us to the reality that such a right in order to be meaningful must be used economically for the protection of the fundamental rights. However, in recent years, with the expansion of the scope of art 21 of the Constitution and the growth of public interest litigation, the threshold enquiry regarding the violation of fundamental rights has become rare. Article 32 has almost become a site for public interest litigation where fundamental rights of the people are agitated. It is under this jurisdiction that the human rights jurisprudence and environmental jurisprudence have developed.

The Court has given such expansive interpretation of art 21 of the Constitution that the question, which seemed to be alien to Art 32, became integral part of it. The right to life and personal liberty came to comprehend such diverse aspects of human freedom such as the right to environment, or the right to gender justice or the right to good governance that questions such as whether the ordinance making power was exercised to defraud the Constitution or whether judges were appointed in such a way as to enhance the independence of the judiciary or who and how should a social service organization undertake the giving of Indian children in adoption to foreigners became matters involving fundamental rights. Since the rights to live guaranteed by Art 21 included the right to live with dignity the right to unpolluted environmental jurisprudence has emerged. With the growth of the public interest litigation, which we will discuss separately, Art 32 has become an important site for the vindication of various group human rights. The Court has even incorporated some of the directive principles of state policy within the compass of the fundamental rights. For example, it declared that the right to primary education was a fundamental right. The Supreme Court entertained a writ petition under Art 32 seeking the implementation of the Consumer Protection Act and appointment of district forums as required there under. The Court

also entertained a petition which said that due to large backlogs, the under-trial prisoner remained for an inordinately long periods in jail.

Principles Regarding Writ Jurisdiction Under Article 226

Article 226 empowers the High Courts to issue writs in the nature of habeas corpus, mandamus, prohibition, certiorari and quo warranto or any of them for the enforcement of any of the fundamental rights or for any other purpose. It has been held that the words 'for any other purpose' mean for the enforcement of any statutory or common law rights. The jurisdiction of the High Courts under Art 226 is wider than that of the Supreme Court under Art 32. The jurisdictions under Art 32 and 226 are concurrent and independent of each other so far as the fundamental rights are concerned. A person has a choice of remedies. He may move either the Supreme Court under Art 32 or an appropriate High Court under Art 226. If his grievance is that a right other than a fundamental right is violated, he will have to move the High Court having jurisdiction. He may appeal to the Supreme Court against the decision of the High Court. After being unsuccessful in the High Court, he cannot approach the Supreme Court under Art 32 for the same cause of action because as said earlier, such a petition would be barred by **resjudicata**. Similarly, having failed in the Supreme Court in a petition filed under Art 32, he cannot take another chance by filing a petition under Art 226 in the High Court having jurisdiction over his matter because such a petition would also be barred by res judicata.

The High Court's jurisdiction in respect of 'other purposes' is however, discretionary. The courts have laid down rules in accordance with which such discretion is to be exercised. The jurisdiction of the High Court under Art 226 cannot be invoked if:

- ☐ The petition is barred by res judicata;
- ☐ If there is an alternative and equally efficacious remedy available and which has not been exhausted;
- ☐ If the petition raised questions of facts which are disputed; and
- ☐ If the petition has been made after an inordinate delay;

These rules of judicial restraint have been adopted by our courts from the similar rules developed by the English courts in the exercise of their jurisdiction to issue the prerogative writs.

Where a civil court had dealt with a matter and the High Court had disposed of an appeal against the decision of the civil court, a writ petition on the same matter could not be entertained. This was not on the ground of res judicata as much as on the ground of judicial discipline, which required that in matters relating to exercise of discretion, a party could not be allowed to take chance in different forums. Withdrawal or abandonment of a petition under Art

226/227 without the permission of the court to file a fresh petition there under would bar such a fresh petition in the High Court involving the same subject matter, though other remedies such as suit or writ petition under Art 32 would be open. The principle underlying Rule 1 of Order 23 of the CPC was held to be applicable on the ground of public policy.

It is a general rule of the exercise of judicial discretion under Art 226 that the High Court will not entertain a petition if there is an alternative remedy available. The alternative remedy however, must be equally efficacious. Where an alternative and efficacious remedy is provided, the Court should not entertain a writ petition under Art 226. Where a revision petition was pending in the High Court challenging the eviction degree passed against a tenant by the court of the Small Causes, it was held that the High Court should not have entertained a writ petition filed by the cousins of the tenants. The petitioners should have exhausted the remedies provided under the Code of Civil procedure before filing the writ petition. Petitions were dismissed on the ground of the existence of an alternative remedy in respect of elections to municipal bodies or the Bar Council.

When a law prescribes a period of limitation for an action, such an action has to be brought within the prescribed period. A court or a tribunal has no jurisdiction to entertain an action or proceeding after the expiration of the limitation period. It is necessary to assure finality to administrative as well as judicial decisions. Therefore, those who sleep over their rights have no right to agitate for them after the lapse of a reasonable time. Even writ petitions under Art 226 are not immune from disqualification on the ground of delay. Although the law of limitation does not directly apply to writ petitions, the courts have held that a petition would be barred if it comes to the court after the lapse of a reasonable time. This is however, not a rule of law but is a rule of practice. Where the petitioner shows that illegality is manifest in the impugned action, and explains the causes of delay, the delay may be condoned.

Scope of the High court's Jurisdiction under Article 226

The jurisdiction of the High Court under Art 226 is very vast and almost without any substantive limits barring those such as territorial limitations.

Although the jurisdiction of the High Court is so vast and limitless, the courts have imposed certain limits in their jurisdiction in order to be able to cope with the volume of litigation and also to avoid dealing with questions, which are not capable of being answered judicially. There are three types of limitations:

- ☐ Those arising from judicial policy;
- ☐ Those which are procedural and
- ☐ Those because of the petitioner's conduct.

The Supreme Court has held that the extra ordinary jurisdiction should be exercised only in exceptional circumstances.

It was held that the High Court was not justified in going into question of contractual obligations in a writ petition. It was held that the jurisdiction under Art 226 should be used most sparingly for quashing criminal proceedings. The High Court should interfere only in extreme cases where charges ex facie do not constitute offence under the Terrorist and Destructive Activities Act (TADA) It should not quash the proceedings where the application of the Act is a debatable issue.

Power to Review Its Own Judgments

It was held that the High Court had power to review its own judgments given under Art 226. This power, however, must be exercised sparingly and in cases, which fell within the guidelines provided by the Supreme Court. However, review by the High Court of its own order in a writ petition on the ground that two documents which were part of the record were not considered by it at the time of the issuance of the writ under Art 226, especially when the documents were not even relied upon by the parties in the affidavits filed before the High Court was held to be impermissible.

On the death of the petitioner during the pendency of his writ petition against removal from service, the petition abates. The successor cannot continue the petition.

If the petitioner were guilty of mala fide and calculated suppression of material facts, which if disclosed, would have disentitled him to the extra ordinary remedy under Art 226 or in any case materially affected the merits of the case, he would be disentitled to any relief. Where the writ petitioners had themselves invoked the review jurisdiction of the competent officer under the Evacuee Interest (Separation) Act, 1950, to their advantage and to the disadvantage of the appellant, it was held that the petitioner could not be heard to say that the review orders of the authority were void for want of jurisdiction.

(Rights of the Armed Forces)

The Constitution provides two exceptions to the availability of the constitutional remedies given in Art 32, 226 227 and 136. Art 33 of the Constitution says that Parliament may by law determine to what extent any of the rights conferred by Part III shall, in their application to the members of the Armed Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Suspension of Judicial Review during Emergency

The right to move the court for the enforcement of the fundamental rights be suspended during the emergency. This is the second exception to the availability of constitutional remedies.

Under Art 359 of the Constitution the President may declare that the right to move any court for the enforcement of such of the fundamental rights as may be mentioned in the order and all proceedings pending in any court for the enforcement of those rights shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the Order. By the Constitution (Forty- fourth) Amendment Act, 1978, the words 'except Arts 20 and 21' were added to the above Article. It means that the right to move any court for the enforcement of any of the fundamental rights except the rights guaranteed by Art 20 and the President may suspend 21 during the proclamation of emergency.

The jurisdiction under Art 227 is narrower than that under Art 226 because while under art 226, the High Court can quash any administrative action, under Art 227, it can act only in respect of judicial or at the most quasi- judicial actions. By giving wider meaning to the word 'tribunal' in this Article as well as in Art 136, the courts have included various administrative authorities within the power of superintendence. Clause (4) of art 227, however, excludes the tribunals constituted by or under any law relating to the armed forces from the supervisory jurisdictions of the High Courts. The court martial proceedings under the Military law are not within the power of superintendence of the High Court, though they are subject to judicial review under Art 226.

A petition under Art 227 is not maintainable if there is an adequate alternative remedy. In this matter the same principles will apply as are applicable to petitions filed under the Consumers protection act dismissing a petition for non-appearance would not lie under Art 227 to the High Court since the statutory remedy of appealing under sec. 15 or applying for revision under sec. 17 to the State Commission under that Act was available.

Remedy through Special Leave to appeal under article 136.

Articles 132 to 135 of the Constitution deal with ordinary appeals to the Supreme Court in constitutional, civil and criminal matters. Article 136 deals with a very special appellate jurisdiction conferred on the Supreme Court. Under this provision the Supreme Court has power to grant in the discretion, special leave to appeal from

- (a) Any judgment, decree, determination or order;
- (b) In any cause or matter;
- (c) An order passed or made by any court or tribunal in the territory of India.

The scope of the Article is very extensive and it invests the Court with a plenary jurisdiction to hear appeals. Since the Court has been empowered to hear appeals from the determination or orders passed by the tribunal including all such administrative tribunals and bodies which are not Courts in the strict sense, this has become most interesting aspect of this provision from the point of administrative law. Under the provision, the Court may hear appeals from any tribunal even where the legislature declares the decision of a tribunal final.

A large number of ad judicatory bodies outside the regular judicial hierarchy have sprung up in modern times and it was deemed highly desirable that the Supreme Court should be able to keep some control over such bodies through the technique of hearing appeal there from. Prof. Jain and Jain have rightly observed it in this connection:

“ It is extremely desirable that there should be some forum correct misuse of power by such bodies. To leave these bodies outside the place of any judicial control would be to create innumerable tiny despots, which could negative the rule of law. The ambit of Supreme Court’s jurisdiction under Article 136 is in some respects broader than that under Article 32. Article is confined to the enforcement of fundamental rights only whereas Article 136 is not so. The appellate jurisdiction of the court gives more scope to the Court to intervene with ad judicatory bodies and provides grounds of judicial control. But from another point of view the jurisdiction of the Court under Article 136 is narrower than that under Article 32. Article 136 is available only in cases of tribunals while Article 32 can be invoked when any authority whatsoever infringes a fundamental right. It has been found that the Court has been extremely reluctant to intervene with quasi- judicial bodies. As regard the points of difference between the writ jurisdiction of the High Courts under Article 226 any appellate jurisdiction of the Supreme Court under Article 136, it can be said that a high court can issue a writ to any authority whether quasi-jurisdiction or administrative; whereas the supreme Court under Article 136 can hear appeal only from a court or tribunal. In this respect writ jurisdiction of a High Court is broader than the appellate scope of the Supreme Court under Article 136. But from another point of view the scope of Article 226 is narrower than Article 136. The Supreme Court can interfere with a decision of a tribunal on wider form than the High Court in its writ jurisdiction, are not so flexible it does not enter into questions of facts while there is no restriction on the powers of the Supreme Court.”

General principles relating to the grant of special leave to appeal. The following principles have been evolved on the basis of cases decided by the Court, in connection with the grant of special leave to appeal:

(1) The Court has imposed certain limitations upon its own powers under Article 136, e.g., it has laid down that the power is to be exercised sparingly

and in exceptional cases only. The power shall be exercised only where special circumstances are shown to exist.

(2) Ordinarily, the Supreme Court would refuse to entertain appeal under Article 136 from the order of an inferior tribunal where the litigant has not availed himself of the ordinary remedies available to him by law, e.g., a statutory right of appeal or revision or where he has not appealed from the final order of an Appellate Tribunal from the decision of the inferior tribunal.

This may be allowed only in exceptional cases e.g., breach of the principles of natural justice by the order appeal to the Supreme Court is on a point, which could not have been decided in the appeal under ordinary law.

(3) The reserve power of the court cannot under Article 136 be exhaustively defined but it is true that the Court has acted arbitrarily or has not given a fair deal to the litigant, will not be handicapped in the exercise of its findings of facts or otherwise.

(4) It is quite plain that the Supreme Court reaches the conclusion that the tribunal or the Court has acted arbitrarily or has not given a fair deal to the litigant, will not be handicapped in the exercise of its findings of facts or otherwise.

(5) The Supreme Court would not permit a question to be raised before it for the first time, if the same has not been raised before the tribunal. But where the question raised for the first time involves a question of law and it arose on admitted facts, then the court may allow the same to be argued before it.

The court again said that the point was neither raised in the written statement filed by the appellant in the trial Court nor in the grounds of appeal filed by him in the appellate court cannot be canvassed before the Supreme Court for the first time on appeal by special leave.

(6) In an appeal under this provision, the Supreme Court will not interfere with the award of a Tribunal unless some erroneous principle has been invoked or some important piece of evidence has been overlooked or misapplied.

Remedy against the administrative tribunal under Article 227 : According to Article 227 (1) as it existed before the 42nd amendment of the Constitution every High Court had the power of superintendence over all Courts and tribunals within its territorial jurisdiction except those which are constituted under a law relating to armed forces. Here the word tribunal was read in the same connotation as it has been used in Article 136. The power of superintendence included the power to call returns from such courts, to make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts and prescribe forms in which books, entries, and accounts were to be kept by the officers of such Courts. Now under Forty-fourth Amendment act of the Constitution the jurisdiction of the High Court over

administrative tribunals has been restored and accordingly the power of superintendence and supervision of the High Courts over them exists as before.

The high Courts were thus empowered to exercise broad powers of superintendence over Courts and tribunals. The power extended not only to administrative but also even to judicial superintendence over judicial or quasi-judicial bodies. The power of the High Court under Article 226 differed from power of superintendence exercised by it under Article 227

Firstly, where it could quash orders of inferior court or tribunal, but the court under Article 226 may quash the order as well as issue further directions in the matter.

Secondly, Under Article 227 the power of interference was limited to seeing that the tribunal function within the limits of its authority .

Thirdly, the power under Article 227 will only be exercised where the party affected moves the court, while the superintending power under Article 227 could be exercised at the instance of High Court itself.

In exercising the supervisory power under Article 227, the High Court does not act as an appellate tribunal. It did not use to review or reweigh the evidence upon which the determination of the inferior tribunal purported to be based.

B) Statutory Review.

The method of statutory review can be divided into two parts:

- i) **Statutory appeals.** There are some Acts, which provide for an appeal from statutory tribunal to the High Court on point of law.
e.g. Section 30 Workmen's Compensation act, 1923.
- ii) **Reference to the High Court or statement of case.** There are several statutes, which provide for a reference or statement of case by an administrative tribunal to the High Court. Under Section 256 of the Income-tax Act of 1961 where an application is made to the Tribunal by the assessee and the Tribunal refuses to state the case the assessee may apply to the High Court and if the High Court is not satisfied about the correctness of the decision of the Tribunal, it can require the Tribunal to state the case and refer it to the Court.)

C. Ordinary Remedies or Equitable Remedies

Apart from the extra-ordinary (Constitutional Remedies) guaranteed as discussed above there are certain ordinary remedies, which are available to

person under specific statutes against the administration. The ordinary courts in exercise of the power provide the ordinary remedies under the ordinary law against the administrative authorities. These remedies are also called equitable remedies. This includes:

- i) Injunction
- ii) Declaratory Action
- iii) Action for damages.) In some cases where wrong has been done to a person by an administrative act, declaratory judgments and injunction may be appropriate remedies. An action for declaration lies where a jurisdiction has been wrongly exercised. Or where the authority itself was not properly constituted. Injunction is issued for restraining a person to act contrary to law or in excess of its statutory powers. An injunction can be issued to both administrative and quasi-judicial bodies. Injunction is highly useful remedy to prevent a statutory body from doing an ultra vires act, apart from the cases where it is available against private individuals e.g. to restrain the commission of torts, or breach of contract or breach of statutory duty.

Before discussing these remedies let us find out what is the meaning of equity.

Meaning of Equity

Before we discuss equitable remedies, it is necessary for us to know something about equity. Since the administration of justice has begun on the basis of law in the world, a class of society has always been against the rigidity of law. This class of society is of the opinion that howsoever mature and legally skilled men may make the laws, yet they cannot experience the circumstances which the judges may have to face in future. The circumstances in which the provisions of law may prove to be unjust for the people if it is necessary to make the provisions of law flexible, and injustice caused by such rigidity of law should be stopped. Equity is based on this consideration. Equity is a voice against injustice caused by rigidity of law. Equity, which is not a synonym of natural justice, demands that justice should be made in accordance with the circumstances. Equity is a new and independent system of law which developed in England. It has its own history and origin. It made an important contribution in the English system of law as a supplementary of main legal system till 1873, when it was merged in the common law. According to Ashburner. "Equity is a word which has been borrowed by law from morality and which has acquired in law a strictly technical meaning."

Equitable Remedies may be discussed under following headings:

(1) Injunction

An injunction is a preventive remedy. It is a judicial process by which one who has invaded or is threatening to invade the rights of another is restrained from continuing or commencing such wrongful Act.

In India, the law with regard to injunctions has been laid down in the specific Relief Act, 1963.

Injunction may be prohibitory or mandatory.

Prohibitory Injunction. Prohibitory injunction forbids the defendant to do a wrongful act, which would infringe the right of the plaintiff. A prohibitory injunction may be interlocutory or temporary injunction or perpetual injunction.

Interlocutory or temporary injunction . Temporary injunctions are such as to continue until a specified time or until the further order of the court. (S. 37 for the specific Relief Act) . It is granted as an interim measure to preserve status quo until the case is heard and decided. Temporary injunction may be granted at any stage of a suit. Temporary injunctions are regulated by the Civil Procedure Code.(Ibid)

Temporary injunction is provisional in nature. It does not conclude or determine a right. Besides, a temporary injunction is a mere order. The granting of temporary injunction is a matter of discretion of the court.

Perpetual injunction. A perpetual injunction is granted at the conclusion of the proceedings and is definitive of the rights of the parties, but it need not be expressed to have perpetual effect, it may be awarded for a fixed period or for a flexed period with leave to apply for an extension or for an indefinite period terminable when conditions imposed on the defendant have been complied with; or its operation may be suspended fro a period during which the defendant is given the opportunity to comply with the conditions imposed on him, the plaintiff being given leave to reply at the end of that time.

Mandatory injunction. When to present the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in the discretion grant an injunction to prevent the breach complained of and also to compel performance of the requisite acts. (S. 39 of the Specific Relief Act.) The mandatory injunction may be taken as a command to do a particular act to restore things to their former condition or to undo, that which has been done. It prohibits the defendant from continuing with a wrongful act and also imposes duty on him to do a positive act. For example construction of the building of the defendant obstructs the light for which the plaintiff is legally entitled. The plaintiff may obtain injunction not only for restraining the defendant from the construction of the building but also to pull down so much of the part of the building, which obstructs the light of the plaintiff.

Declaration (Declaratory Action)

Declaration may be taken as a judicial order issued by the court declaring rights of the parties without giving any further relief. Thus a declaratory decree declares the rights of the parties. In such a decree there is no sanction, which an ordinary judgment prescribes same sanctions against the defendant. By declaring the rights of the parties it removes the existing doubts about the rights and secures enjoyment of the property. It is an equitable remedy. Its purpose is to avoid future litigation by removing the existing doubts with regard to the rights of the parties. It is a discretionary remedy and cannot be claimed as a matter of right.

Action for Damages

If any injury is caused to an individual by wrongful or negligent acts of the Government servant the aggrieved person can file suit for the recovery of damages from the Government concerned. This aspect of law has been discussed in detail under the topic liability of Government or state in torts.

WRITS

WRIT OF HABEAS CORPUS

Habeas corpus is a prerogative writ, which was granted to a subject of His Majesty, who was detained illegally in jail. It is an order of release. The words *habeas corpus sub i di cendum* literally mean 'to have the body'

The writ provides remedy for a person wrongfully detained or restrained. By this a command is issued to a person or to jailor who detains another person in custody to the effect that the person imprisoned or the detenu should be produced before the Court and submit the day and cause of his imprisonment or detention. The detaining authority or person is required to justify the cause of detention. If there is no valid reason for detention, the Court will immediately order the release of the detained person.

The personal liberty will have no meaning in a constitutional set up if the writ of habeas corpus is not provided therein. The writ is available to all the aggrieved persons alike. It is the most effective means to check the arbitrary arrest by any executive authority. It is available only in those cases where the restraint is put on the person of a man without any legal justification.

When a person has been subjected to confinement by an order of the Court, which passed the order after going through the merits of the case the writ of habeas corpus cannot be invoked, however erroneous the order may be. Moreover, the writ is not of punitive or of corrective nature. It is not designed

to punish the official guilty for illegal confinement of the detenu. Nor can it be used for devising a means to secure damages.

An application for habeas corpus can be made by any person on behalf of the prisoner as well as by the prisoner himself, subject to the rules and conditions framed by various High Courts.

Thus the writ can be issued for various purposes e. g.

- (a) testing the validity of detention under preventive detention laws;
- (b) securing the custody of a person alleged to be lunatic;
- (c) securing the custody of minor;
- (d) detention for a breach of privileges by house;
- (e) testing the validity of detention by the executive during emergency, etc.

When the Writ does not lie.

The writ will not lie in the following circumstances:-

1. If it appears on the face of the record that the detention of the person concerned is in execution of a sentence on indictment of a criminal charges. Even if in such cases it were open to investigate the jurisdiction of the court, which convicted the petitioner, but the mere jurisdiction would not justify interference by habeas corpus.
2. In habeas corpus proceedings the court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of institution of the proceedings. It was, thus, held in *Gopalan v. State*, (AIR 1950 SC.27) that if a fresh and valid order justifying the detention is made by the time to the return to the writ, the court couldn't release the detenu whatever might have been the defect of the order in pursuance of which he was arrested or initially detained.
3. There is no right to habeas corpus where a person is put into physical restraint under a law unless the law is unconstitutional or the order is ultra virus the statute.

4. Under Article 226 a petition for habeas corpus would lay not only where he is detained by an order of the State Government but also when another private individual detains him.

Grounds of Habeas Corpus:

The following grounds may be stated for the grant of the writ:

- (1) The applicant must be in custody;
- (2) The application for the grant of the writ of habeas corpus ordinarily should be by the husband or wife or father or son of the detenu. Till a few years back the writ of habeas corpus could not be entertained if a stranger files it. But now the position has completely changed with the pronouncements of the Supreme Court in a number of cases. Even a postcard written by a detenu from jail or by some other person on his behalf inspired by social objectives could be taken as a writ-petition.
- (3) In *Sunil Batra v. Delhi Administration (AIR 1980 SC.1579)* II the court initiated the proceedings on a letter by a co-convict, alleging inhuman torture to his fellow convict. Krishna Iyer, J., treated the letter as a petition for habeas corpus. He dwelt upon American cases where the writ of habeas corpus has been issued for the neglect of state penal facilities like over-crowding, in sanitary facilities, brutalities, constant fear of violence, lack of adequate medical facilities, censorship of mails, inhuman isolation, segregation, inadequate rehabilitative or educational opportunities.
- (4) A person has no right to present successive applications for habeas corpus to different Judges of the same court. As regards the applicability of res judicata to the writ of habeas corpus the Supreme Court has engrafted an exception to the effect that where the petition had been

rejected by the High Court, a fresh petition can be filed to Supreme Court under Article 32.

- (5) All the formalities to arrest and detention have not been complied with and the order of arrest has been made mala fide or for collateral purpose. When a Magistrate did not report the arrest to the Government of the Province as was required under Section 3(2) of the Punjab Safety Act, 1947, the detention was held illegal.
- (6) The order must be defective in substance, e.g., misdescription of detenu, failure to mention place of detention etc. Hence complete description of the detenu should be given in the order of detention.
- (7) It must be established that the detaining authority was not satisfied that the detenu was committing prejudicial acts, etc. It may be noted in this connection that the sufficiency of the material on which the satisfaction is based cannot be subject of scrutiny by the Court.

Where the detaining authority did not apply his mind in passing the order of detention, the court will intervene and issue the order of release of the detenu. Vague and indefinite grounds of detention.____ where the detaining authority furnishes vague and indefinite grounds, it entitles the petitioner to release.

Delay in furnishing ground may entitle detenu to be released.

The Court has consistently shown great anxiety for personal liberty and refused to dismiss a petition merely on the ground that it does not disclose a prima facie case invalidating the order of detention. It has adopted the liberal attitude in view of the peculiar socio-economic conditions prevailing in the country. People in general are poor, illiterate and lack financial resources. It would therefore be not desirable to insist that the petitioner should set out clearly and specifically the ground on which he challenges the order of detention.

The scope of writ of habeas corpus has considerably increased by virtue of the decision of the Supreme Court in *Maneka Gandhi v. Union of India*, and also by the adoption of forty-fourth amendment to the Constitution. Hence the

writ of habeas corpus will be available to the people against any wrongful detention.

WRIT OF MANDAMUS

Nature and Scope__ A writ of mandamus is in the form of command directed to the inferior Court, tribunal, a board, corporation or any administrative authority, or a person requiring the performance of a specific duty fixed by law or associated with the office occupied by the person.

Mandamus in England is “neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of public duty and specially affects the right of an individual provided there is no other appropriate remedy.

The writ is issued to compel an authority to do his duties or exercise his powers, in accordance with the mandate of law. The authority may also be prevented from doing an act, which he is not entitled to do. The authority, against which the writ is issued, may be governmental or semi-governmental, or judicial bodies. Its function in Indian Administrative Law is as general writ of justice, whenever justice is denied, or delayed and the aggrieved person has no other suitable the defects of justice. An order in the nature of mandamus is not made against a private individual. The rule is now well established that a writ of mandamus cannot be issued to a private individual, unless he acts under some public authority. A writ can be issued to enforce a public duty whether it is imposed on private individual or on a public body.

The Court laid down that public law remedy mandamus can be availed of against a person when he is acting in a public capacity as a holder of public office and in the performance of a public duty. It is not necessary that the person or authority against whom mandamus can be claimed should be created by a statute. Mandamus can be issued against a natural person if he is exercising a public or a statutory power of doing a public or a statutory duty.

Grounds of the Writ of Mandamus

The writ of mandamus can be issued on the following grounds :

- (i) That the petitioner has a legal right.
The existence of a right is the formation of the jurisdiction of a Court to issue a writ of mandamus. The present trend of judicial opinion appears to be that in the case of non-selection to a post, no writ of mandamus lies.
- (ii) That there has been an infringement of the legal right of the petitioner;

- (iii) That the infringement has been owing to non-performance of the corresponding duty by the public authority;
 - (iv) That the petitioner has demanded the performance of the legal duty by the public authority and the authority has refused to act:
 - (v) That there has been no effective alternative legal remedy.
- The applicant must show that the duty, which is sought to be enforced, is owed to him and the applicant must be able to establish an interest the invasion of which has been given rise to the action.

The writ of mandamus is available against all kinds of administrative action, if it is affected with illegality. When the action is mandatory the authority has a legal duty to perform it. Where the action is discretionary, the discretion has to be exercised on certain principles; the authority exercising the discretion has mandatory duty to decide in each case whether it is proper to exercise its discretion. In the exercise of its mandatory powers as well as discretionary powers it should be guided by honest and legitimate considerations and the exercise its discretion should be for the fulfillment of those purposes, which are contemplated by the law. If the public authority ignores these basic facts in the exercise of mandatory or discretionary.

Where the duty is not mandatory but it is only discretionary, the writ of mandamus will not be issued. The principles are illustrated in *Vijaya Mehta v. State* (AIR 1980 Raj.207) There a petition was moved in the high Court for directing the state Government to appoint a Commission to inquire into change in climate cycle, flood in the State etc. Refusing to issue the writ, the Court pointed out that under Section 3 of the Commission of Inquiry Act, the Government is obligated to appoint a commission if the Legislature passes a resolution to that effect.

In other situation, the government's power to appoint a commission is discretionary and optional as a commission could only be appointed by the State Government if, in its opinion it is necessary to do so. The petitioner, therefore has no legal right to compel the State Government to appoint a Commission of Inquiry even when there is a definite matter of public importance for the government may not feel inclined to appoint a Commission if it is of the opinion that is not necessary to do so.

If the public authority neglects to discharge mandatory duty he would be compelled by mandamus to do it. The refusal to refer to the High Court questions under statutory provision like section 57 of the Stamp Act may be included in the class of mandatory duties in the light of the decision of the Supreme Court in *Maharashtra Sagar Mills case*.

Mandamus was issued to compel the government to fill the vacant seats in a Medical College as Article 41 of the Constitution, which is a directive principle of State policy, includes the right to medical education.

In *Bhopal sugar Industries Ltd. V. income Tax Officer, Bhopal*, (AIR 1961 SC 182) it was held by the supreme Court that, where the Income Tax Officer had virtually refused to carry out the clear and unambiguous directions which a superior tribunal like the Income tax appellate Tribunal had given to him by its final order in exercise of its appellate power in respect of an order of assessment made by him, such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based on as it is the hierarchy of Courts. In such a case a writ of mandamus should issue ex-debits justifiable to compel the Income-tax Officer to carry out the directions given to him by the Income-tax Appellate Tribunal. The High Court will be clearly in error if it refused to issue a writ on the ground that no manifest injustice has resulted from the order of the Income-tax Officer in view of the error committed by the tribunal itself in its order. Such a view is destructive of one of the basic principles of the administration of justice.

Thus we find that the Court will not tolerate the omission of mandatory duties by the police authority and it would compel the authority by the writ of mandamus to do what it must.

A writ of mandamus will not be issued unless an accusation of non-compliance with a legal duty or a public duty is leveled. It must be shown by concrete evidence that there was a distinct and specific demand for performance of any legal or public duty cast upon the said party declined to comply with the demand.

When an original legislation by the Union or State exceeds its legislative orbit and injures private interests, the owner of such interests can have a mandamus directing the States not to enforce the impugned law “against the petitioners in any manner whatsoever.” The duty of this writ becomes more onerous as it attempts to face different phases and types of ultra vires administrative action, whether with regard to internment or election, taxation or license fees, evacuee property or dismissal of public officers.

Grounds on which writ of mandamus may be refused.

The relief by way of the writ of mandamus is discretionary and not a matter of right. The Court on any of the following grounds may refuse it:

1. The Supreme Court has held in *Daya v. Joint Chief Collector* (AIR 1962 SC 1796), that where the act against which mandamus is sought has been completed, the writ if issued, will be in fructuous. On the same principle, the Court would refuse a writ of mandamus where it would be meaningless, owing to lapse or otherwise.

Who may apply for mandamus? __ It is only a person whose rights have been infringed who may apply for mandamus. It is interesting to note that the rule of locus standi has been liberalized by the Supreme Court so much as to

enable any public-spirited man to move the court for the issue of the writ on behalf of others.

General principles relating to mandamus to enforce public duties In considering general principles the following points have to be considered:

(a) That the duty is public. In this connection an important case, *Ratlam Municipality v. Vardhi Chand* (AIR 1980 SC 1622) came to be decided by the Supreme Court in 1980, in which it compelled a statutory body to exercise its duties to the community. Ratlam Municipality is a statutory body. A provision in law constituting the body casts a mandate on the body “to undertake and make reasonable and adequate provision” for cleaning public streets and public places, abating all public nuisances and disposing of night soil and rubbish etc. The Ratlam Municipality neglected to discharge the statutory duties.

(b) That it is a duty enforced by rules having the force of law. Thus

- (i) Where an administrative advisory body is set up (without the sanction of any statute) mandamus will not be issued against such body even though the functions of the body relate to public matters;
- (ii) Though executive or administrative directions issued by a superior authority are enforceable against an inferior authority by departmental action, they have no force of law and are, accordingly not enforceable by mandamus.
- (iii) An applicant for mandamus must take the position that the person against whom an order is sought is holding a public office under some law, and his grievance is that he is acting contrary to the provisions of that law.

In short, mandamus will be issued when the Government or its officers either overstep the limits of the power conferred by the statute, or fails to comply with the conditions imposed by the statute for the exercise of the power.

Against whom a Writ of Mandamus cannot be issued?

Writ of mandamus is issued generally for the enforcement of a right of the petitioner. Where the applicant has no right the writ cannot be issued. It cannot lie to regulate or control the discretion of the public authorities.

The writ of mandamus will not be issued if there is mere omission or irregularity committed by the authority. It will not lie for the interference in the internal administration of the authority. In the matters of official judgment, the High Court cannot interfere with the writ of mandamus.

WRIT OF CERTIORARI

Definition and Nature : Certiorari is a command or order to an inferior Court or tribunal to transmit the records of a cause or matter pending before them to the superior Court to be dealt with there and if the order of inferior Court is found to be without jurisdiction or against the principles of natural justice, it is quashed:

“Certiorari is historically an extraordinary legal remedy and is corrective in nature. It is issued in the form of an order by a superior Court to an inferior civil tribunal which deals with the civil rights of persons and which is public authority to certify the records of any proceeding of the latter to review the same for defects of jurisdiction, fundamental irregularities of procedure and for errors of law apparent on the proceedings.”

The jurisdiction to issue a writ of certiorari is a supervisory one and in exercising it, the Court is not entitled to act as a Court of appeal. That necessarily means that the findings of fact arrived at by the inferior Court or tribunal are binding. An error of law apparent on the face of the record could be corrected by a writ of certiorari, but not an error of fact; however grave it may appear to be.

Certiorari is thus said to be corrective remedy. This is, of course, its distinctive feature. The very end of this writ is to correct the error apparent on the face of proceedings and to correct the jurisdictional excesses. It also corrects the procedural omissions made by inferior courts or tribunal. If any inferior court or tribunal has passed an order in violation of rules of natural justice, or in want of jurisdiction, or there is an error apparent on the face of proceeding, the proper remedy so through the writ of certiorari.

Certiorari is a proceeding in personam : Unlike the writ of habeas corpus the petition for certiorari should be by the person aggrieved, not by any other person. The effect of the rule of personam is that if the person against whom the writ of certiorari is issued does not obey it, he would be committed forthwith for contempt of court.

Certiorari is an original proceeding in the superior Court. It has its origin in the court of issue and therefore the petition in India is to be filed in the High Court under Article 226 or before the Supreme Court under Article 32 of the Constitution.

Against whom it can be issued : As regards the question against whom the writ can be issued, it is well settled that the writ is available against nay judicial or

quasi-judicial authority, acting in a judicial manner. It is also available to any other authority, which performs judicial function and acts in a judicial manner. Any other authority may be Government itself. But the conditions allied with it are that Government acts in a judicial manner and the issue is regarding the determination of rights or title of a person. Previously the question was in doubt whether it was available against Central and Local Governments. The majority of judgment is there, when the grant of certiorari against the Government has been denied. The Madras High Court in 1929 and again in 1940 in Chettiar v. Secretary to the Government of Madras (ILR 1940 Mad. 205.) held that a writ of certiorari would not lie against Madras Government.

The Assam High Court has held that the writ of certiorari will be issued to an authority or body of persons who are under a duty to act judicially. It will not be available against the administrative order or against orders of non-statutory bodies.

Necessary conditions for the issue of the Writ : When any body persons

- (a) Having legal authority.
- (b) To determine questions affecting rights of subjects,
- (c) Having duty to act judicially,
- (d) Acts in excess of their legal authority, writ of certiorari may be issued. Unless all these conditions are satisfied, mere inconvenience or absence of other remedy does not create a right to certiorari.

Grounds of Writ of Certiorari : The writ of certiorari can be issued on the following grounds:

- (1) Want of jurisdiction, which includes the following:
 - (a) Excess of jurisdiction.
 - (b) Abuse of jurisdiction.
 - (c) Absence of jurisdiction.
- (2) Violation of Natural justice.
- (3) Fraud.
- (4) Error on the face of records.

(1) Want of jurisdiction : The Supreme Court has stated in Ebrahim Abu Bakar v. Custodian- General of Evacuee Property (111952 SCJ 488), that want of jurisdiction may arise from.

- (1) The nature of subject matter.
- (2) From the abuse of some essential preliminary, or

- (3) Upon the existence of some facts collateral to the actual matter, which the Court has to try, and which is the conditions precedent to the assumption of jurisdiction by it.

It may be added that jurisdiction also depends on

- (4) The character and constitution of the tribunal

There have been a good number of cases in Indian Administrative Law where the use of jurisdiction has been corrected through the writ of certiorari. Thus the orders of tribunals which did not wait even for 15 minutes to hear a party and which resorted to its own theories to assess the premises of people and acted under the influence of political considerations, have been quashed.

The Court does not interfere in the cases where there is a pure exercise of discretion, and which is not arbitrary if it is done in good faith. They do not ignore the legislative intention in the statute which might give a wide aptitude of powers to the administrative authority or the social needs, which demand the bestowal of some wider jurisdiction, or the historical circumstances under which a certain tribunal got exclusive jurisdiction of a particular subject-matter.

(2) **Violation of Natural Justice** The next ground for the issue of writ of certiorari is the violation of natural justice and has a recognized place in Indian legal system as discussed in the earlier part of the reading material.

(3) **Fraud** there are no cases in India where certiorari has been asked on account of fraud. The cases are found in British Administrative law where on the ground of fraud the Court has granted the writ of certiorari. The superior Courts have an inherent jurisdiction to set aside orders of convictions made by inferior tribunals if they have been procured by fraud or collusion a jurisdiction that now exercised by the issue of certiorari to quash Where fraud is alleged, the Court will decline to quash unless it is satisfied that the fraud was clear and manifest and was instrumental in procuring the order impugned.

(4) **Error of law apparent on the face of record.** “An error in decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceeding e. g., when it is based on clear ignorance or disregard of the provision of law.” In other words; it is a patent error, which can be corrected by certiorari but not a mere wrong decision. (*T. C. Basappa v. T. Nagappa AIR1954 SC 440*). It was for the first time when the Supreme Court issued the writ of certiorari on the only ground that the decision of the election tribunal clearly presented a case of error of law, which was apparent on the face of the record. The error must be apparent on the face of the records.

WRIT OF QUO WARRANTO

Definition and Nature. The term quo warranto means “by what authority.” Whenever any private person wrongfully usurps an office, he is prevented by the writ of quo warranto from continuing in that office.

The basic conditions for the issue of the writ are that the office must be public, it must have been created by statute or Constitution itself, it must be of a substantive character and the holder of the office must not be legally qualified to hold the office or to remain in the office or he has been appointed in accordance with law.

A writ of quo warranto is never issued as a matter of course and it is always within the discretion of the Court to decide.

The Court may refuse to grant a writ of quo warranto if it is vexatious or where the petitioner is guilty of laches, or where he has acquiesced or concurred in the very act against which he complains or where the motive of the relater is suspicious.

As to the question that can apply for writ to quo warranto, it can be stated that any private person can file a petition for this writ, although he is not personally aggrieved in or interested in the matter.

Ordinarily, delay and laches would be no ground for a writ of quo warranto unless the delay in question is inordinate.

An unauthorized person issues the writ in case of an illegal usurpation of public office. The public office must be of a substantive nature.

The remedy under this petition will go only to public office private bodies the nature of quo warranto will lie in respect of any particular office when the office satisfies the following conditions:

- (1) The office must have been created by statute, or by the Constitution itself;
- (2) The duties of the office must be of public nature.
- (3) The office must be one of the tenure of which is permanent in the sense of not being terminable at pleasure; and
- (4) The person proceeded against has been in actual possession and in the user of particular office in question.

Another instance of granting the writ of quo warranto is where a candidate becomes subject to a disqualification after election or where there is a continuing disqualification.

In cases of office of private nature the writ will not lie. In *Jamalpur Arya Samaj Sabha v. Dr. D. Rama*, (AIR 1954 Pat 297) the High Court of Patna refused to issue the writ of quo warranto against the members of the Working Committee of Bihar Raj Arya Samaj Pratinidhi Sabha- a private religious association. In the same way the writ was refused in respect of the office of a doctor of a hospital and a master of free school, which were institutions of private charitable foundation, and the right of appointment to offices therein was vested in Governors who were private and not public functionaries.

It will not lie for the same reason against the office of surgeon or physician of a hospital founded by private persons. Similarly, the membership of the Managing Committee of a private school is not an office of public nature; therefore writ of quo warranto will not lie.

In *Niranjan Kumar Goenka v. The University of Bihar, Muzaffarpur* (AIR 1973 Pat 85) the Patna High Court held that writ in the nature of quo warranto cannot be issued against a person not holding a public office.

Acquiescence is no ground for refusing quo warranto in case of appointment to public office of a disqualified person, though it may be a relevant consideration in the case of election.

When the office is abolished no information in the nature of quo warranto will lie.

Public Interest Litigation

P I L

Good governance is the *sine qua non* of any State, particularly a democratic polity that would have three organs of government, namely, executive, legislative and judiciary. These three organs constitute as it were three pillars of the good and effective governance with the judiciary functioning as the watchdog for maintenance of the Constitutional balance as the powers and responsibilities of the various machineries of state, vis-à-vis one another, and the people.

Public Interest Litigation

An individual who does it out of concern for public interest initiates it. But after having initiated it, once the Court admits a matter, it no longer remains the concern only of the person who has initiated it.

For example, Sheela Barse, a journalist, had initiated a PIL on behalf of the children who were languishing in remand homes. The respondents were the State governments who prolonged the litigation by not filing their affidavits in time. Sheela Barse had to rush from her home in Bombay to Delhi to attend the Supreme Court every time a date was fixed for a hearing. Exasperated with the willful delay caused by the State Governments, which was not adequately checked by the Court, when threatened to withdraw the petition. Although her frustration was understandable, the court could not allow her to withdraw the petition. Even if she withdrew from the matter, the Court could continue to examine the contentions made by her in the petition and deliver the orders. Although a person may be accorded standing to bring a public interest matter in Court, such a person cannot withdraw proceedings on the ground that she was disassociating herself from that matter. Justice Venkatachaliah (as he then was) speaking for himself and Ranganath Misra J (as he then was) observed that:

If we acknowledge any such stands of a dominos lit is to a person who brings a public interest litigation, we will render the proceedings in public interest litigation vulnerable to and susceptible of a new dimension which might, in conceivable cases, be used by persons for personal ends resulting in prejudice to the public weal.

Constraints on Public Interest Litigation.

Although the courts have been liberal in conceding locus standi to public-spirited citizens to espouse petitions involving public interest, such public interest litigation has got to be constrained by considerations of feasibility as well as propriety. The constraints of feasibility restrain the courts from over admitting matters, which might go beyond its resources to deal with. The consideration of propriety persuades the courts from not undertaking issues, which are better, dealt with by the other co-ordinate organs of the government such as the legislature or the executive.

It's Area of Operation

While this may be true, as far as popular perception is concerned, the truth, in a deeply vital sense, is that if certain infringement of law, injury to public interest, public loss due to official apathy, inaction or manipulation or dereliction of duty as ordained by the authoritative rules or statutes—which are co relatable to public interest, being offensive to or destructive of it, will all fall within the PIL jurisdiction and judgment given in such cases, in view of their impact and end-result or even visibility in forms of reduction or elimination of the “original sin” are often categorized as pronouncements

belonging to the area of the “judicial activism”. Some of the areas where so-called judicial activism, emanating from PIL, has been in evidence cover subjects like environment pollution, social ills__ like dowry death/bride burning, bonding labour, child labour, custodial death police torture (Bhagalpur blinding case) and other forms of atrocities on prisoners/jail inmates, non -payment on the part of Ministers/Prime Ministers for private use of public (Air force) air crafts, public compensations, dereliction or abnegation of essential statutory duties by public Institutions/corporations or official bodies. There have been cases where other individual fundamental rights as enshrined in Part III of the Constitution have formed part of PIL as they had under public repercussions. Such PIL cases may be taken directly to Supreme Court where constitutional infringement is involved__ private, i.e., individual rights included. They can also be taken up in High Courts.

It's Rationale

Usually, the courts take cognizance of a case when the person affected makes complaint. This is the question of *locus standi*, that is, whether a person not involved or affected in any case has any legal justification or ground to take up someone else's case in the constitution on others behalf. The courts were reluctant to accept or admit such cases. But in the early 80s (or may be a little earlier), the Supreme Court made a relaxation of this principle and started accepting genuine and appropriate cases even through complainant was someone different from the person affected. Of course, the admissions done only after a very strict scrutiny of the points involved, the motive or motivation of the complainant and the purpose, which the case, if decided, would serve. It is only after a full satisfaction of the court that such a case is accepted as a PIL.

There are many reasons, which dictate the rationale for PIL. In a country like ours, where:

- (1) Poverty is abysmal.
- (2) Illiteracy is acute.
- (3) Society is case ridden.
- (4) Backwardness is widespread,
- (5) Fear of the high and might is deep
- (6) Three M's (money, muscles and mind) have a sway
- (7) Communications system is poor,
- (8) Judicial process is cumbersome and costly, and
- (9) Justice is denied through delay.

It is idle to except that poor, illiterate, disprivileged, weak and vulnerable sections of society, utterly ignorant of the law and the processes of law would come out openly against the abuses of their personal or group rights(al bit legally bestowed), fighting the very people who are often treated, in remote interiors of the country, as Mai-baap (because they are rich, high caste,

powerful and brutal). Fighting the government can never cross the mind of majority of our people___ as being possible, feasible, desirable or profitable.

The only way such a situation can be tackled is if some public-spirited men take up cudgels on their behalf and bring up before law courts cases of law infringement or non-implementation on statutory provisions affecting adversely people or public. The alternative is that the courts suo moto take up some such cases either on the basis of reports, communications or other verifiable evidences. As of now, the courts are well disposed towards this form or course of litigation. They do not or would not reject such a course outright but would take cognizance, even if ultimately they way as well dispose of them or discuss them on good and sufficient grounds.

PIL, thus, represents the arguments of both liberals and conservations upholding the soul and sprit of justice through following on initiatory procedure not traditionally preferred or favoured. The former Chief Justice of India, P.N. Bhagwati, sitting with Justice O.A. Desai in 1982 described the diatribe against PIL as:

The criticism is based on a highly elitist approach and proceeds from a blind obsession with the rites and rituals sanctified by an out-moded Anglo-Saxom jurisprudence.

This aroused the judicial conscience of others. Justice fazal Ali, sitting with Justice S. S. Venkataramiah in the same year referred to the whole gamut of PLIL and the courts' jurisdiction to a five Judges Bencdh - sensing the importance and relevance of the new reality. Infect, one of the questions formulated was:

Can a stranger to a cause- be he a journalist, social worker, advocate or an association of such persons initiate action before the court in matters alleged to be involving public interest or should a petition have some interest in common with others whose rights are infringed by some governmental action or inaction in order to establish the locus stand to make such a complaint?

Now, it is no longer in doubt. Even a post card received from a far away place from an unknown man can e treated ass a petition (so goes the report) if it contains valid points worthy of being taken cognizance by the Court. Time have changed, approaches have changed and so have the Courts' systems – though they are still bogged down in perhaps avoidable rituals which make for delay, add to cost and dilute justice at times. The gradual erosion in principles and values in public life since Nehru and Shastri era in India have brought into sharp focus the constitutional mandate and Supreme Court of India, arousing public interest in the on-going debate over the intentions behind Constitutional provision. It was being widely felt and publicly perceived that the declining values, lack of access to social justice and judicial system, States' arbitrariness, corrupt practices, attack on rights, grossly deviant social and economic activities, and murder of moral mores cannot make India an honest, progressive and a prosperous society.

PIL as a Tool for Access of Poor man to Justice

No less a person than the former Chief Justice of India, A.M Ahmadi, had once described the Supreme Court as the world's powerful court because of its wide -ranging, vast jurisdiction. Apart from its original, appellate, civil criminal and advisory jurisdictions, it has the power to entertain petitions even from ordinary people who otherwise cannot approach it due to financial and a host of other constraints. In the Fertilizer Corporation Manager Union v. Union of India case, the eminent jurist V.R. Krishna Iyer, the initiator of this innovative process of PIL, described law as “ a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction of the Court”.

In the same vein, the former Chief Justice P.N Bhagwati, picking up the thread from where Iyer left it, propounded in S.P. Gupta's case, “the court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights, the only way in which this can be done is by entertaining writ petitions and even letters from public spirited citizens seeking judicial redress on behalf of those who have suffered a legal wrong or an injury”. At last, the problem of providing justice to millions of helpless and hapless men got recognition PIL fast became one of the most effective and powerful instruments of justice for protecting the weak, the deprived the prosecuted be they women in protective custody, children in juvenile institutions under trial prisoners in jails, unorganized workman, landless labourers, slum and pavement dwellers or people belonging to schedule castes/scheduled tribes.

It is the PIL which exposed the brutality of Bhagalpur blinding, merciless exploitation of bonded labour, river (Jamuna) pollution through industrial effluents, environmental degradation, health hazard issues, education capitation rackets and so on.

Not remaining confined to righting the wrongs alone, judicial activism has made its presence felt by entering areas traditionally believed to be in the domains of legislature and executive. For instance, the apex judiciary can ask for the records based on which the president and the Governors may have reached their ‘subjective satisfaction’ with regard to, say, failure of constitutional machinery in a state. This, in effect, means that such decisions can be challenged on various grounds like malafides, extraneous considerations, and unreasonableness. Governance, a clear executive function, is now a good subject of judicial activism.

Similarly, justice Kuldeep Singh's directive to the union government for in acting a uniform civil code, one of the unenforceable directive principles of State Policy (Part IV of the constitution) is another example of excessive judicial zeal.

Again, certain other constitutional provisions, such as the pleasure of the president contained in articles 310, 311 and 312 of the constitution, as well as section 18 of Army Act, which deal with civil services and armed forces respectively, have been brought under judicial control through the 'creative interpretation' of articles 14 and 19 of the constitution. The recent "santusti" case is also a case in point. It only establishes the fact that if the constitution provides for any absolute power, it is judiciary's own authority of judicial review, to say the least. Though such review attempts cannot be branded as "grossly undemocratic", critics maintain that the courts, ordained as a judicial body, cannot at the same time be looked to as a "general heaven for reform movements". It cannot, even so, be gainsaid that the need and desirability of judicial activism have clearly been established on the ground; for, more than once,

It has brought out skeletons from administration's cupboard which remained unexposed for years and would have otherwise remained so for years on end;

It has shown that those in authority abuse and misuse power without compunction for noxious purposes and hide them from public gaze;

All that glitters in the legislative and executive world is not gold. Arbitrariness, greed, corruption, nepotism, patronage, the notorious 'in-law and out-law' syndrome, 'private-gain-at-public expense' considerations, malafide motive and many other vilest vices do reign supreme in places and persons who were earlier considered to be 'paragons of virtue'.

